

# PENNSYLVANIA JUDICIAL DESKBOOK:

## A Guide to Statutes, Judicial Decisions and Recommended Practices for Cases Involving Dependent Children in Pennsylvania

Fourth Edition

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with Nina W. Chernoff

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JUVENILE LAW CENTER

## Acknowledgements

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## Introduction

The Juvenile Law Center has revised and updated its Judicial Deskbook, first published in 1986, to provide a current survey and review of the statutes and judicial decisions governing dependency court practice in Pennsylvania. Since the publication of the Third Edition in 1995, Pennsylvania's Juvenile Act has been amended to conform to the requirements of the Federal Adoption and Safe Families Act of 1997 (ASFA). Recent case law, applying and interpreting these new provisions of the Juvenile Act, addresses issues raised by the imposition of strict time lines for moving dependent children out of foster care or other temporary placements, and into permanent, stable living situations, either through reunification with their natural family, adoption or other statutorily designated arrangements. The amended legislation requires greater judicial oversight of children and families under court jurisdiction and greater exercise of judicial authority over state and local agencies to ensure safe, permanent outcomes for children. The Deskbook provides the courts, other judicial officers and those that work within the system, a picture of statutory mandates and case law pertinent to the practice of child welfare law in Pennsylvania. The Deskbook also provides guidelines for the conduct of hearings at various stages of dependency proceedings.

**Part I** of the Deskbook describes the legislation that governs the dependency system and points out significant legislative changes that effect court practice. This section addresses the role of attorneys and guardians *ad litem* and the role judges must take to assure effective assistance of counsel to parties in the dependency system.

**Part II** of the Deskbook examines the various bases for dependency jurisdiction. This section of the Deskbook considers the statutes and case law that apply to dependent children and provides suggestions for conducting hearings, which determine the status and placement of dependent children. Case law related to third party standing and visitation issues that may arise at various stages of dependency hearings is also discussed in this section.

**Part III** of the Deskbook sets out the rights of dependent older youth.

**Part IV** examines the rights of dependent children to health care and education.

Reports by both governmental and private entities, written since the passage of ASFA, cite judicial leadership as essential to reform efforts. Everyday, courts in Pennsylvania hear child

welfare dependency cases and make decisions that affect the lives of children and their families. Courts must operate to protect children from further harm and make decisions for their future in a timely manner. Juvenile Law Center's Deskbook can serve as a valuable resource to those who work to balance the needs of children and families and the requirements of the law.



## **Part I**

### **Section One**

#### **I. Federal and State Child Welfare and Adoption Legislation**

##### **A. Federal Law: An Overview**

The Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 608, 620-628, 670-676 (AACWA), the Federal Adoption and Safe Families Act of 1997, 42 U.S.C. §§ 671(a)(15) (ASFA) and the Foster Care Independence Act (Pub. L. No 106-169) (the Chafee Act) are the three major federal laws governing child welfare.

AACWA uses fiscal incentives provided to the states with an aim toward reducing the unnecessary placement of children in foster care. The concept of reasonable efforts was a cornerstone of the 1980 Act. For every child receiving federally funded foster care maintenance payments under Title IV-E of the Social Security Act, each state's child welfare agency had to establish service programs and make reasonable efforts to prevent placement of children or to reunify families.

ASFA is intended to shorten the time children spend in foster care and to speed the process of adoption so that children, who cannot be reunified with their families, are moved to other permanent, family settings as quickly as possible. In adopting ASFA, Congress modified, but did not eliminate, the reasonable efforts requirement of the 1980 Act. However, Congress did conclude that there are some cases in which reasonable efforts should not be made to reunify children with dangerous adults or adults otherwise incompetent to parent. Congress enacted ASFA to identify certain situations that it defined as aggravated circumstances under which a court might determine that family reunification efforts are not required. Under ASFA, reasonable efforts were expanded to require efforts to finalize a permanent placement for children for whom reunification is not the permanent plan. 42 U.S.C. §671(a)(15)(C) & (E). ASFA set shorter time-limits for a child's stay in foster-care. To forward ASFA's key goal of permanency, the state agency must move to terminate parental rights and seek adoption or other permanent alternatives for a child who has been in foster care for 15 of the past 22 months. ASFA allows agencies to engage in "concurrent planning," in which two permanency goals, such as family reunification and adoption planning, are pursued at the same time. 42 U.S.C. §671(a)(15)(F). These provisions are

intended to prevent children from languishing in foster care and to ensure the availability of a safe, permanent home.

The Chafee Act has, as its primary purpose, reforming and expanding independent living programs for older youth in foster care and helping youth become self-sufficient. The Chafee Act focuses on ensuring the provision of services to help older youth obtain high-school diplomas, vocational training, job placement, training in daily living skills, substance abuse prevention and preventative health activities. See Part III, Section One for a more detailed discussion of the Chafee Act.

### **What are the main principles of federal law?**

Together, the 1980 Act, ASFA and the Chafee Act should be applied to ensure that:

- Children who can be protected in their own homes are not placed in foster care.
- Reasonable efforts are made to reunify families unless the court determines that such efforts need not be made in accordance with ASFA and state law.
- Reasonable efforts are made to finalize permanent placements for children who are unable to return to their families.
- Older youth are provided the services and assistance necessary to transition out of foster-care and become self-sufficient.

### **B. State Law: An Overview**

The Juvenile Act, (Act 333), 42 Pa. C.S. § 6301 (2000 & Supp. 2003), and the Child Protective Services Law, (Act 124), 23 Pa. C.S. §6301(2000), govern child abuse and neglect.<sup>1</sup> The Juvenile Act was first propounded in 1972 as part of a trend to grant children a variety of constitutional protections. The Act provides the Commonwealth with authority to intervene in the lives of children who arguably need state protections. Courts have noted that the authority to intervene must be balanced against the rights of families to be free of state intrusion. See, e.g., *In*

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<sup>1</sup> A full comparison of the two statutes can be found in JLC's publication *Child Abuse and the Law*, Sixth Edition.

***the Interest of LaRue***, 366 A. 2d 1271 (Pa. Super. Ct. 1976); 42 Pa. C.S. §6301(b)(1). In 1998, the Pennsylvania General Assembly passed Act 126, which amended the Juvenile Act to incorporate the requirements of ASFA, including planning for permanent placement of children and limitation of the time children may spend in foster care placements. The General Assembly adopted additional changes in 2002. This Deskbook, in the main, addresses child welfare and dependency as it is governed by the Juvenile Act in conjunction with federal mandates.

The Child Protective Services Law (Act 124) (CPSL) is primarily a reporting statute and was enacted in 1975 in response to a national effort to increase reporting of child abuse. The CPSL integrates the reporting, investigating and recording of child abuse and also provides for the swift delivery of protective services. The CPSL was amended in 1998 to expand the time period for maintaining reports of suspected child abuse and expanding the number of matters to be referred by county children and youth agencies to law enforcement officials for investigation.<sup>2</sup>

The Adoption Act, 23 Pa. C.S. §2501, governs termination of parental rights and adoption, a critical component of permanency planning for dependent children who cannot be reunified with their families.<sup>3</sup>

### **What are the main principles of the Juvenile Act?**

Like the relevant federal statutes, the Juvenile Act should be applied to ensure that:

- Children who can be protected in their own homes are not placed in foster care.
- Reasonable efforts are made to reunify families unless the court determines that such efforts need not be made in accordance with the aggravated circumstances provisions of ASFA and the Juvenile Act.
- Reasonable efforts are made to finalize permanent placements for children who are unable to return to their families.
- Older youth are provided the services and assistance necessary to transition out of foster-care and become self-sufficient.

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<sup>2</sup> A full discussion of the CPSL can be found in JLC's publication *Child Abuse and the Law*, Sixth Edition.

<sup>3</sup> See JLC's publication *Adoption of Dependent Children in Pennsylvania*

Section 6301(b) of the Juvenile Act provides that the Act shall be interpreted and construed to effectuate the following purposes: “(1) To preserve the unity of the family whenever possible or to provide another alternative permanent family when the unity of the family cannot be maintained. (1.1) To provide for the care, protection, safety and wholesome mental and physical development of children coming within the provisions of this chapter.”

To effectuate this purpose the Juvenile Act adopts the “permanency,” reasonable efforts and aggravated circumstances mandates of federal law. A short overview of these tenets follows. Each is more fully explicated in the sections of the Deskbook describing the principles and law applicable to dependency hearings.

## **II. The Main Tenets of Federal and State Statutes Governing Dependent Children: Permanency, Reasonable Efforts and Aggravated Circumstances**

### **What is permanency?**

Federal and state laws seek to facilitate permanency for children who enter the child welfare system. Permanency is a safe, enduring and nurturing home where a child has the best opportunity to establish relationships and reach his or her full potential. Permanency, where possible, should be accomplished within a child’s own family, but if that is impossible, it should be accomplished in a family setting. The child’s permanent placement is intended to last indefinitely and to give a child a supportive family which will provide a definitive legal and social status. In the case of older children, particularly those in late adolescence, who will not be adopted or reunified with their families of origin, permanency must include a plan to prepare them to live independently, as adults, without the assistance of the child welfare system. The court and the children and youth agency must strive to achieve permanency for each child in the dependency system.<sup>4</sup>

### **What does “reasonable efforts” mean?**

The reasonable efforts language of the Adoption Assistance and Child Welfare Act of 1980 has been interpreted to require children and youth agencies to offer a full range of services to prevent children from being removed from their homes and placed into foster or other substitute

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<sup>4</sup> See, *Making it Permanent, Reasonable Efforts to Finalize Permanency Plans for Foster Children*, C. Fiermonte and J. Renne, ABA Center for Children and the Law, 2002. This publication is an important resource for implementation of the permanency and permanency planning requirements instituted by the passage of ASFA.

care, or to enable the reunification of families after the children's removal. 42 U.S.C. § 671(a)(15). ASFA expanded reasonable efforts to require that the agency, at a permanency hearing, secure a finding from the court that it is making or has made reasonable efforts to finalize the child's permanency plan. See Office of Children, Youth and Families Bulletin No. 3130-01-01, "The Revised Interim Implementation Guidelines for the Adoption and Safe Families Act (ASFA) of 1997 (Pub. L. No. 105-89)," effective February 2, 2001, 28-29, 51 ("OCYF Bulletin No.3130-01-01"). Pennsylvania's Juvenile Act was amended on December 9, 2002, by Act 215, to reflect this requirement.

### **What *are* reasonable efforts to prevent removal or secure reunification?**

By law, children and youth agencies must provide a service if it is logically included in "reasonable efforts," a term that is not defined in either federal or state legislation. The phrase has been interpreted by the courts in Pennsylvania to require that county agencies provide or ensure the provision of services, which will preserve family unity whenever possible. See, e.g., ***In the Interest of S.A.D.***, 555 A.2d 123 (Pa. Super. Ct. 1989) (Single mother voluntarily placed child in care of agency; court found that getting mother "hooked up" with community services, providing a bus pass and a motel room through the Salvation Army, not sufficient to comply with reasonable efforts requirements.); ***In the Interest of James Feidler***, 573 A.2d 587 (Pa. Super. Ct. 1990) (Agency must not only provide preventative and reunification services, but can be required to provide services that are the province of other agencies). If the court finds that the agency provided appropriate services and the parent failed to take advantage of the services, the court will find that the agency met its duty to extend reasonable efforts to preserve the family. ***In re Diaz***, 669 A.2d 372 (Pa. Super. Ct. 1995).

Guidelines exist in federal regulations that require states, in their state plans, to list available pre-placement prevention and reunification services. 45 C.F.R. §§ 1357-11, 1357-15. Pennsylvania law requires that every county children and youth agency provide four prevention or reunification services. 55 Pa. Code § 3130.35. The language of the Code is laid out in full to provide the court with an easy reference to what the law requires of the agency and what the court should, at a minimum, expect for the child and family that comes before the bench.

§3130.35. *Placement prevention and reunification services.*

- (1) Counseling service. Supportive and therapeutic activities provided to a child or a child's family and directed at preventing or alleviating conditions, including crisis conditions, which present a risk to the safety or well-being of the child by improving problem-solving and coping skills, interpersonal functioning, the stability of the family, or the capacity of the family to function independently.
- (2) Parent education. Practical education and training for parents in child care, child development, parent child relationships and the experience and responsibilities of parenthood.
- (3) Homemaker/caretaker service. Home help, home care skills instruction and/or child care and supervision provided to a child and the child's family in the child's home by a trained homemaker or caretaker.
- (4) Part day service. Care and supervision for a child for less than 24 hours per day provided under a family service plan (FSP) to allow the child to remain in or return to the child's own home.

The agency must also provide any services the court may order to comply with reasonable efforts requirements. See 55 Pa. Code § 3130.38(a). The Pennsylvania Supreme Court held that juvenile court dependency judges can order the agency to provide any and all the services "best suited" to a child's needs. *In re Tameka M.*, 580 A. 2d 750 (Pa. 1990). Every judge and master should take the time to determine what services would best enable the child to remain or be reunited with his or her family, if services will achieve that result. The court should expect the agency and others who work with the child and the family to provide the court with a full list of all services the child needs and to be familiar with all services, both private and public, that are or should be available, including but not limited to, educational, health and recreational services.

### **What does "aggravated circumstances" mean?**

A guiding principle of both federal and state child welfare legislation is the child's health and safety. In making reasonable efforts to prevent removal of a child or reunify a family, the child's health and safety are paramount concerns. ASFA amendments, adopted by the Pennsylvania General Assembly in its amendments to the Juvenile Act, now define particular situations or offenses where no attempts need be made to reunite a child, who has been adjudicated dependent, with his family. These situations arise when a court determines, by clear and

convincing evidence, that a parent has subjected the child to aggravated circumstances<sup>5</sup> and further determines that reasonable efforts need not be extended. 42 Pa. C. S. §6302.

The child welfare agency is required to file an aggravated circumstances petition if it reasonably believes they exist. The Juvenile Act states that “it shall file the appropriate petition...,” and gives the agency a deadline of 21 days from its determination that aggravated circumstances exist, to do so. 42 Pa. C. S. § 6334(b) (2). However, even when aggravated circumstances are found, the judge retains discretion to determine that the agency extend reasonable efforts or, in other words, provide services, in an attempt to avoid separation of the child from the family or to reunite the family. If the totality of the circumstances calls for it, the court may order the provision or continued provision of services to the child and family.

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<sup>5</sup> “Aggravated circumstances” are defined by the Juvenile Act as: “Any of the following circumstances: (1) The child is in custody of a county agency and either: (i) the identity or whereabouts of the parents is unknown and cannot be ascertained and the parent does not claim the child within three months of the date the child was taken into custody; or (ii) the identity or whereabouts of the parents is known and the parents have failed to maintain substantial and continuing contact with the child for a period of six months. (2) The child or another child of the parent has been the victim of physical abuse resulting in serious bodily injury, sexual violence or aggravated physical neglect by the parent. (3) The parent of the child has been convicted of any of the following offenses where the victim was a child: (i) criminal homicide under 18 Pa.C.S. Ch. 25 (relating to criminal homicide); (ii) a felony under 18 Pa.C.S. § 2702 (relating to aggravated sexual assault), 3121 (relating to rape), 3122.1 (relating to statutory sexual assault), 3123 (relating to involuntary deviate sexual intercourse), 3123.1 (relating to sexual assault) or 3125 (relating to aggravated indecent assault). (iii) a misdemeanor under 18 Pa.C.S. § 3126 (relating to indecent assault). (iv) an equivalent crime in another jurisdiction. (4) The attempt, solicitation or conspiracy to commit any of the offenses set forth in paragraph (3). (5) The parental rights of the parent have been involuntarily terminated with respect to a child of the parent.

## Part I

### Section Two

#### I. The Right to Representation in Juvenile Dependency Matters

An effective lawyer is necessary to ensure that a child's rights and needs are met throughout dependency proceedings. The history of a child's right to counsel is set forth in the Juvenile Law Center's publication, *Promises Kept, Promises Broken: An Analysis of Children's Right to Counsel in Dependency Proceedings in Pennsylvania*. Today, state law and ABA standards exist which set forth criteria for quality representation in the dependency courts.

By ensuring the right to effective representation, the court will enhance its own ability to determine the best course with respect to the child whose future well-being is at issue. Judges, masters and hearing officers can guard against assembly-line justice and shoddy representation by requiring that competent attorneys for all children and for their families are the norm and not the exception in the dependency courts.

#### What is the right to counsel under the Juvenile Act?<sup>6</sup>

(1) *The rights of all parties (parents, legal guardians, children, and those standing in loco parentis)*

In Pennsylvania, all parties in a dependency proceeding have the right to representation by legal counsel. 42 Pa. C. S. §6337. The Juvenile Act requires that "counsel must be provided for a child unless his parent, guardian, or custodian is present in court and affirmatively waive it." *Id.* However, if the interests of the parent, guardian or custodian conflict with the interests of the child, waiver is not permitted. *Id.* The courts in Pennsylvania have long recognized that, in a dependency proceeding, the child's interests will always conflict with the interests of the parent or guardian and that a child must always have independent counsel. *In Interest of Pernishek*, 408 A.2d 872 (Pa. Super. Ct. 1979); *Stapleton v. Dauphin County Child Care Service*, 324 A.2d 562, (Pa. Super. Ct. 1974), *reversed on other grounds*, (citations omitted).

(2) *The rights of children (Act 18) 42 Pa .C. S. §6311(Supp. 2003)*

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<sup>6</sup> For a full discussion of issues relating to the representation of dependent children in Pennsylvania, see the Juvenile Law Center's publication: *Promises Kept, Promises Broken: An Analysis of Children's Right to Counsel in Dependency Proceedings in Pennsylvania*, 2001.



In 2000, the Pennsylvania legislature amended the Juvenile Act to set forth specific instances when attorneys, acting as guardians *ad litem* (“GAL’s”), **must** be appointed for every child and that every child is entitled to representation by a GAL at each and every stage of dependency proceedings. The amendments included specific requirements that GAL’s must conform to in their representation of dependent children. 42 Pa. C. S. §6311(Supp. 2003). This legislation aims for a consistently higher quality of representation for children in dependency proceedings.

In full, Section 6311 of the Act provides:

§6311 Guardian *ad litem* for child in court proceedings.

**(a) Appointment**—When a proceeding, including a master’s hearing, has been initiated alleging that the child is a dependent child under paragraph (1), (2), (3), (4) or (10) of the definition of “Dependent child” in section 6302 (relating to definitions), the court shall appoint a guardian *ad litem* to represent the legal interests and the “best interests” of the child. The guardian *ad litem* must be an attorney at law.

**(b) Powers and duties**—The guardian *ad litem* shall be charged with representation of the legal interests and the best interests of the child at every stage of the proceedings and shall do all of the following:

(1) Meet with the child, as soon as possible following appointment pursuant to section 6337 (relating to right to counsel) and on a regular basis thereafter, in a manner appropriate to the child’s age and maturity.

(2) On a timely basis, be given access to relevant court and county agency records, reports of examination of the parents or other custodian of the child pursuant to this chapter, and medical, psychological and school records.

(3) Participate in all proceedings, including hearings before masters, and administrative hearings and reviews to the degree necessary to adequately represent the child.

(4) Conduct such further investigation necessary to ascertain the facts.

(5) Interview potential witnesses, including the child's parents, caretakers and foster parents, examine and cross-examine witnesses, and present witnesses and evidence necessary to protect the best interests of the child.

(6) At the earliest possible date, be advised by the county agency having legal custody of the child of: (i) any plan to relocate the child or modify custody or visitation arrangements, including the reasons therefore, prior to the relocation or change in custody or visitation; and (ii) any proceeding, investigation or hearing under 23 Pa C.S. Ch. 63 (relating to child protective services) or this chapter, directly affecting the child.

(7) Make specific recommendations to the court relating to the appropriateness and safety of the child's placement and services necessary to address the child's needs and safety.

(8) Explain the proceedings to the child, to the extent appropriate given the child's age, mental condition and emotional condition.

(9) Advise the court of the child's wishes, to the extent that they can be ascertained and present to the court whatever evidence exists to support the child's wishes. When appropriate because of the age or mental and emotional condition of the child, determine to the fullest extent possible the wishes of the child and communicate this information to the court. A difference between the child's wishes under this paragraph and the recommendations under paragraph (7) shall not be considered a conflict of interest for the guardian *ad litem*.<sup>7</sup>

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<sup>7</sup> The enhancements that come from requiring greater thoroughness and more professionalism may well be undermined by the confusion in Act 18 over the GAL's role. Act 18 requires that, in the majority of cases, the attorney appointed to represent the child be appointed as a guardian *ad litem* (GAL) who is charged with representing both the best interests and the legal interests of the child to the court. JLC opposes that confounding of the GAL-lawyer function. Historically, a GAL is an individual appointed by the court to represent only the best interests of the child. GALs are authorized to substitute their judgment for that of their clients no matter how old or mature. Since the passage of Act 18, there has been much discussion about the constitutionality of the Act, as it impermissibly regulates the practice of law by imposing on GALs the duty to represent both a child's legal interests and his best interests despite potential conflicts of interest. Though that particular provision of Act 18 is controversial, the intent to raise the overall quality of lawyering for dependent children by requiring that the attorneys representing these children meet minimum practice requirements is applauded for its efforts to raise the overall quality of lawyering for dependent children.

**When should counsel be appointed?***(1) The rights of children*

Children who are taken into protective custody must be provided counsel at the 72-hour hearing. The right exists at all stages of dependency proceedings. 42 Pa. C. S. §6337(2000). For all other children, attorneys should be appointed to represent them as soon as the dependency petition is filed. Early appointment is necessary if the mandates of Act 18 are to be followed. Early appointment is necessary to avoid delay in the proceedings, which is almost always a detriment, particularly to young children.

Children also have a right to counsel pursuant to Pennsylvania's Adoption Act. A child is guaranteed the right to counsel in an involuntary termination proceeding which is being contested by one or both parents. 23 Pa. C. S. §2313. See *In re J.J.F.*, 729 A.2d 79 (Pa. Super. Ct. 1999); *In re M.T.*, 607 A.2d 271, 276 (Pa. Super. Ct. 1992).

*(2) The rights of all parties (parents, legal guardians, children, and those standing in loco parentis)*

At each and every hearing, parents or other parties must be apprised of their right to counsel. The ten-day adjudicatory hearing may be delayed to ensure that a parent is afforded the right to counsel. *In the Interest of S.N.W.*, 524 A.2d 514 (Pa. Super. Ct. 1987). Section 2313 of the Adoption Act was amended in 1992 to provide a parent, whose rights are subject to termination in an involuntary termination proceeding, the right to counsel. 23 Pa. C. S. §2313(a.1).

It is incumbent upon the court to ensure that all parties are represented by counsel at the outset of dependency matters. It is not clear that this right is always afforded in a timely manner. *In the Adoption of M.E.P.*, 825 A.2d 1266(Pa. Super.Ct. 2003) (From the Superior Court's opinion, it appears that counsel was only appointed for the mother, father and child after a goal of adoption replaced the goal of reunification and a termination hearing was set to commence. This occurred more than two years after *M.E.P.* was placed in foster care). Parents or those standing *in loco parentis* should be discouraged from waiving their right to counsel. A knowledgeable attorney can elucidate his or her client's circumstances, thus enabling the court to make more informed decisions on behalf of the child.

## How can the court insure that all parties understand their right to counsel?

All parties have the right to representation. If they cannot afford to hire an attorney, parties have a right to have counsel appointed for them. All parties, including parents, guardians and legal custodians, must be informed of their right to counsel and their right to have counsel appointed for them if they cannot afford counsel. This instruction must be given at the beginning of each hearing. This instruction must be given in a meaningful way.

***In Interest of Michael Y.***, 530 A.2d 115 (Pa.

Super. Ct. 1987)(In determining whether trial

court's explanation of right to counsel is sufficient, test is whether court's instruction, taken as a whole, conveys sufficient information regarding benefits of counsel and makes it clear that party who cannot afford counsel is entitled to court-appointed counsel without cost.)

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### ***The judge or master must tell each party at each hearing:***

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- You have the right to be represented by an attorney.
  - An attorney will help you understand your rights with respect to the hearing that will take place today and any decisions the court may make today.
  - If you cannot afford an attorney, an attorney will be provided for you without charge.
- 

Information regarding the right to counsel should be conveyed clearly and slowly, giving the person being addressed a chance to ask questions and respond thoughtfully. The court should make certain that all parties are before the bench and understand these rights before moving on. See ***In re Manuel***, 566 A.2d 626 (Pa. Super. Ct. 1989).

## What are the remedies when counsel is ineffective?

The Superior Court has held that the right to counsel in dependency proceedings means that all parties are entitled to the effective assistance of counsel, and that "ineffectiveness may be alleged as a basis for appellate review." ***In the Matter of J.P.***, 573 A.2d 1057, 1061 (Pa. Super. Ct. 1990) (*en banc*). Act 18 has codified certain parameters of effectiveness, at least as applied to counsel for children. Parents in dependency proceedings are also entitled to effective counsel who will advocate zealously on their behalf.

The Adoption Act was amended in 1992 to provide for appointment of counsel for a parent in an involuntary termination proceeding. 23 Pa. C. S. §2313. In the context of termination

proceedings, the Superior Court has provided a variety of interpretations as to the rights of parents to effective counsel. ***In re Adoption of T.M.F.***, 573 A.2d 1035 (Pa. Super. Ct. 1989) (*en banc*) (The court distinguishes ineffective counsel in criminal matters from ineffective counsel in termination matters and applies the fundamental fairness doctrine, whereby, an allegation of ineffectiveness is reviewed in light of the total record to determine whether, on the whole, the parties received a fair hearing, the proof supports the decree by the standard of clear and convincing evidence and whether counsel's ineffectiveness was the cause of a termination decree. Assertion of ineffectiveness is not a basis for remand or rehearing and even if there is a finding of ineffectiveness on one or more aspects of the case, if the result would likely have been the same, the termination decree will not be changed.) (Montemuro concurring and dissenting would apply the same standard for determining ineffectiveness as is applied in other court proceedings. He notes that there is "no substitute for competent legal counsel whose primary responsibility it has always been to ferret out all facts of a case and bring them to the attention of the trial judge.") (Beck, concurring, finds a constitutional right to effective assistance of counsel in termination proceedings. Relief, however, would be restricted to "instances in which a parent makes a *strong showing* of ineffective assistance of counsel. The parent should come forward with evidence that indicates that a high degree of likelihood exists that but for an unprofessional error on counsel's part, parental rights would not have been terminated.") *Id.*, at 1055.

### **Do parents have the right to separate counsel?**

The Superior Court quashed the appeal of indigent parents seeking reversal of a juvenile court's decision refusing to allow mother separate counsel where there was no evidence that mother's and father's interests were in conflict and where a dependency decision was still pending. ***In re N.B.***, 817 A.2d 530 (Pa. Super. Ct. 2003).

## **II. The Court's Role in Ensuring Effective Assistance of Counsel**

### **What can the court do to encourage counsel to work effectively for parties in dependency proceedings?**

Despite codified standards for conduct by counsel for dependent children, all who work in the dependency courts around the state are well-aware that deficiencies remain. The judge or the master who observes counsel on a daily basis is best positioned to ensure that all parties to

dependency proceedings are afforded effective assistance of counsel. Counsel appearing in dependency court proceedings should represent their clients professionally, fully prepared to attend to the matters that are before the court.

### **How can the court work with attorneys to improve the quality of counsel?**

- Advocate for training for all attorneys who represent children.
- Encourage attorneys for children in dependency proceedings to attend specialized training that will prepare them to represent children, many of very young age, many who face extreme challenges and many who are wholly dependent on the effectiveness and involvement of advocates to ensure them a safe and productive future.

At a minimum, training should include the following:

- Training on the requirements of the Juvenile Act and the ABA Standards of Practice for Juvenile Court attorneys.
- Training on specific techniques for interviewing/talking to a child-client.
- Education on the multitude of systems that may impact the life of the child they represent, including the special education system and the mental health system.
- Training on the psychological/developmental issues that children present and the special needs of abused and neglected children.
- Training on the needs of young adults who will be transitioned out of the dependency system and may require assistance in acquiring independent living skills

### **What specific inquiries might the court make before the hearing commences to determine that the attorneys are prepared?**

Prior to calling the parties into the courtroom, the judge or master may want to ask attorneys the following questions, as appropriate to the age and condition of the child, prior to

beginning any hearing. With some modification, these same questions can be addressed to attorneys for parents, guardians or legal custodians.

- When did you meet with your client?
- How much time did you spend with your client?
- Did you explain to your client the issues that the court will be addressing today?
- Have you obtained and reviewed all paperwork connected with your client's case?
- When did you meet with the other parties and/or the attorneys for the other parties in this matter? Did you attend all family service plan meetings and case conferences?
- Have you interviewed the child's parents, guardians, foster parents or other persons who are familiar with the child's circumstances?
- What other investigation have you conducted regarding your client?
- Have you been apprised of county agency plans for the child, including changes in custody, visitation arrangements, relocation to other facilities etc.?
- Do you have ready a list of recommendations for the child's placement which you believe are necessary to address the child's needs and issues relating to the child's safety?

If the attorney is not prepared, the court will have to decide whether to postpone the hearing or proceed with the matter under less than adequate conditions. But if the court becomes known for requiring that attorneys in the courtroom must come prepared to answer the questions set forth above in the affirmative, that courtroom will become a place where appropriate, effective decisions regarding the lives of children are made.

**What training should the court require of itself?**

The judges, masters and hearing officers who oversee dependency proceedings should also insist on regular training so that they can:

- Learn the best ways to address the requirements of Act 18 in the dependency courts.
- Learn the fundamentals of child development.
- Understand the needs of children from infancy through early adulthood, the population that they will serve.
- Recognize and understand the various child and parent services that are available to those who come before the bench.
- Keep up-to-date on the changes in the law and professional literature addressing child dependency issues.

**What can the court do to address the issues of attorney workload and compensation?**

It behooves the juvenile court judge to play a role in ensuring that attorneys who appear in his or her courtroom are adequately compensated and have manageable case loads. See the Juvenile Law Center's publication *Promises Kept, Promises Broken: An Analysis of Children's Right to Counsel in Dependency Proceedings in Pennsylvania* and *A Report by Philadelphia's Public Interest Bar and Advocacy Community on Dependent Court Resources and the Need for Judges*. Both are available at [www.jlc.org](http://www.jlc.org).



## **Part I**

### **Section Three**

#### **I. The Use of Masters, 42 Pa. C.S. §6305(b)(c) & (d)**

The Juvenile Act provides for dependency court hearings to take place, in the first instance, before a master. 42 Pa. C. S. §6305(b). Upon the conclusion of a hearing before a master, he or she must transmit written findings and recommendations, which must be promptly given to the parties, to the judge. 42 Pa. C. S. §6305(c). The same legal requirements that apply in a judge's courtroom apply to a master. A master's findings and recommendations in support of a dependency determination cannot be based upon vague stipulations without corroborating testimony. *In re A.S.*, 594 A.2d 714 (Pa. Super. Ct. 1991).

In many counties, a master may be a family's first introduction to the judicial system. The master, as his or her first order of business, must inform the parties that they are entitled to have the matter heard by a judge. If a party objects to the master's hearing the matter, the hearing shall be conducted by a judge. 42 Pa. C. S. §6305(b)(2000). See *In re A.S.*, 594 A.2d 714,717 (Pa. Super. Ct. 1991) (Notice of right to hearing before a judge mandatory, but failure to so instruct deemed waived unless contested in a timely fashion.); *In re R.W.J.*, 826 A.2d 10 (Pa. Super. Ct. 2003) (mother's request, after the adjudication hearing conducted by a master, to have the permanency hearing before a judge, was honored). If cause is shown, a judge may order a rehearing of a matter initially heard by a master. Otherwise, the findings and recommendations of the master become an order of the court, upon written confirmation by the judge. 42 Pa. C. S. §6305(d).

#### **What is the role of the judge when masters are used?**

The judge is ultimately responsible for reviewing and signing the findings of fact and recommended orders of the master. It is therefore incumbent upon the judge to ensure that masters receive training and continuing education both in the substantive and procedural aspects of dependency court practice. In many counties, children enter the system through the master's doorway. The master may be the only judicial officer a child ever sees. A master must bring the same skills, commitment and concern to the dependency courts as is expected of judges.

The judge, who depends on a master to relieve some of the burden of an overcrowded dependency court system, must:

- Make sure that each master is fully trained in dependency law and procedure.
- Set up model guidelines for the conduct of hearings, including timeframes, sample questions and forms of orders.
- Meet regularly with the masters to ensure that any issues or problems are addressed early and adequately.
- Make sure that masters approach each case fully prepared to ensure the rights of all parties, to hear testimony, to listen to and understand the facts presented, and to make fully informed recommendations in an articulate form of order.

**What should a master do to ensure the parties of their rights?**

A master must follow the same procedures that a judge employs in the courtroom. Outlines for conducting dependency court hearings are set forth in Part II of this Deskbook. At a minimum, a master should:

- Inform the parties that they have a right to have their case heard by a judge.
- Inform the parties that they have the right to an attorney, explain the benefits of exercising that right and inform them that if they cannot afford an attorney, one will be provided for them without charge.
- Inform the parties that they have the right to have the hearing recorded.
- Provide the parties with a copy of the findings of fact and completed order he or she intends to forward to the judge for signature.
- Ensure that a copy of the signed order is supplied to all parties as soon as possible.

A master's hearing room should be equipped with sufficient space to permit the parties, their attorneys, witnesses, foster parents, pre-adoptive parents and other necessary persons to participate fully in the proceedings.

**Is a transcript required in dependency proceedings heard by a master? 42 Pa. C.S. §6336(c)**

While a transcript of the proceedings is not required by the Juvenile Act, a party may request that a hearing be recorded by appropriate means. Therefore, each hearing facility used by a master should be equipped with stenographic or taping equipment. If not, a master must take notes to ensure that "full minutes" of the hearing are available. 42 Pa. C. S. §6336. The Superior Court has recently held that "it is incumbent upon the courts of common pleas throughout this Commonwealth to ensure that a transcript exists of any hearing, before a master or judge that adjudicates a change of placement goal with regard to a dependent juvenile." *In the Interest of J.H.*, 788 A.2d 1006, 1009 (Pa. Super. Ct. 2001). A transcript of every dependency court proceeding, including those which take place before masters, would benefit both the courts and the parties.

**II. Cases Involving Issues Pertaining to the Use of Masters:**

*In re R.W.J.*, 826 A.2d 10 (Pa. Super. Ct. 2003). Master filed findings and recommendations of dependency and found reasonable the agency's decision not to offer services and to place infant in foster care from the time of release from the hospital. A permanency hearing was scheduled within 14 days and at mother's request the matter was held before a judge rather than the master.

*In the Interest of J.H.*, 788 A.2d 1006 (Pa. Super. Ct. 2001). Case remanded for evidentiary hearing. The master's hearing was conducted with a recording and, without a transcript or a trial court opinion, the appellate court could not determine whether the lower court abused its discretion in making its determination to change the child's permanency goal.

*In re A.S.*, 594 A.2d 714 (Pa. Super. Ct. 1991). Master's failure to advise parties of their right to have the matter heard by a judge and extensive *ex parte* contact with the agency required reversal of the order continuing the youth in foster care.

## Part II

### Section One

#### I. Dependency Court Jurisdiction

Children may come within the jurisdiction of the dependency courts for a variety of reasons. “Generally, the basis for dependency jurisdiction is the failure of a parent or guardian to provide a home for a child in which a child can be adequately cared for and protected.” *Representing the Child Client* ¶ 4.03. In Pennsylvania, to put it simply, the court is faced with two questions in its inquiry into whether a child is without proper care and control and, therefore, dependent: “(1) Is the child *at this moment* without proper care and control? (2) If so, is such care and control *immediately available*?” *In re J.C., T.C., H.C., K.K. & E.K.*, 603 A.2d 627, 628 (Pa. Super. Ct. 1992) (*emphasis in text*).

Lack of adequate care may be the result of deliberate acts of abuse or abandonment, negligent acts, a parent’s mental illness or disability or a physical or psychological impairment of the child that requires special care the parent is unable to provide.

#### How does the Juvenile Act define dependency? 42 Pa. C.S. §6302 (Supp. 2003)

The Juvenile Act defines a dependent child as coming within the following ten categories:

- A child who lacks proper parental care or control;
- A child who has been placed for care or adoption in violation of the law;
- A child who has been abandoned;
- A child who is without a parent, guardian or legal custodian;
- A child who is habitually, and without justification, truant from school;
- A child who has committed a specific act or acts of habitual disobedience and is ungovernable;
- A child who is under the age of ten and has committed a delinquent act;
- A child who has been adjudicated dependent previously and is under the jurisdiction of the court and is ungovernable;
- A child referred pursuant to an informal adjustment and who commits an act which defines him as ungovernable; and

- A child who is born to a parent whose parental rights with regard to another child have been involuntarily terminated under 23 Pa. C.S. §2511 within three years immediately preceding the child's birth and the parent's conduct poses a risk to the child.

### **What are some specific circumstances that may result in a finding of dependency?**

Each and every child who comes into the courtroom brings with him a unique set of circumstances. The Juvenile Act categorizes specific conditions or actions which may require the judge or master to determine that a child is dependent and that the state must become involved to protect that child. Most of the cases that come before the bench will fall under the following categories:

#### **A. Neglect/Failure to Thrive**

Neglect, at its essence, is the failure to provide adequate food, clothing and shelter for a child. Neglect does not exist merely because the conditions in the home are offensive to a case worker or other social service agency representative. A diagnosis of "failure to thrive" often leads to the filing of a dependency petition for neglect. Failure to thrive is defined as decelerated or arrested physical growth or a downward change in growth associated with poor developmental and emotional functioning. See *In re J.A.S.*, 820 A.2d 774, 777 (Pa. Super. Ct. 2003). "Failure to thrive" cases often include facts evidencing parental incapacity. *In re J.T.*, 817 A.2d 505 (Pa. Super. Ct. 2002); *In the Interest of C.J.R.*, 782 A.2d 568 (Pa. Super.Ct. 2001); *In the Interest of T.M.*, 689 A.2d 954 (Pa. Super. Ct. 1997).

Failure to provide children with adequate medical care, even when a religious reason for the failure is alleged, provides a basis for a child's removal from parental custody for neglect and may subject parents to criminal prosecution. *Commonwealth v. Foster*, 764 A.2d 1076 (Pa. Super. Ct. 2000).

#### **B. Abuse—Physical, Sexual and Emotional**

Pennsylvania, pursuant to the Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101-18e, has set up a child abuse reporting system. A thorough discussion of Pennsylvania's

child abuse statute can be found in the Juvenile Law Center's publication, *Child Abuse and the Law*, Sixth Edition.

**Physical Abuse:** Physical abuse is often the basis for removing a child from a parent's custody. In Pennsylvania, physical child abuse is defined as "any recent act or failure to act by a perpetrator which causes non-accidental serious physical injury to a child under 18 years of age." 23 Pa. C.S. §6303(b)(1)(i). Instances of physical abuse are not as clear cut as they may at first seem and the courts may be confronted with a variety of issues stemming from physical injuries to a child. Physical injuries may be the result of long-term maltreatment or a one-time beating. ***In the Matter of C.R.S.***, 696 A.2d 840 (Pa. Super. Ct. 1997) (question of whether injuries were incurred while attempting to resuscitate child with apnea or were the result of shaken baby syndrome).

Corporal punishment is one controversial issue that a dependency court judge may have to confront. In 2002, the Pennsylvania Supreme Court articulated a new standard, applying criminal negligence criterion, to determine whether parental discipline that caused physical injury was, in fact, child abuse. ***P.R. v. Department of Public Welfare***, 808 A.2d 478 (Pa. 2002). Applying this standard, findings of child abuse were overturned in two Superior Court cases in 2003. ***J.B. and S.R. v. Department of Public Welfare***, 824 A.2d 342 (Pa. Cmmw. Ct. 2003); ***R.P. v. Department of Public Welfare***, 820 A.2d 882 (Pa. Cmmw. Ct. 2003).

**Sexual Abuse:** Child sexual abuse has been defined to require two elements: (1) sexual activities involving children and (2) an "abusive condition" such as coercion or a large age gap between the participants, indicating a lack of consensuality." David Finkelhor, *Current Information of the Scope and Nature of Child Sexual Abuse*, 4 ***The Future of Children*** 31, 32 (Summer/Fall 1994). Sexual abuse is defined in Pennsylvania's Child Protective Services Law codified at 23 Pa. C.S. §6303(a) and (b)(1)(ii). Proof of sexual abuse may require the testimony of multiple witnesses. See ***In the Matter of B.R.***, 596 A.2d 1120, 1123 (Pa. Super. Ct. 1991) (testimony of two teachers, emergency room physician and child sufficient to uphold finding of sexual abuse). See also, ***In re Child M.***, 681 A.2d 793 (Pa. Super. Ct. 1996). If corroborated, a child's direct testimony is not required to deny expungement of an indicated report of sexual abuse. ***A.O. v. Department of Public Welfare***, 838 A.2d 35 (Pa. Cmmw. Ct. 2003).

**Emotional or Psychological Abuse:** Emotional or psychological abuse may manifest itself physically, however, it may be difficult to determine because its effects are cumulative and may be

the result of behavior on the parents' part that takes place over a period of years. A report prepared for pediatricians and republished in *Children and the Law*, 2nd ed., Abrams & Ramsey, page 328, provides in part: "Psychological maltreatment of children occurs when a person conveys to a child that he or she is worthless, flawed, unloved, unwanted, endangered, or only of value in meeting another's needs. The perpetrator may spurn, terrorize, isolate, or ignore or impair the child's socialization." The report lists behaviors that may constitute psychological maltreatment. Pennsylvania law permits a finding of emotional abuse of children. ***In the Matter of J.K. and J.K.***, 825 A.2d 1277 (Pa. Super. Ct. 2003) (finding made of emotional abuse and court suspended direct contact between mother and children until contact approved by mental health professional). See also, 23 Pa. C.S. §6303(a) and (b)(1)(iii).

### **C. Parental Incapacity**

The Juvenile Act does not explicitly define a parent's physical or mental incapacity as leading to a determination of child dependency. However, when a parent is unable to provide a home for her child due to his or her physical or mental illness or because of absence due to circumstances such as incarceration, the court may find a child dependent. ***In re J.A.S.***, 820 A.2d 774 (Pa. Super. Ct. 2003). In 1999, a superior court panel held that the Americans with Disabilities Act does not apply to dependency or termination of parental rights cases. ***In re A.P.***, 728 A.2d 375 (Pa. Super. Ct. 1999).

### **D. Truancy and Habitual Disobedience/Ungovernable Children**

The Juvenile Act places children, who are in violation of what have also been termed status offenses, within the jurisdiction of the dependency courts. A status offense is an act of non-criminal misbehavior committed by a person under the age of majority. Such acts include truancy from school, running away from home or unsecured detention facilities, and failure to obey lawful and reasonable parental demands. Historically, truancy, ungovernability and other status offenses have been shifted between the delinquency courts, the mental health system and the child welfare arena. In Pennsylvania, the law requires that these children be dealt with in the child welfare system.

Section 6302(5) of the Juvenile Act allows a petition seeking adjudication as a dependent child for a child, who, "while subject to compulsory school attendance is habitually and without

justification truant from school.” Section 6302(6) of the act provides that a child may be adjudicated dependent if he or she “has committed a specific act or acts of habitual disobedience of the reasonable and lawful commands of his parent, guardian or other custodian and who is ungovernable and found to be in need of care, treatment or supervision.”

Adjudication as a result of truancy can lead to loss of parental custody of children. *In re E.P., J.P., & E.P.*, 841 A.2d 128 (Pa. Super. Ct. 2003); *In the Interest of James Feidler*, 573 A.2d 587 (Pa. Super. Ct. 1990). In *In re K.A.D.*, 779 A.2d 540 (Pa. Super. Ct. 2001), the court refused to overturn a dependency determination, based upon a finding of ungovernability and truancy where a non-custodial father alleged his readiness to take custody of the fifteen-year-old. The mother, the custodial parent, had sought the help of children and youth services because of the child’s behavior. The court analyzed the matter in terms of whether the child was in need of care, treatment and supervision. Finding that she was, the court upheld the determination of dependency, but left the child in mother’s custodial care.

One court has noted that a substantial number of dependency petitions are brought by parents who throw up their hands and give up on children whom they view as ungovernable. *In the Interest of Michael Y*, 530 A.2d 115, 119 (Pa. Super Ct. 1987). See also, *In re A.S.*, 594 A.2d 714 (Pa. Super. Ct. 1991). In these instances, it is the court that must distinguish that child who is merely difficult from that child whose behavior is so egregious as to warrant adjudication as a dependent child. The court must take the time to examine the facts that bring the child and his or her family before the court and seek effective solutions.

Just like parents who throw up their hands and put troublesome adolescents into the dependency system, at times, judges have thrown up their hands and adjudicated as delinquent, children who are actually ungovernable, dependent children. This is not a lawful solution. The courts cannot move a child who is dependent into the delinquency category for running away or “escaping” from a non-secure detention facility. See *In the Interest of Tasseing H.*, 422 A.2d 530 (Pa. Super. Ct. 1980); *Commonwealth v. Feick*, 439 A.2d 774 (Pa. Super. Ct. 1982); *In the Interest of R.B.*, 621 A.2d 1038 (Pa. Super. Ct. 1993).

Status offenders will often be older children. Whether these children have been part of the dependency system in the past or not, suggestions for evaluating their needs can be found in Part III of this Deskbook, The Rights of Dependent Older Youth.



### **E. Children of a Parent Whose Parental Rights to another Child have been Terminated**

Under ASFA, a new category of dependent child has been created, which the Juvenile Act has adopted. 42 Pa. C.S. §6302(10) (Supp. 2003). If a parent has had his or her rights to a child involuntarily terminated within three years immediately preceding the date of birth of the child and the conduct of the parent poses a risk to the health, safety or welfare of the child, a petition can be filed alleging the prior termination as a ground for dependency. The statute cannot be applied retroactively. *In re R.T., C.A., & K.A.*, 778 A.2d 670 (Pa. Super. Ct. 2001).

## **II. The Dependency Petition 42 Pa. C.S. §6331**

If a child is detained, a sworn petition must be filed within 24 hours or the next court business day of the child's admission to shelter care. 42 Pa. C.S. §6331. In examining a dependency petition, the court should remind itself that the grounds alleged in the petition are often the beginning of a complicated series of hearings, meetings and disruptions for the child and his or her parents. The court should make every effort to ensure that the petition reflects the allegations clearly and precisely, putting the parties on notice. Failure to allege accurate bases for dependency may lead to due process claims as well as inappropriate decisions regarding the child and his or her family. *In the Interest of R.M.*, 790 A.2d 300 (Pa. 2002).

A judge cannot issue an order of dependency *sua sponte*. A dependency petition, or one of the other avenues provided for by statute (42 Pa. C.S. §6321), is required. *In re A.L.*, 779 A.2d 1172, 1175 (Pa. Super. Ct. 2001).

### **Who may bring a dependency petition? 42 Pa. C.S. §6334(a)**

The statute provides that a dependency petition may be brought by *any* person. The statutory language specifically includes law enforcement officers. Although not specifically mentioned, an attorney or advocate for a child may also file a dependency petition.

### **What should the dependency petition contain? 42 Pa. C.S. §6334**

In both emergency and non-emergency situations, the verified petition must set forth:

(1) The facts which bring the child within the court's jurisdiction, including a statement that the proceeding is in the child's and the public's best interest.

(2) The name, age and residence address, if any, of the child on whose behalf the petition is brought.

(3) The names and residence addresses, if known to the petitioner, of the parents, guardian, or custodian of the child and of the spouse, if any, of the child. If none of these persons resides or can be found within the Commonwealth, or if their places of residence are unknown, the name of any known adult relative residing within the county or in the nearest location to the court.

(4) Whether the child is in custody and, if so, the place of his detention and the time his custody began.

A study conducted by the Pennsylvania Court Improvement Project found that, in Philadelphia, the majority of non-emergency petitions filed with the court contain multiple allegations. A clear statement of the facts, at the earliest stages of the dependency process, will aid the court in its determination.

The petition should allow the court to determine whether:

- The petitioner is alleging neglect, physical, sexual or emotional child abuse, parental incapacity, truancy, or ungovernability.
- The petitioner is alleging that the child's problems are, specifically, the result of one or more of the following: parental substance abuse, housing and/or financial problems, domestic violence, incarcerated parent(s), or the child's serious medical problems and/or emotional/mental health problems.
- The petitioner is alleging aggravated circumstances and, if so, what violations of the law have been committed?

The law requires reasonable factual specificity in a dependency setting. The petition must conform to the proofs the agency makes at the adjudicatory hearing. Failure to do so opens the petition to due process claims and can lead to reversal of a dependency finding. ***In the Interest of R.M.***, 790 A.2d 300 (Pa. 2002)

(violation of parents' due process rights where, at adjudicatory hearing, dependency sought on grounds other than child abuse, the grounds alleged in the petition).

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The court should review the Dependency Petition and read it aloud at the initial hearing and at subsequent hearings to make sure that everyone is clear as to the allegations or that the allegations are reframed as may be required by the circumstances.

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## Part II

### Section Two

#### I. Dependency Court: An Overview of the Process and Procedure

##### A. The Hearings

Following the filing of the petition, dependency hearings begin. These hearings provide a structure for the court as it considers how to best serve the needs of the child. Since the passage of ASFA and the amendments to the Juvenile Act, while the terminology may vary from county to county across the state, the sequence of hearings should look something like this:

**Preliminary Protective/Shelter hearing:** When a child is removed pursuant to emergency circumstances, this hearing commences within 72 hours to determine whether the child can be returned home or should remain in another setting until a full hearing is convened.

**Adjudication hearing:** This hearing determines whether allegations of neglect, abuse or other bases for dependency jurisdiction are sustained by the evidence and legally support the state's intervention on behalf of the child. If the child has been removed from the home, the adjudication hearing should be completed within ten days.

**Disposition hearing:** This hearing decides who will have custody and control of a child who is declared dependent. This hearing should proceed immediately after the adjudication hearing, and must take place, in the case of a child who has been removed from the home, no later than twenty days after adjudication. For a child adjudicated dependent, but who is placed in the home, a disposition hearing is required if that placement is reconsidered.

**Review hearing/permanency review hearing:** These hearings are intended to review dispositions of children placed outside of the home. ASFA and the Juvenile Act require review hearings at least every six months to ensure children spend the least amount of time possible in non-permanent/non-parental placements. Review hearings can take place more frequently, at the discretion of the court.

**Permanency planning hearing:** This hearing decides the permanent placement of a child. ASFA requires that this hearing take place within twelve months of a child having been adjudicated

dependent, but may be held sooner if circumstances require. The Juvenile Act does not explicitly provide for a permanency planning hearing, but instead mandates permanency hearings at prescribed times.

**Termination of parental rights hearing:** This hearing determines whether to end the rights of parents to a child, including the right to visit, communicate with and obtain information about the child. This hearing is a precursor to adoption and involves a determination that the child will never be able to be placed with his or her parents. In Pennsylvania, this hearing is governed by the Adoption Act.

**Adoption hearing:** To establish a legal relationship between the child and the individual(s) who is/are to become the child's adoptive parent(s).

## **II. Procedural Goals for All Hearings**

There are certain procedural steps which every judge and judicial officer should take to ensure that each hearing is conducted in a manner that complies with the law and protects the rights of the parties. See box on page 32.

**Notice—See 42 Pa.C.S. §6336.1**

**Who:** All parties, and putative fathers, foster parents, pre-adoptive parents, relatives or others, providing care for the child.

**How:** Oral and written, in language understandable to all recipients.

**When:** Quickly and diligently, children and youth agencies should be instructed to seek out persons who may have an interest in or information pertaining to the welfare of the child.

**Why:** Notice of a petition for dependency and the initial hearing, and notice of all subsequent hearings, to all parties and to witnesses, will enable the court to ensure that all relevant persons are present in the courtroom.

**Counsel—See 42 Pa.C.S. §6337**

**Who:** All parties to the proceedings have a right to counsel.

**How:** Appointment of a GAL for children; counsel for all parties, without cost to indigent parties, through court appointment, the defender association or other avenues provided by a particular county.

**When:** At each and every hearing.

**Why:** It is the law that parties in dependency proceedings are entitled to counsel. Effective counsel can ensure that the rights of the parties are addressed and that a child's right to a permanent, safe home is ensured.

**Testimonial Evidence—See 42 Pa.C.S. §6338**

**Who:** All persons and agency representatives who have relevant knowledge of the child and the family.

**How:** Through direct testimony.

**When:** At each hearing where such testimony is relevant to the child's status.

**Why:** When persons with relevant knowledge about the child or family, such as foster parents, teachers, medical and health professionals and extended family members are called upon to testify, the court will be able to make better permanency decisions for the child.

**Documentary Evidence**

**Who:** Children & Youth agencies, private providers, schools, health care providers, and others who have documentary evidence about the child and his family.

**How:** Attorneys and GAL's should request and receive pertinent information and provide it to the court.

**When:** Prior to each hearing, documentary evidence should be exchanged by all parties.

**Why:** Without documentation, it will be difficult to make appropriate decisions about a child's permanent placement.

While juvenile courts need not be subject to strict procedural rules, there are good reasons to require the same structures that govern other courts in the Commonwealth. Uniform dependency court rules of procedure have not been adopted by the Supreme Court of Pennsylvania, but such rules will go a long way toward ensuring uniform, consistent and adequate procedures in the courts that serve children. Until uniform rules are adopted, judges can implement appropriate procedures in their courtrooms to ensure procedural consistency and fairness.

### III. Courtroom Propriety

The judge or master sets the tone for what occurs in the courtroom. Steps can be taken to improve what in many venues is often a less than optimal experience for the parties, the lawyers and, in the final analysis, the judge. The judge must start by introducing himself or herself and explaining the judicial role.

- Ask the people in the courtroom to introduce themselves by name and to identify their relationship to the child. Where age appropriate, ask the child his or her name. Address all persons in the room by their names. Avoid calling them “mother” “aunt” “grandfather.” The judge should find out what role each person plays in the child’s life. Important information may come from a person sitting in the back of the room—the judge should not let that person go unnoticed.
- The judge should explain what is going to happen in the courtroom. For most of the nonprofessionals, setting out the procedure, keeping the terminology jargon-free and moving more slowly than the average dependency court hearing moves today, will benefit all involved. For example, an older child, a young mother or a grandparent may not know what reasonable efforts means or what “SCOH services” refers to. The judge should take the time to explain and ask the participants whether they understand what is going on. The judge should not proceed until he is certain that the participants understand the proceedings. If interpreters are needed for participants for whom English is a second language, the judge should require the presence of an interpreter.
- The judge should observe at least some of the formalities that are expected in courtrooms. The judge must act in a way that counters the lack of respect many in our society have for the courts and the judicial system. Often the condition of dependency courts makes it difficult to maintain an atmosphere of respect. Parties and witnesses should receive apologies from the court for long waits, continuances, bad physical facilities and other conditions that plague **our** juvenile courts. If possible, the judge should set times for certain hearings and should apologize for delays when they occur.

#### **IV. The Courts and Needs-Based Planning**

Judges who hear dependency cases are consumers of services provided by county children and youth agencies. As consumers, it is important for judges to participate in their county's needs-based planning process. This process is Pennsylvania's most important vehicle for service-creation and funding of services to dependent children, including those who are aging out of foster care. Through this planning process, judges can help to create services that they will later order in individual cases. Because it is often too late to create these services when youth reach the bar of the court, judges need to be routinely involved in the development of the county plan.

##### **What is needs-based planning?**

Since the early 1990s, the Public Welfare Code has established a budgeting process that enables counties to predict and receive funding for the services the counties will provide in the following fiscal year. 62 P.S. § 709.1. Needs-based planning ensures that the state will pay its share of the cost of children and youth services that are mandated by 55 Pa. Code §§ 3130.34-3130.38. Counties submit plans and budgets to Pennsylvania Department of Public Welfare (DPW) by August 15<sup>th</sup> of each year. DPW compiles the county submissions and approves or disapproves requests for funding for services. The Governor then submits the aggregate county child welfare needs-based budget to the General Assembly for the coming fiscal year, which begins on July 1. 62 P. S. § 709.1; 55 Pa. Code § 3140.13.

##### **How can the court participate in the needs-based plan?**

DPW regulations require counties to involve the public in developing needs-based plans. "Involvement" means, at a minimum, identifying the "needs and problems" which the plan must address. 55 Pa.Code § 3140.14(a). Before counties develop their needs-based plans, they must invite the court to participate in developing the plan. 55 Pa.Code § 3140.14(b). Indeed, DPW requires that Form CY 92 be included with the county plan submission. Titled "Documentation of Participation by the Juvenile Court," the form informs DPW that the juvenile court has assisted in the plan's development, and that the plan accurately reflects the needs of children and youth served by the court.



The purpose of having a plan is to ensure that services are in place to respond to identified needs. The submission to DPW is both a budget and planning document. While every county operates on its own timetable to meet the August 15<sup>th</sup> deadline for submitting plans, courts should be involved early and often with their county children and youth agencies. Think of the times that **you** have thought, “If only our county had that type of program.” Ideally, judges and court staff should keep track of needs that go unmet because the county lacks a particular service. That information can inform the next round of planning.

## **Part II**

### **Section Three**

#### ***DEPENDENCY COURT***

This section describes dependency court hearings and procedural and substantive issues that may arise within the context of those hearings. Case law that addresses various legal issues and factual circumstances that a court may face in making dependency decisions is set forth either by citation or in summary form. A complete list of cases referred to in each of the hearing sections can be found at the conclusion of that section. Summaries of cases, beginning with cases decided in the year 2000, can also be accessed by going to the Juvenile Law Center's website: [www.jlc.org](http://www.jlc.org) and clicking on Legal Developments.

#### **I. Entering the Child Welfare System: Emergency Custody, Shelter Care and Voluntary Placement Agreements**

##### **What statutes govern the detention of a child in Pennsylvania?**

The Juvenile Act, 42 Pa. C. S. §6301(2000) and the Child Protective Services Law, 23 Pa. C.S. §6301 (2000) address the detention of abused children in the Commonwealth. While the laws have discrete purposes, they do overlap. The Juvenile Act provides the state with a vehicle for getting involved in the lives of children who arguably need state protection. The Act enables the Commonwealth to intervene when a child is alleged to be “dependent.” The Child Protective Services Law (CPSL) is primarily a reporting statute and integrates the reporting, investigating and recording of child abuse. It also provides for the swift delivery of protective services. The CPSL aims to protect children from serious physical or mental injury, sexual abuse or sexual exploitation, and from serious physical neglect. A more detailed comparison of the two laws and a full discussion of the law of child abuse can be found in the Juvenile Law Center's publication: *Child Abuse and the Law, Sixth Edition*.

**When can a child be taken into custody? 42 Pa. C.S. §6324, 23 Pa. C.S. §6351(a), 55 Pa. Code § 3130.65.**

Under the Juvenile Act, a child may be taken into custody only pursuant to specific statutory conditions, including, among others, (1) an order of the court, where the court has determined that

to allow the child to remain in the home is contrary to the child's welfare; (2) by a law enforcement officer or duly authorized officer of the court if there are reasonable grounds to believe the child is suffering from illness or injury or is in imminent danger from his surroundings that make removal necessary; (3) by a law enforcement officer or duly authorized officer of the court if there are reasonable grounds to believe the child is a runaway. 42 Pa. C.S. §6324.

Under CPSL, a child may be taken into custody by a physician or director (or designee) of a medical institution when it is immediately necessary to protect the child from further serious injury. 23 Pa. C.S. §6351(a). The CPSL also provides that a child may be taken into custody pursuant to Section 6324 of the Juvenile Act.

A child may also be placed in the custody of an agency voluntarily, by a parent or other legal custodian. 55 Pa. Code § 3130.65.

**What are the limits to detaining a child prior to adjudication? 42 Pa. C.S. §6325**

Under the Juvenile Act, a child may not be detained or placed into shelter care except in situations where such care is required to protect the child or because he has no parent, guardian, custodian or other person able to provide supervision and care for him. Children should be permitted to remain in the home whenever this can be accomplished safely. When a person is available to provide supervision and care for the child, shelter care should not be utilized.

**When may a kinship caregiver be called upon to provide a temporary placement for a child?**

The agency may place a child with a kinship caregiver in an emergency situation, but must have the caregiver approved in accordance with the Chapter 3700 regulations within 60 days. The court can order a specific placement even if the caregiver is unapproved, however the state will not make foster care payments to an unapproved caregiver. See OCYF Bulletin # 00-03-03, 8. See also, The Kinship Care Program, Act (2003-25).

## **A. The Informal or Shelter Care Hearing**

### **What is an informal or shelter care hearing? 42 Pa C.S. §6332, 23 Pa. C.S. §6315**

A shelter care hearing is the juvenile court proceeding at which the court determines whether it is necessary to keep the child out of the home prior to the adjudicatory hearing. Shelter care hearings are triggered by a child's being detained in protective custody pursuant either to 42 Pa. C.S. §6325 or to 23 Pa. C. S. §6315(a). The Juvenile Act authorizes continued custody if it "is required to protect...the child...." The Act also provides for the situation in which a parent or guardian fails to appear for the hearing or is incapacitated, authorizing continued custody if the child "has no parent, guardian, or custodian or other person able to provide supervision and care...." 42 Pa. C.S. §6325. The CPSL authorizes continued custody if "it is determined that protective custody shall be continued and the child is alleged to be without proper parental care or control or is alleged to be a dependent child." 23 Pa. C.S. §6315(d).

### **When must a petition be filed? 42 Pa. C.S. § 6331, 23 Pa. C.S. §6315(d)**

Under the Juvenile Act, a petition must be "promptly made and presented to the court within 24 hours or the next court business day" of a child's admission to shelter care. Under the Juvenile Act, the filing of the petition normally precedes the hearing.

Under the CPSL, protective custody of an abused child may be maintained for longer than 72 hours only if an "informal hearing" is held. If, at the informal hearing, it is determined that the protective custody should continue, the child protective services agency must, within 48 hours, file a petition with the court pursuant to the Juvenile Act alleging that the child is dependent and invoking Juvenile Act procedures. 23 Pa. C. S. § 6315(d).

### **What must the petition contain? 42 Pa. C.S. §6334**

The petition must meet the requirements of the Juvenile Act, 42 Pa. C. S. §6334. Those requirements are set forth in full at pages 27-29. In child abuse cases, child protective services agencies often seek to ensure that the court makes an adjudication of abuse as well as dependency. Where allegations of abuse are absent, the court should inquire whether they should

be made a part of the petition. This will permit the introduction of evidence, pursuant to the CPSL, which the court might have to exclude if they are omitted from the petition.

**When does a shelter care hearing take place? 42 Pa. C.S. §6332, 23 Pa. C.S. §6315(d)**

Section 6332 of the Juvenile Act and Section 6315(d) of the CPSL mandate an informal hearing, also known as a shelter care hearing, within 72 hours after the child has been placed in a location away from his or her parents or guardian. This hearing is required every time a child is removed from his home and detained in shelter care.

**What questions should the court ask at the outset of the shelter care hearing?**

Before the hearing on the merits of the detention, the court should ascertain, whenever possible:

- The identity of all persons connected to the matter, including putative fathers.
  - If information is unavailable, prompt follow-up by a certain date may prevent future difficulty and prevent delays in achieving permanency for a child.
  - Failure to locate non-present parties limits possible dispositions for the child.
- Whether all interested parties received notice of the hearing.
  - If parents, guardians or custodians were not notified, did not appear or did not waive their appearance, the court or master must rehear the matter without unnecessary delay. 42 Pa. C.S. §6332(b).
- Whether the parties are represented by attorneys. If not, the court should instruct the parties of their right to an attorney and, if they cannot afford one, their right to have an attorney appointed.
- Whether all interested parties, including age-appropriate children, relatives with legal standing or other custodial adults, are present in the courtroom and, if not, why not.
- Whether the assigned case worker is available to provide the court with accurate information regarding the matter.

- Whether the emergency petition is complete, accurate and legally adequate and has been provided to all parties.
  - The petition should specifically state the nature of the danger to the child.
- Whether documentation, other than the petition, is available and has been provided to all parties and their attorneys.

It is essential for the court to conduct the shelter care hearing in as thorough a manner as possible despite the urgency that often accompanies an emergency proceeding. Many times this will be a family's first encounter with the court system; at this stage of the proceedings, judges and judicial officers can do much to ensure that a child's rights are protected, and that children and families are introduced to a court and child welfare system that they perceive is fair and responsive to their needs.

**What issues must the court address and determine at the shelter care hearing?**

- The court must advise all parties of their rights, including the right to counsel and the right to have the matter heard by a judge, if a master or other judicial officer is conducting the hearing.
- Whether, prior to a full hearing, the child should be returned home or kept in alternative care.
  - Parents, children and others with legal standing should be given the opportunity to present evidence that the child can be returned home.
- What services, if any, would facilitate the child's immediate return home?
- Whether the proposed out-of-home placement is the most appropriate for this child and is in the most family-like setting available.
  - Whether placement of the child with a relative or other person who has a close relationship is possible.
- Whether a Protection from Abuse order or other order that would dislodge an abusive parent or individual from the home is appropriate. This may be an alternative to removing the child from the home, thus lessening the potential trauma to the child.

- If the child is to remain outside the home, whether visitation, prior to the adjudicatory hearing, is safe and appropriate and what terms and conditions should be attached to a visitation order.

### **What are the placement options available to the child?**

The Juvenile Act authorizes continued custody if it “is required to protect...the child...” If a parent or guardian fails to appear for the hearing or is incapacitated, the Act authorizes continued custody where “no parent, guardian, or custodian or other person able to provide supervision and care...” is available. 42 Pa. C. S. §6325.

At the shelter care hearing, the court, often with only minimal information, must decide whether the child should remain in a protective placement or be returned home until a full hearing can take place. The purpose of the Juvenile Act is to “preserve the unity of the family whenever possible...” 42 Pa. C. S. §6301(b)(1). The court’s choices, other than returning the child to the home, are authorized by statute:

- a licensed foster home or home (such as that of a relative) approved by the court;
- a facility operated by a licensed child welfare agency or one approved by the court;
- any other suitable place or facility, designated or operated by the court, and approved by the Department of Public Welfare. 42 Pa. C. S. §6327.

Effective March 30, 2004, Act 25, the Kinship Care Program, mandates that children and youth agencies give first consideration to relatives before other placements are explored.<sup>8</sup>

### **What reasonable efforts have been or can be made to avoid protective custody? 42 Pa. C.S. §6332(a)**

At the shelter hearing, the Juvenile Act requires the court to determine whether reasonable efforts were made to prevent placing the child in protective custody and whether efforts should be

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<sup>8</sup> The Kinship Care Program provides (b) Placement of children—When a child has been removed from his home under a voluntary placement agreement or is in the legal custody of the agency, the county agency shall give first consideration of placement to relatives before other forms of placement are explored. The county agency shall document that an attempt was made to place the child with a relative. If the child is not placed with a relative, there shall be documentation which indicates why this was not possible. The Kinship Care Program (Act No. 2003-25)

made in order to return the child to the home. (ASFA also requires a finding of reasonable efforts to arrange and finalize a new permanent home after reunification is no longer the case goal. 45 C.F.R. § 1356.21(b).)

The following four services aimed at preventing placement or assisting reunification must be provided by every county agency in accordance with Pennsylvania law. 55 Pa. Code § 3130.35 mandates:

1. Counseling services;
2. Parent education services;
3. Homemaker/caretaker services; and
4. Part day services.

The court may also order any other service it deems necessary and which furthers the goals of the Juvenile Act. The county agency must ensure the provision of services ordered by the court. 55 Pa. Code § 3130.38(a). *See also, In re Tameka M.*, 534 A.2d 782 (Pa. Super. Ct. 1987), *aff'd.*, 580 A.2d 750 (Pa. 1990); *In re Frederick F.*, 583 A.2d 1248 (Pa. Super. Ct. 1990).

Even at the shelter care hearing, the earliest stage of dependency hearings, the court has the authority, and should relate the services needed, to the circumstances of the child and his or her family. *Simply ordering the standard services recommended by the agency may not be adequate.* The court should be familiar with the child welfare and family preservation services that are available in the community and the problems these services address. Familiarity with public and private agencies is essential to the court's ability to order appropriate services. More suggestions for ensuring that appropriate, reasonable efforts are made can be found in: *Making Reasonable Efforts: A Permanent Home for Every Child*, (2000), The Youth Law Center, 417 Montgomery Street, San Francisco, California, 94104.

### **What should the judge's findings of fact and order contain?**

When the shelter hearing is over, the court should complete and distribute a clear statement of the findings of fact and the determinations made as a result of those findings. If the child is to be returned home and no further action is required, the court should issue a written order to that effect.



**No** party should be allowed to leave the courtroom without a complete court order or a form of order that is to be submitted from a master or judicial officer to the judge for signature. All parties should receive a copy of the final order. A written order can help ensure understanding and, therefore, compliance by all parties, including the agency, the parents and, where age allows, the child.

In language parents and all parties, including children of an appropriate age, can understand, the order should contain the following information, as required by the placement decision and *modified to protect the safety and welfare of the child*:

- The identity, address and phone number of the person who is being given custody of the child, modified, as necessary, to protect the safety and welfare of the child.
- The location of the child's placement, including address, phone number and other contact information, modified, as necessary, to protect the safety and welfare of the child.
- The services, if any, to be provided to the child and/or the child's family, specifying, where possible, when, where and by whom these services are to be provided. This will help in tracking whether ordered services were, in fact, provided. When the question arises again, at the adjudication hearing, as to whether reasonable efforts were made, the order will serve as a benchmark against which to measure the agency's efforts.
- The terms of any visitation.
- Instructions for meeting any specific medical/psychological/educational needs of the child while the child remains in care.
- A finding that the out-of-home placement made is in the best interests of the child and best protects the child's health and safety.

### **What cannot be accomplished at a shelter care hearing?**

The shelter care hearing is not a substitute for the adjudicatory hearing. *In re A.S.*, 594 A.2d 714 (Pa. Super. Ct. 1991) (Dependency determination for 16 year-old placed in youth

services' custody because of conflict with parents, and based upon stipulations at a shelter care hearing, overturned.) While procedural safeguards, testimony and documentation necessary to establish whether a child should be returned home may all be a part of the shelter care hearing, this hearing does not replace the full adjudicatory hearing provided for in the Juvenile Act, which, except in specific circumstances, must be held within 10 days of a shelter care hearing. 42 Pa. C. S. §6335(a).

The shelter care hearing may not be used to award custody. *In the Interest of A.E.*, 722 A.2d 213 (Pa. Super. Ct. 1998) (Appellant mother temporarily left her child, *A.E.*, with a friend. When she did not retrieve *A.E.* at the agreed upon time, the agency filed a petition for dependency. At an informal 72-hour hearing, the father testified that he was in the process of trying to gain custody of the child from the mother, and that he was ready, willing and able to provide proper parental care and control. The court then transferred custody of *A.E.* to the father, without making a finding of dependency. The Superior Court reversed, holding that a dependency determination is a prerequisite to a custody disposition and a shelter hearing cannot be used to adjudicate a child dependent.)

## **B. Voluntary Placement Agreements**

A child may also come into the care of children and youth agencies through a voluntary placement agreement (VPA), executed by a child's parents or other legally responsible person.

### **What are the terms of a voluntary placement agreement? 55 Pa. Code §3130.65**

VPA's are governed by 55 Pa. Code §3130.65, which provides:

Custody of a child may be temporarily transferred to the county agency for no more than 30 days if the child's parents or other person legally responsible for the child freely enter into a written agreement with the county agency. The agreement may not be renewed beyond the 30 days and shall contain:

- (1) A statement of the parents' or legal guardian's right to be represented by legal counsel or other spokesperson during the conferences with the county agency about voluntary placement.
- (2) A statement of the parent's (sic) or legal guardian's right to refuse to place the child.

- (3) A statement of the parents' or legal guardian's right to visit the child, to obtain information about the child, and to be consulted about and approve medical and educational decisions concerning the child while the child is in voluntary placement.
- (4) A statement of the parents' or legal guardian's right to the immediate return of the child upon request of the parent or guardian, unless the court orders the legal custody of the child to be transferred to the county agency.
- (5) Placement of the child may not extend beyond 30 days unless a court order has been entered under 42 Pa. C. S. § 6341 and § 6351 (relating to adjudication and disposition of dependent children) which authorizes continued placement.

### **What enforcement tools are available to ensure review of voluntarily placed children?**

Reimbursement for the child's care is available for only 30 days when the child comes into agency custody through a VPA. This tool helps assure that the decision to voluntarily place a child will be subject to prompt judicial review. At that review, it is essential that the court conduct a full hearing, with all the rights and protections available pursuant to the Juvenile Act and other applicable statutes. A parent who voluntarily places his or her child in the custody of the agency for a limited period of time must not suffer prejudice for that act at a full adjudicatory or disposition hearing.

### **Who should review VPA cases?**

In VPA cases, the question arises as to who is minding the store. How does the court know that 30 days have passed from the date a VPA is signed? Is it the agency, the parent or the child that is required to bring the matter before the court for an adjudication hearing if the child is not returned to the home on the 31<sup>st</sup> day? While it is difficult to track these matters, it is not difficult to imagine that children and their families get lost in the bureaucratic shuffle. In one reported Common Pleas opinion, a teenager, who was placed in foster care pursuant to a VPA, three months later asked to be returned home. The youth was then adjudicated dependent and ordered to remain in foster care. *In re D.K.*, Pa. D. & C. 4<sup>th</sup> (2002).

While the exact procedural posture of the case is not clear from the opinion, it raises the question whether it was the child's request alone that triggered the review. If the child were too young to ask to return home, when would review occur?

Strict procedures should be in place in every county to ensure that VPAs are reviewed by the courts at the end of 30 days and, if the child is not returned to the parents, that judicial oversight, in the form of an adjudicatory hearing, is prompt.

## **II. Adjudication of A Child Alleged Dependent 42 Pa. C.S. §6341**

### **A. Defining Dependency**

#### **How does the Juvenile Act define dependency?**

The Juvenile Act defines a child as dependent when the child does not have proper parental care or control, education as required by law, or other care or control necessary for physical, mental or emotional health or morals. 42 Pa. C. S. §6302. Specifically, a dependent child is:

A child who lacks proper parental care or control;

A child who has been placed for care or adoption in violation of the law;

A child who has been abandoned;

A child who is without a parent, guardian or legal custodian;

A child who is habitually and without justification truant from school;

A child who has committed a specific act or acts of habitual disobedience and is ungovernable;

A child who is under the age of ten and has committed a delinquent act;

A child who has been adjudicated dependent previously and is under the jurisdiction of the court and is ungovernable;

A child referred pursuant to an informal adjustment and who commits an act which defines him as ungovernable; and

A child who is born to a parent whose parental rights with regard to another child have been involuntarily terminated under 23 Pa. C. S. §2511 within three years immediately preceding the child's birth and the parent's conduct poses a risk to the child.

See pages 22-27 for a more detailed discussion of the various bases that may cause a child to be brought into the dependency system.

**What is the standard of proof required to adjudicate a child dependent? 42 Pa. C.S. §6341(c)**

To prove that a child is dependent, the evidence must be clear and convincing. 42 Pa. C. S. §6341(c); *In re D.A.*, 801 A. 2d 614, 617 (Pa. Super. Ct. 2002) (*en banc*), quoting *In re M.L.*, 757 A.2d 849, 850-851 (Pa. 2000); *In Interest of Pernishek*, 408 A.2d 872 (Pa. Super. Ct. 1979). Clear and convincing evidence is testimony that “is so clear, direct, weighty, and convincing as to enable the [trier of facts] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.” *In re Kyiah Jackson*, 406 A.2d 1116, 1118 (Pa. Super. Ct. 1979).

Each dependency case is unique, but the cases set out below at pages 61-67 and cases that are summarized on the JLC website ([www.jlc.org](http://www.jlc.org)) offer a view into a variety of factual situations that the court concluded either did or did not provide evidence clear, direct and weighty enough to support an adjudication of dependency.

In applying the facts of the case it is considering, the court should ask the following questions:

- Do the facts prove that the child is without proper parental care and control?
- Do the facts prove that immediate, proper parental care and control is unavailable to the child without state intervention?

Unless the answer to both questions is yes, a finding of dependency should not be made. Both custodial and non-custodial parents should be considered when making a determination of whether a child is or is not dependent. See *In re M.L.*, 757 A.2d 849 (Pa. 2000) (The availability of the non-custodial parent who could provide proper care and control required reversal of a dependency adjudication). The non-custodial parent must be able to provide immediate, **proper** parental care. See *In re K.A.D.*, 779 A.2d 540 (Pa. Super. Ct. 2001). A court may discharge a dependency adjudication if a parent is found immediately ready, willing and able to provide proper parental care and control because the child, by definition, is not dependent. *In the Matter of S.J.-L.*, 828 A.2d 168 (Pa. Super. Ct. 2003).

### **Can a child be adjudicated dependent based upon a finding that a sibling is dependent?**

Each child's circumstances in the family should be examined independently. Proper and necessary parental care has been defined as the "care which (1) is geared to the particularized needs of the child and (2) at a minimum, is likely to prevent serious injury to the child." *In Interest of Pershniak*, 408 A.2d 872, 878 (Pa. Super. Ct. 1979). While a finding of abuse is sufficient in most circumstances to support an adjudication of dependency, evidence of dependency as to one child, does not, by itself, establish the dependency of that child's siblings. *In the Interest of J.M.*, 652 A.2d 877, 881 (Pa. Super. Ct. 1995); *In the Interest of R.T.*, 592 A.2d 55, 61 (Pa. Super. Ct. 1991).

Two recent Superior Court cases have cited ASFA and the Juvenile Act, as amended, to affirm the dependency adjudications of siblings of a child who had also been adjudicated dependent based upon a finding of sexual abuse. *In re S.B.*, 833 A.2d 1116 (Pa. Super. Ct. 2003) (Court upheld the dependency adjudication of S.B. based upon a finding of an "aggravated circumstance," in this case, sexual abuse of his sibling, by the Father. The trial court's findings reflected that S.B. had not been the subject of physical or sexual abuse and was doing well in school and was safe in the home. The court affirmed the trial court's dependency adjudication by expanding the Juvenile Act's definitions of dependency to include dependency based upon "aggravated circumstances."). In JLC's view, the court's interpretation is unwarranted either by the language of the Juvenile Act or ASFA and its legislative history. *In re M.W.*, 842 A.2d 425 (Pa. Super. Ct. 2004), cites *In re S.B.*, but notes specifically that "the Juvenile Act itself did not expressly expand the statutory definition of "dependent children" to include siblings of sexually abused children." However, the court accepted the reasoning of the **S.B.** panel, stating that "the

Juvenile Act is now significantly more sensitive to the fact that siblings of sexually abused children may be “without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his physical, mental or emotional health, or morals.” The court held that the inquiry as to the siblings must address the issue of whether, considering the sexual abuse of a sibling, the definition of dependency set forth at 42 Pa. C. S. §6302 is proved. In **M. W.**, the court found that mother’s failure to preclude father, who had been found to have sexually abused one daughter, from having unsupervised contact with the other children required a finding of dependency as to all of the children.

### **Can a finding of dependency be based upon prognostic evidence?**

Yes. One component in determining whether proper parental care and control may not be immediately available can be prognostic evidence. One example is a newborn in a family where two previous children have died because of the parents’ improper care. The court need not wait until the child is actually harmed to find dependency, but may use evidence of the siblings’ deaths to determine that the newborn is dependent. ***In Interest of Black***, 417 A.2d 1178 (Pa. Super. Ct. 1980); *see also*, ***In re R.W.J.***, 826 A.2d 10 (Pa. Super. Ct. 2003); *Cf.*, ***In re M.W.***, 842 A.2d 425 (Pa. Super. Ct. 2004).

## **B. Procedural, Standing and Evidentiary Issues**

### **When does an adjudicatory hearing take place? 42 Pa. C.S. §6335(a)**

The adjudicatory hearing takes place after the filing of a petition alleging a child to be dependent. See pages 27-29 for a discussion of dependency petitions.

#### ***(1) Children in Shelter Care***

If the child is in shelter care, the hearing must occur no later than ten days after the petition is filed. 42 Pa. C. S. §6335(a). ***In Interest of S.N.W.***, 524 A.2d 514, 515 (Pa. Super. Ct. 1987), *citing In re Kerr*, 481 A.2d 1225, 1227 (Pa. Super. Ct. 1984). There are, however, exceptions to the rule. A child may remain in shelter care for an additional 10 days only if the court finds, at a hearing, that despite due diligence, evidence material to the case is unavailable, but may become available at a later date, and the court finds by clear and convincing evidence that the life of the

child would be in danger if the child is released. 42 Pa. C. S. §6335(a)(1)&(2). If delay is caused by the child, the child may continue to be detained in shelter care for successive 10 day intervals. 42 Pa. C. S. §6335(f). Delay caused by the child includes, but is not limited to (1) unavailability of the child or his attorney; (2) delay caused by a continuance granted at the request of the child or his attorney; or (3) delay caused by the unavailability of a witness resulting from conduct by or on behalf of the child. The fact that a hearing was not held because of a child's conduct must be placed on the record and the child may be held in shelter care for a period not to exceed 10 days.

Under any other circumstances, if the hearing is not held within the set time limits, the child must be returned to his or her parents. See *In the Interest of J.P.*, 832 A.2d 492 (Pa. Super. Ct. 2003) (Order for shelter care vacated; postponement of dependency hearing until father's sexual abuse criminal trial completed violated 42 Pa. C. S. §6335(a)).

The court should make every effort to minimize delay when a child is in shelter care because:

- minimizing delay when a child has been removed from the home will reduce trauma to the child.
- permitting delay will impede efforts to reunify the family.
- permitting delay in situations where the family cannot be reunified, will impede efforts to find an alternate, permanent placement for the child.

## *(2) Children not in Shelter Care*

Where a child is not held in shelter care, the Juvenile Act prescribes no specific deadline for holding an adjudicatory hearing. Good practice would be to hold a hearing within a reasonable time after the filing of the petition. This will ensure that the child and family, if allegations of dependency prove sufficient, receive the services to which they are entitled under the law. If the allegations are insufficient, the petition should be dismissed and the state's right to intervene in the life of the family ended.

### **Who has standing at an adjudicatory hearing?**

Individuals who have a personal stake in the outcome of a controversy generally have



standing to make a legal claim or seek judicial enforcement of a duty or right.

Parents have standing at an adjudicatory hearing on the dependency petition. ***In the Interest of J.P.***, 832 A.2d 492 (Pa. Super. Ct. 2003). Persons who stand *in loco parentis* also have standing. See pages 174-193 for a full discussion of issues related to third party standing, including the rights of foster parents.

Parties with standing have a right to participate in dependency proceedings. One parent may not be precluded from testifying at or participating in a dependency hearing where the rights of a second parent are being considered. ***In the Interest of J.P.***, 832 A.2d 492 (Pa. Super. Ct. 2003).

### **Who has the right to counsel at an adjudicatory hearing? 42 Pa. C.S. §6337**

The child and every other party are entitled to representation by legal counsel, either private or court appointed, at all stages of a dependency case. Children are entitled to counsel separate and apart from parents and parents may not waive a child's right to counsel. 42 Pa. C. S. §6311(a); ***Stapleton v. Dauphin County Child Care Service***, 324 A.2d 562 (Pa. Super. Ct. 1974). Parents have a right to counsel at adjudicatory hearings, even if obtaining counsel may cause a delay in the hearing. ***In Interest of S.N.W.***, 524 A.2d 514 (Pa. Super. Ct. 1987) (ten day hearing requirement of 42 Pa. C. S. §6335 does not override parent's right to counsel). Where there is no conflict of interest, parents do not have a right to separate counsel at an adjudication hearing. ***In re N.B.***, 817 A.2d 530 (Pa. Super. Ct. 2003).

The right to counsel is not waived by silence. ***In Interest of Michael Y.***, 530 A.2d 115 (Pa. Super. Ct. 1987) (great-grandmother's silence not effective waiver of right to counsel). For a full discussion of right to counsel in dependency proceedings, see pages 10-18.

### **Who has the right to receive notice of an adjudicatory hearing? 42 Pa. C.S. §6335(a), 42 Pa. C.S. §6336.1.**

Once a dependency petition is filed, a summons is issued to the parents and other interested parties, including juveniles over the age of fourteen. 42 Pa. C.S. §6335(a).

The 1998 amendments to the Juvenile Act provided that notice is to be given not only to the

parties, children and their parents, but to foster parents, pre-adoptive parents and relatives who are caring for a child. 42 Pa.C.S. §6336.1. This requirement applies to all hearings and inquiry should be made as early as the adjudicatory stage as to whether these persons have been notified of the hearing. The court should attempt to involve all persons who can provide relevant information about the child.

While the court has held that “reasonable” efforts need not be made to locate an absent, non-custodial parent prior to a finding of dependency, *In re J.C., T.C., H.C., K.K., & E.K.*, 603 A.2d 627(Pa. Super. Ct. 1992) (effort to locate absent parent who had no contact with the children since they were a few weeks old not necessary), early efforts to notify even non-custodial parents may locate a parent who can provide a permanent home for the child. The late appearance of a non-custodial parent may slow efforts to achieve permanency for children by delaying termination of parental rights and adoption hearings. The courts should encourage agency efforts to locate and provide notice to persons who may assist in the goal of establishing permanency for the child.

#### **What are a party’s rights to introduce evidence at adjudicatory hearings? 42 Pa. C.S. §6338**

Section 6338 of the statute provides: “A party is entitled to the opportunity to introduce evidence and otherwise be heard in his own behalf and to cross-examine witnesses.” The Juvenile Act provides no guidance as to the admissibility of evidence at the adjudicatory stage of the proceedings. “Questions concerning the admission and exclusion of evidence are within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion.” *In re R.T., C.A. & K.A.*, 778 A.2d 670, 682-83 (Pa. Super. Ct. 2001) (*citations omitted*).

The Supreme Court of Pennsylvania has not, as yet, promulgated uniform procedural rules that would govern dependency practice in the Commonwealth. Because juvenile court proceedings are to be conducted “by the court without a jury, in an informal but orderly manner” 42 Pa. C.S. §6336(a), rules that govern evidence at each stage of dependency court hearings are advisable.

#### **What is the law regarding the use of hearsay at adjudicatory hearings?**

##### *(1) Statements Made by a Child*

Courts have held that dependency adjudications may be based upon hearsay testimony. “Under 42 Pa. Cons. Stat. Ann § 5986, it is provided: ...A statement made by a child describing acts and attempted acts of indecent contact, sexual intercourse or deviate sexual intercourse with or on the child by another, not otherwise admissible by statute or court ruling, is admissible in evidence in a dependency proceeding initiated under Chapter 63 (having to do with juvenile matters), involving the child or other members of that child’s family, if a court finds that the time, content and circumstances of this statement provide sufficient indicia of reliability.” *In re A.M. & P.M.*, 530 A.2d 430, 435-36 (Pa. Super. Ct. 1987). *See also, In re M.K.*, 636 A.2d 198 (Pa. Super. Ct. 1984) (In a case of child abuse by mother’s paramour, psychologist allowed to testify as to statements made by child).

## *(2) Statements Made by a Parent*

Courts have, *sua sponte*, precluded hearsay testimony at an adjudicatory hearing. *In re R.T., C.A. & K.A.*, 778 A.2d 670, 682-83 (Pa. Super. Ct. 2001) (Mother began to testify as to what her treating psychologist told her about her new obsession with collecting Beanie Babies. The court inquired as to whether mother’s counsel intended to call the psychologist. When counsel said no, the court excluded the testimony as inadmissible hearsay).

## **What is the law regarding admission of psychological evaluations at an adjudicatory hearing?**

The courts have long held that testimony from psychologists or other health care professionals with regard to parenting skills and caring for children is advisable. *In re D.A.*, 801 A.2d 614 (Pa. Super. Ct. 2002) (*en banc*). A panel, in a case decided in 2004, declined to establish that such testimony is always required. *In re M.W.*, 842 A.2d 425 (Pa. Super. Ct. 2004).

Like many other areas of dependency practice in Pennsylvania, the law with respect to the use of psychological evaluations made at the behest of the agency or the court is not clearly articulated. The following three cases provide conflicting views.

*In Interest of Bender*, 531 A.2d 504 (Pa. Super. Ct. 1987) (Agency requested psychological exam of mother. At the adjudicatory hearing, mother revoked her consent to release of evaluation. Superior Court upheld testimony by psychologist, stating that the patient-

psychologist privilege did not apply where mother knew that evaluation at the request of agency was only done so the results could be used by the agency and the court to determine whether child was dependent).

A more recent case, which involved a disposition of a child after a dependency adjudication, *In re T.R., J.M., C.R., & C.R.*, 731 A.2d 1276 (Pa. 1999), may call **Bender** into question. In *T.R., et. al.*, the trial court ordered a mother to undergo a psychological evaluation, and release the results to the court for the purpose of determining whether or not to return custody of her children after removal due to unexplained injuries. The court concluded that a mother's state constitutional right to privacy precluded the trial court from compelling her to participate in a psychological evaluation, the results of which would be disclosed to the interested parties. This case is not precedential. Only three justices joined in the rationale. Two others dissented and a third concurred in the result.

*In re T.R., et al.*, is discussed by the court in *In the Interest of J.Y.*, 754 A.2d 5 (Pa. Super. Ct. 2000), a goal change case, which held that refusal of parents to cooperate with mental health personnel can be considered, but cannot be determinative, in the goal change decision. The court held that while they may not be able to require parents to submit to treatment, they could consider the parents' refusal to do so in determining issues relating to a request for a goal change from reunification to adoption. *Id.*, 754 A.2d at 9. This same reasoning may apply to adjudicatory decisions as well.

### **How may a party or the court procure evidence for use at adjudicatory hearings?**

#### *Subpoenas—42 Pa. C.S. §6333*

Section 6333 of the Juvenile Act provides that the court, upon its own motion or upon application from a party, shall issue subpoenas requiring attendance and testimony of witness and production of papers at any Juvenile Act hearing. Refusal to do so may require reversal of a dependency determination. *In re J.C., T.C., H.C., K.K., & E.K.*, 603 A.2d 627, 629 (Pa. Super. Ct.1992).

At adjudicatory hearings, the court should ask whether subpoenas are necessary to obtain:

- Agency records.
- Expert reports or reports by health, educational or other service providers.
- Attendance by fact or expert witnesses.

In the best circumstances, everything will be in place before the adjudicatory hearing. If not, the court should be prepared to issue subpoenas and set a date for a second hearing to occur at the earliest possible opportunity.

### **Can stipulations, agreements and admissions be used at adjudicatory hearings?**

A child may not be adjudicated dependent based upon stipulated facts alone. *In re A.S.*, 594 A.2d 714 (Pa. Super. Ct. 1991); *In the Interest of Michael Y.*, 530 A.2d 115 (Pa. Super. Ct. 1987). It is the court's responsibility to make a determination of dependency based upon clear and convincing evidence; stipulations, admissions and agreements, while helpful, must not substitute for a presentation of evidence. The court should seek out evidence from objective, disinterested witnesses, as well as the parties. *Id.* at 118 (*quoting In re LaRue*, 366 A.2d 1271 (Pa. Super. Ct. 1976)). Procurement of evidence may require the court to take an active role in assuring the appearance of witnesses and the production of documents. Gathering the facts may require multiple hearings unless the court establishes adequate pretrial protocols.

### **C. Aggravated Circumstances**

#### **Can aggravated circumstances be raised at adjudicatory hearings? 42 Pa. C.S. §6302.**

aggravated circumstances may be pled at the adjudicatory hearing stage of dependency proceedings. The court then determines whether the agency must make 'reasonable efforts' to reunite the family or whether it may cease efforts and propose another alternative as the permanency goal for the child.

ASFA allowed states to define and clarify what acts constitute "aggravated circumstances." 65 FR 4053. The Juvenile Act defines aggravated circumstances as follows:

The child is in the custody of a county agency and either:

1. The identity or whereabouts of the parents is unknown and cannot be ascertained and the parent does not claim the child within three months of the date the child was taken into custody.
2. The identity or whereabouts of the parents is known and the parents have failed to maintain substantial and continuing contact with the child for a period of six months.
3. The child or another child of the parent has been the victim of physical abuse resulting in serious bodily injury, sexual violence or aggravated physical neglect by the parent.
4. The parent has been convicted of a specific list of offenses where the victim is a child or has been convicted of the attempt, solicitation or conspiracy to commit any of said offenses.
5. The parental rights of the parent have been involuntarily terminated with respect to a child of the parent within three years immediately preceding the date of birth of the child.

If one or more aggravated circumstances is alleged at the adjudicatory phase of the dependency proceeding, the court must engage in a three step analysis:

**First:** The court must determine that the child is dependent. (See pages 22-23 for dependency criteria).

**Second:** The court must determine whether the alleged “aggravated circumstance” has been proved. 42 Pa. C.S. §6341(c.1).

**Third:** If the court determines the child is dependent and one or more aggravated circumstances exists, the court must decide whether or not reasonable efforts to prevent or eliminate the need for removing the child from the home or to preserve and reunify the family should continue in spite of the existence of the aggravated circumstance.

If the court determines that reasonable efforts need not be made, the court must schedule a permanency hearing within 30 days. See 42 Pa. C.S. §6351(e)(3)(ii).

If the court determines that reasonable efforts should be made and that reunification is a stated goal for the child, the court must proceed with a disposition hearing within twenty days of the adjudication.

### **Why might the court order reunification services even if one or more aggravated circumstances is found?**

The aggravated circumstances language of the Juvenile Act, like that found in ASFA, may, in certain situations be overly inclusive, in others overly exclusive. For example, one can imagine a situation where a parent has not been able to maintain contact with a child for six months due to a severe illness. The agency might be able to plead and prove “aggravated circumstances,” but the provision of services to the family for an additional period of time might be the appropriate course of action. The law allows the court to exercise discretion and order reasonable efforts in circumstances like this or in any number of other instances that might arise. For additional examples of and commentary on aggravated circumstances as well as a thorough guide to ASFA and its regulations, JLC recommends: *Making Sense of the ASFA Regulations: A Roadmap for Effective Implementation*, ABA, Washington, D.C. (2001).

### **How have appellate courts interpreted aggravated circumstances in dependency adjudications?**

As of the date of this publication, few opinions deal with allegations of aggravated circumstances at the adjudicatory stage of dependency court proceedings. *In re S.B.*, 833 A.2d 1116 (Pa. Super. Ct. 2003), upheld the dependency adjudication of S.B. based upon a finding of an “aggravated circumstance,” in this case, sexual abuse of his sibling by the Father. The trial court’s findings reflected that S.B. had not been the subject of physical or sexual abuse and was doing well in school and was safe in the home. The court affirmed the trial court’s dependency adjudication by expanding the Juvenile Act’s definitions of dependency to include dependency based upon “aggravated circumstances.” In JLC’s view, the court’s interpretation is unwarranted either by the language of the Juvenile Act or ASFA and its legislative history.

Another superior court panel specifically noted that the Juvenile Act “did not expressly expand the definition of “dependent children” to include siblings of sexually abused children. While it agreed with S.B. that the Juvenile Act is “more sensitive to the fact that siblings of sexually

abused children may be without proper parental care or control...” it did not find that the aggravated circumstance of sexual abuse was alone grounds for a finding of dependency. ***In re M.W.***, 842 A.2d 425 (Pa. Super. Ct. 2004) (Siblings of sexually abused child adjudicated dependent based upon a finding of lack of proper parental care and control. Evidence showed that mother not only allowed father to sexually abuse one child, but continued to allow father unsupervised contact with other children).

The court has affirmed, at a dependency hearing, a finding of aggravated circumstances and permitted the agency to cease reunification efforts where there was clear and convincing evidence of serious physical abuse of the child. ***In the Matter of A.H. & A.L.***, 763 A.2d 873 (Pa. Super. Ct. 2000). *Cf. In re R.W.J.*, 826 A.2d 10 (Pa. Super. Ct. 2003) (child’s father, mother’s paramour, had killed child’s ten-week old sibling; father not a party to appeal and aggravated circumstances are discussed, but are not a specific ground for affirmation of dependency order, which continued newborn in foster care based upon prognostic evidence).

Aggravated circumstances cannot be applied retroactively, so that an involuntary termination with respect to another child of the parent, which occurred before the amendments to the Juvenile Act, could not serve as the basis for the dependency adjudication. ***In re R.T., C.A. & K.A.***, 778 A.2d 670, 679 (Pa. Super. Ct. 2001).

#### **D. Transcripts and Appeals**

##### **Should adjudicatory hearings be recorded? 42 Pa.C.S. §6336(c)**

The Juvenile Act does not require that dependency proceedings be recorded unless requested by the parties or ordered by the court. If the proceedings are not recorded, the court is required to keep full minutes. 42 Pa. C.S. §6336(c). Prior to the start of hearings, where a stenographic or taped record is not regularly made, the parties must be informed of their right to request a transcript or recording of the proceedings. A transcript must be made in order to permit the court to hear appeals in matters involving a goal change. ***In the Interest of J.H.***, 788 A.2d 1006, 1009 (Pa. Super. Ct. 2001). However, recording should not be limited to goal change hearings.



All courts should adopt a policy of recording every stage of dependency hearings. A record of the proceedings will help to:

- maintain appropriate decorum in the courtroom.
- encourage attorneys to be fully prepared to present evidence and cross-examine witnesses.
- streamline future hearings.
- provide a full record that a trial judge can rely on to review proceedings conducted by a judicial officer.

### **Are appeals allowed as of right from an adjudication of dependency?**

Prior to a final disposition order, there is no direct right of appeal from an adjudication of dependency. Until disposition, the order of dependency is considered an interlocutory order. *In re A.M. & P.M.*, 530 A.2d 430, 432-33 (Pa. Super. Ct. 1987).

Because appellate rights must await a disposition order, it is important that a disposition hearing take place immediately or, at the very latest, within the twenty days allowed by the Juvenile Act, and that a disposition order be issued forthwith.

### **E. Conducting an Adjudicatory Hearing**

The time allotted for adjudicatory hearings will vary from case to case and from courtroom to courtroom. The time allotted for the hearing should be enough to address, in a thorough and judicious manner, the legal and factual issues to be determined and to ensure that the decision is based upon clear and convincing evidence. See Box 1.

The following suggestions for conducting an adjudicatory hearing are adapted from *Resource Guidelines Improving Court Practice in Child Abuse & Neglect Cases* (NCJFCJ 1995) ("Resource Guidelines").

### **Hearing Activity**

1. Introductory Remarks
  - Identification of parties, counsel and others
  - Advising parties on rights
  - Description of the proceeding
2. Adequacy of Notice and Service of Process Issues
  - Are subpoenas or bench warrants necessary to procure records or witnesses?
3. Testimony to Support or Refute Dependency Allegations
  - Caseworker and agency testimony/safety and welfare of the child
  - Parent, child, if appropriate, and other fact witness testimony
  - Expert testimony, if necessary
  - Aggravated circumstances testimony, if alleged
4. Issues Related to Dependency Adjudication
  - Reasonable Efforts finding if child in shelter care
  - Family preservation services/assessments
  - Placement/Visitation
  - Services in the home and non-placement reviews
5. Issuance of Orders and Scheduling Next Hearing (disposition or permanency review)
  - Finding of dependency by clear & convincing evidence
  - If finding of dependency and aggravated circumstances, finding of whether reunification efforts should continue or cease
  - Order necessary assessments, order necessary services
  - Prepare and distribute orders to all parties
  - Explain orders, as necessary, to all parties prior to adjournment

**Box 1**

### **F. Adjudication Cases**

The Juvenile Act defines a dependent child as a child without proper parental care or control, education as required by law, or other care or control necessary for physical, mental or emotional health or morals. 42 Pa. C. S. §6302. Adjudications of dependency must be founded upon clear

and convincing evidence. 42 Pa. C. S. §6341(c). Clear and convincing evidence is testimony that “is so clear, direct, weighty, and convincing as to enable the [trier of facts] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.” *In re Kyiah Jackson*, 406 A.2d 1116, 1118 (Pa. Super. Ct. 1979).

Cases involving dependency adjudications are listed below. In the first major grouping, the courts determined that the evidence was insufficient for the adjudication of dependency to stand. In the second major grouping the evidence warranted a finding of dependency. Within these two major groupings, the cases are divided into several categories to enable the reader to locate a variety of fact patterns. However, each case presents complex factual situations and the reader is reminded that there is no substitute for an examination of the full opinion.

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Summaries of adjudication cases decided beginning in the year 2000 and continuing to the present can be found on the Juvenile Law Center’s website: [www.jlc.org](http://www.jlc.org) . Click on Legal Developments and look for Dependency.

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#### CASES WHERE DEPENDENCY ADJUDICATION REVERSED:

##### ***Evidence insufficient to sustain finding of abuse.***

*In re D.A.*, 801 A.2d 614 (Pa. Super. Ct. 2002). Dependency adjudication reversed. Mother’s past depression, for which she had completed a course of treatment, and an isolated incident of sexual contact with a child, which occurred five years prior to the current petition, were not sufficient to warrant a dependency adjudication.

*In the Matter of C.R.S.*, 696 A.2d 840 (Pa. Super. Ct. 1997). Dependency adjudication reversed. Evidence of abuse, as it was not consistent with testimony presented at trial regarding the source of the child’s injuries.(get better description)

*In the Interest of J.M.*, 652 A.2d 877 (Pa. Super. Ct. 1995). Dependency adjudication for five of six children reversed. Although dependency was correctly found for the one child, the basis of dependency adjudications for the other children was “innuendo and suspicion,” not clear and convincing evidence.

***In re A.S.***, 594 A.2d 714 (Pa. Super. Ct. 1991). Dependency adjudication of teenaged girl, based on stipulated facts at a shelter hearing reversed. Case remanded for full adjudication hearing.

***In the Interest of Tanya Palmer***, 590 A.2d 798 (Pa. Super. Ct. 1991). Dependency adjudication reversed. Mother's eight-year-old daughter was drowned by paramour. The mother's other child, the son of the paramour, was then adjudicated dependent by the trial court, which found that the death of the daughter indicated that the mother had elected not to protect her daughter from her paramour. Daughter's death alone, without any prior indication of danger to the child from the paramour, was not sufficient to establish that mother had elected not to protect her child. There was no basis for finding that mother could not provide proper parental care and control to her surviving son.

***In the Interest of Winnie Rodriguez***, 406 A.2d 553 (Pa. Super. Ct. 1979). Dependency adjudication reversed. Mother had removed her daughter from the dangerous situation after the first instance of abuse, of which there had been no prior warning.

***Parent's age and dependent status not a basis for determining child dependent.***

***In the Interest of Kyle Austin Hall***, 703 A.2d 717 (Pa. Super. Ct. 1997). Dependency adjudication reversed. Parent's dependent status and young age were alone not sufficient to adjudicate a child dependent without evidence of improper care and control of the child. The child was born to a dependent 14-year old mother and 18-year old father. At the time of the dependency petition, child was living with his mother in her foster home, and child's father had made arrangements for child to live with him.

***A mere failure to comply with a juvenile court's order is not prima facie evidence of dependency.***

***In the Interest of T.M.***, 689 A.2d 954 (Pa. Super. Ct. 1997). Dependency adjudication reversed. Shortly after T.M.'s birth, agency filed a Petition for Emergency Placement, alleging T.M. suffered from a failure to thrive due to a lack of proper parental care and control. Medical tests, however, revealed nothing remarkable about T.M.'s health. The court ordered return of T.M. to his mother, but also ordered the parents to cooperate with social services agencies. A short time later, the agency filed a dependency petition alleging that T.M. was without proper parental care and control

because his parents were failing to cooperate with the social services agencies. The trial court denied the dependency petition. The Superior Court affirmed. The court declined to accept agency's argument that failure to comply with a court order is *prima facie* evidence of dependency.

***In re T.D.***, 553 A.2d 979 (Pa. Super Ct. 1988). Dependency adjudication reversed. Although child had been abused in the past, there was no clear and convincing evidence of a present lack of proper parental care and control, thus failure of the parents to comply with court ordered SCOH services was not sufficient to establish dependency.

***A child cannot be adjudicated dependent if there is a parent who is ready, willing and able to provide proper parental care and control, even if that parent is the non-custodial parent. It is the duty of the trial court to determine if such a parent is available.***

***In re M.L.***, 757 A.2d 849 (Pa. 2000). Dependency adjudication reversed. Custodial mother suffered from factitious disorder by proxy, and thus falsely alleged that the non-custodial father was sexually abusing the child, although there was no medical evidence of any abuse. The agency filed a dependency petition because of the mother's allegations. The trial court found the child dependent and awarded custody to the father as there was no evidence of abuse. The Supreme Court reversed the dependency adjudication, holding that a court may not adjudicate a child dependent when there is a parent who is ready, willing and able to provide the child with proper parental care and control. The court reasoned that the definition of a dependent child clearly states that a child must lack a parent, guardian or other legal custodian who can provide appropriate care to the child, and that this was patently not true of M.L.

***In the Interest of Anita H.***, 505 A.2d 1014 (Pa. Super. Ct. 1986). Dependency adjudication reversed. Court had failed to consider testimony about the parental fitness of the children's father following the incarceration of the custodial mother.

***In the Matter of Mark T.***, 442 A.2d 1179 (Pa. Super. Ct. 1982). Dependency adjudication reversed. Trial court should first have determined whether proper care and control was immediately available from the non-custodial parent who was not present at the dependency hearing.

***Past instances of abuse or past difficulties that might affect ability to parent are not sufficient to adjudicate a child dependent unless there is evidence that improper parental care and control will continue to exist in the future.***

***In re D.A.***, 801 A.2d 614 (Pa. Super. Ct. 2002). Dependency adjudication reversed. Mother's past depression, for which she had completed a course of treatment, and an isolated incident of sexual contact with a child, which occurred five years prior to the current petition, were not sufficient to warrant a dependency adjudication.

***In re Christopher Swope***, 571 A.2d 470 (Pa. Super. Ct. 1990). Dependency adjudication reversed. The Superior Court found that not only was the lower court's decision based on contested hearsay testimony, but that even if the alleged incidents of abuse had occurred in the past, an inquiry as to the quality of care child would receive from his mother in the future was also necessary.

***In the Interest of H.B.***, 437 A.2d 1229 (Pa. Super. Ct. 1981). Dependency adjudication vacated. Isolated incidents of neglect in the past did not necessarily warrant the conclusion that the child would continue to receive such treatment in the future absent any professional evaluation of the parent's present ability to care for the child.

***The standard for finding dependency is not "in the child's best interest," but rather whether there is immediately available proper parental care and control.***

***In re Jackson***, 448 A.2d 1087 (Pa. Super. Ct. 1982). Dependency adjudication reversed. Child was in the custody of her paternal aunt and uncle and complained of sexual abuse by uncle. Mother (appellant) brought the child to the hospital. A physician reported the incident and the agency subsequently filed a dependency petition. After consolidating the dependency and custody issues, the trial court, using a best interests test found the child dependent and awarded custody to the paternal aunt and uncle.

***In re the Interest of Eugene Haynes***, 473 A.2d 1365 (Pa. Super. Ct. 1983). Best interests standard is not relevant to dependency determinations. Trial court's decision to return the children to their mother, as they were not dependent, affirmed.

## CASES WHERE DEPENDENCY ADJUDICATIONS UPHELD:

***Neglect – parent unable or unwilling to meet needs of child.***

***In re R.T., C.A. & K.A.***, 778 A.2d 670 (Pa. Super. Ct. 2001). Dependency adjudication of children affirmed. Parents failed to remedy filthy living conditions in the home caused by more than 20 animals, their accompanying feces and stench, cockroach infestation and unsafe and unsanitary furnishings.

***In re K.A.D.***, 779 A.2d 540 (Pa. Super. Ct. 2001). Dependency adjudication affirmed. Mother voluntarily agreed to adjudication and, because of daughter's fear of father and emotional and mental health needs, father, although available to take custody, found unable to meet child's needs.

***In the Interest of B.B.***, 745 A.2d 620 (Pa. Super. Ct. 1999). Proper parental care and control for five and six year old boys is not available from a biological father who chooses not be involved in the lives of his children and has seen them on only one occasion. A conscious decision not to parent is clear and convincing evidence of dependency.

***In re R.R.***, 686 A.2d 1316 (Pa. Super. Ct. 1996). Dependency adjudication of an infant in delicate medical condition affirmed. Mother's emotional instability, financial uncertainty and lack of medical expertise rendered her unable to parent infant with special medical needs.

***In re S.M.***, 614 A.2d 312 (Pa. Super. Ct. 1992). Dependency finding and placement of 15 year old boy affirmed due to failure of parents to provide needed support for youth's emotional problems, which may have stemmed, in part, from parents' inappropriate, abusive discipline.

***In re Yeager***, 455 A.2d 717 (Pa. Super. Ct. 1983). A juvenile may be adjudicated a dependent child without a showing of parental fault if the parents cannot meet the juvenile's special needs. In this case, the mother's inability to control teenager's violent actions, inappropriate sexual behavior, and drugs and alcohol use was clear and convincing evidence of dependency.

***In Interest of Black***, 417 A.2d 1178 (Pa. Super. Ct. 1980). Dependency finding and removal to foster home of infant shortly after birth upheld. Infant's two older siblings had died due to poor

parental care and parents were unable to prove that conditions in the home or in their ability to parent had improved.

***In re Kunkle***, 402 A.2d 1037 (Pa. Super. Ct. 1979). Dependency finding based upon evidence of filth throughout home, smell of urine, presence of innumerable animals and their accompanying odors.

***Physical/sexual abuse – parents not only must not harm child, but must also protect child from harm by others.***

***In re R.W.J.***, 826 A.2d 10 (Pa. Super. Ct. 2003). Dependency adjudication of infant affirmed. Mother had history of noncompliance with the state, as indicated by her voluntary termination of parental rights to four other children after demonstrating unwillingness to meet reunification goals, and her reunion with the man who pled guilty in the death of another one of her children.

***In the Matter of A.H. & A.L.***, 763 A.2d 873 (Pa. Super. Ct. 2000). Dependency determination may be based upon clear and convincing evidence that the mother was the abuser either by her intentional acts or by failing in her duty to protect her child from acts of abuse by others.

***In the Matter of C.R.S.***, 696 A.2d 840 (Pa. Super. Ct. 1997). Dependency determination based on physical abuse must be based on clear and convincing evidence of the abuse, but only *prima facie* finding that abuse would not normally have occurred except for the affirmative acts or omissions of the parents is required as to the identity of the abuser(s).

***In the Interest of J.O.V. and J.A.V.***, 686 A.2d 421 (Pa. Super. Ct. 1996). Both the acts and omissions of caretakers must be given equal weight, and thus two separate incidents of serious injury to a child were enough to support a finding of dependency where parents could not account for the injuries.

***In the Interest of C.L.***, 648 A.2d 799 (Pa. Super. Ct. 1994). Dependency finding upheld. Mother admitted she was aware of paramour's previous sexual abuse of a minor, and yet failed to prevent her children from being in a "possible sexual abuse situation" with the paramour. Lower court's finding that the children had, in fact, been abused by the paramour affirmed.



***In the Matter of B.R.***, 596 A.2d 1120 (Pa. Super. Ct. 1991). Dependency finding affirmed. Child had been sexually abused by her father, and mother refused to believe her and was, therefore, incapable of protecting her from future abuse.

***In re Frank W.D., Jr.***, 462 A.2d 708 (Pa. Super. Ct. 1983). Dependency adjudication and out-of-home placement of infant upheld. No adequate explanation provided for serious injury sustained while child in the care of a babysitter who was living in the home.

***In re Barclay***, 468 A.2d 778 (Pa. Super. Ct. 1983). Dependency adjudication upheld. Mother admitted her husband abused the children and she refused to leave him. The court properly considered the extreme abuse suffered by both the child at issue and the half-sister, since they were part of the same household.

***In the Interest of K.B.***, 419 A.2d 508 (Pa. Super. Ct. 1980). Dependency finding upheld. Mother refused to believe that stepfather sexually assaulted the children and admits she will allow stepfather to return home if released from prison.

***Sexual abuse of one child/finding of dependency as to siblings.***

***In re M.W.***, 842 A.2d 425 (Pa. Super. Ct. 2004). Dependency adjudication upheld. Mother failed to protect siblings of sexually abused child by permitting father to have unsupervised contact with them.

***In re S.B.***, 833 A.2d 1116 (Pa. Super. Ct. 2003). Dependency adjudication upheld. aggravated circumstances provisions of the ASFA and the Juvenile Act allow the expansion of the definition of a dependent child to include a sibling of a sexually abused child, despite evidence that the sibling was not abused, was well-cared for in the home and was otherwise doing well. There was no finding that the child was without parental care and protection.

### III. Disposition of a Dependent Child 42 Pa. C.S. §6351(a) & (b).

#### A. Disposition

**Even after a child has been determined to be dependent, the court is not free to remove the child from parental custody.** A disposition hearing must take place.<sup>9</sup> The disposition of a dependent child is governed by Section 6351(a) & (b) of the Juvenile Act. While a child's initial disposition should begin the permanency planning process, **a disposition hearing is not a permanency hearing.** Dispositional orders must be best suited to the safety, protection and physical, mental and moral welfare of the child.

Under Section 6351(a), the court may make any of the following dispositions:

- Allowing the child to remain with his parents, guardian or other custodian subject to conditions, including supervision as directed by the court for the child's protection;
- The transfer of temporary legal custody to other individuals, licensed private or public agencies, subject to conditions and limitations as the court prescribes; or,
- The transfer of permanent legal custody to an individual who is found by the court to be qualified to receive and care for the child, subject to conditions and limitations as the court prescribes.

42 Pa. C. S. §6351(a)(1)-(2.1).

The statute affords the court discretion to craft conditions and limitations, which will allow for a disposition that best serves the interest of the child, whether the child remains in the home or is placed elsewhere. The court has the discretion to order supervision for the child's protection when it allows the child to remain with or be returned to parents, guardians or other custodians. The parameters of the supervision can even include payment by the agency for costs of care required by a child while in the custody of her parents. *In re N.E.*, 787 A.2d. 1040 (Pa. Super Ct. 2001)

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<sup>9</sup> All of the procedural requirements and rules of evidence applicable to adjudicatory hearings, set forth at pages 49-55, are applicable to disposition hearings, unless otherwise noted.

**What must the record or a disposition order contain if the child is removed from the home?**  
**42 Pa. C.S. §6351(b)**

Before entering any disposition order that removes a child adjudicated dependent from his or her home or keeps a child from returning home, the court must find, on the record or in an order of the court:

- (1) That it would be contrary to the welfare, safety or health of the child to remain in his or her home.
- (2) Whether reasonable efforts were made prior to removal to prevent or eliminate the need for removal.
- (3) If preventive services were not offered due to emergency placement, whether that course of action was reasonable given the circumstances.
- (4) If an informal hearing was held and it was determined that reasonable efforts were not made to prevent removal, whether reasonable efforts to make reunification possible are underway.

**What dispositions are not permitted under the Juvenile Act? 42 Pa. C.S. §6351(c)**

A child who is adjudicated dependent may not be committed to or placed in an institution or other facility designed or operated for the benefit of delinquent children, unless the child is also adjudicated delinquent. This provision applies to post-disposition placements of the dependent child as well. See, *In the Interest of Tasseing H.*, 422 A.2d 530 (Pa. Super. Ct. 1980); *Commonwealth v. Feick*, 439 A.2d 774 (Pa Super. Ct. 1982); *In the Interest of R.B.*, 621 A.2d 1038 (Pa Super. Ct. 1993).

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Section 6302 of the Juvenile Act now defines “[f]acility designed or operated for the benefit of delinquent children” as “[a] facility that either identifies itself by charter, articles of incorporation or program description as solely for delinquent children.” It is, therefore, possible that a facility may house both delinquent and dependent children. Housing dependent and delinquent children in the same facility is not the best practice and JLC would encourage judges to avoid placing dependent children in institutional settings geared mainly for the treatment and rehabilitation of youth adjudicated delinquent.

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### What legal standard governs removal of a child?

The standard governing removal of a dependent child from his or her parents is “clear necessity.” Removal may be ordered only where the evidence demonstrates a clear necessity for removal. Such necessity is implicated where the welfare of the child demands that a child be taken from his parents' custody. *In re A.L.*, 779 A.2d 1172, 1175 (Pa. Super. Ct. 2001). Clear necessity is established when it has been determined that alternatives to removal are unfeasible. See, e.g., *In the Interest of LaRue*, 366 A.2d 1271, 1273 (Pa. Super. Ct. 1976); *In Interest of Pernishek*, 408 A.2d 872, 877 (Pa. Super. Ct. 1979); *In the Interest of Y.P. and T.H.*, 509 A.2d 397, 399 (Pa. Super. Ct. 1986). Clear necessity and not a best interests standard is applied whenever a child faces separation from his or her parents and home. *In the Interest of Paul S.*, 552 A.2d 288 (Pa. Super. Ct. 1988) (Dependent child temporarily placed back home. To remove the child again, evidence must rise to the level of proving removal to be clearly necessary). See also, *In the Interest of S.S.*, 651 A.2d 174 (Pa. Super. Ct. 1994) (Child who has been adjudicated dependent and removed from the home, but is then placed back in the home, cannot be removed again except pursuant to a clear necessity standard).

One Superior Court panel seems to question the “clear necessity” standard for determining the disposition of a dependent child. *In re E.P., J.P. & A.P.*, 841 A.2d 128 (Pa. Super. Ct. 2003). This appeal was taken following the second “permanency review hearing”<sup>10</sup> at which the children were removed from the mother’s custody and placed in foster care. Citing Section 6301 of the Juvenile Act, which states as one of its purposes: “(1) To preserve the unity of the family whenever possible **or** to provide another alternative permanent family when the unity of the family cannot be maintained,” the court found that the focus of the Act had “shifted somewhat from its emphasis on family unity to an emphasis on the child impacted by a dependency adjudication.” The court also applied the reasoning in termination of parental rights cases, (which generally take place after a child has been removed from a parent’s custody for an extended period of time), to support its application of a necessary and appropriate standard for removal of the children. The court agreed with the trial court in finding that, even after extensive efforts, family unity could not be maintained. The court affirmed the trial court’s determination that the children’s removal from Mother’s physical custody was “both necessary and appropriate.” *Id.*, 841 A.2d at 135. The necessary and

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<sup>10</sup> It is unclear whether the hearings conducted by the trial court were “permanency review hearings” as defined in Section 6351(e) of the Juvenile Act, which, in the main apply to children removed from the home. Section 6351(e)(3)(ii)(D) provides for permanency hearings within thirty days of a petition alleging that the hearing is necessary to protect the safety or physical, mental or moral welfare of a dependent child. It is not clear from the Superior Court opinion whether the hearings were convened pursuant to petition.

appropriate standard utilized by the court is not significantly different than the clear necessity standard. If efforts to provide services and support that would allow the children to remain in the home have not proved effective, and the court determines that additional efforts will not improve the situation, the removal of the children from the home is clearly necessary and appropriate.

### **Other than specific dispositional locales, what can the court order at a disposition hearing?**

In addition to the placement options set forth in Section 6351(a) of the Juvenile Act, the court can order any and all services necessary for the protection and welfare of the child. *In re Tameka M.*, 534 A.2d 782 (Pa. Super. Ct.

1987), *aff'd.*, 80 A.2d 750 (Pa. 1990) (court

ordered the agency to reimburse foster parents for a Montessori school program that best suited the educational needs of the child; programs offered by agency were unsuitable). See also, *In re Frederick F.*, 583 A.2d 1248 (Pa. Super. Ct. 1990); *In re N.E.*, 787 A.2d. 1040 (Pa. Super. Ct. 2001) (agency required to pay for dental bills while child still under supervision, but in custody of parent).

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Judges have the legal authority to require the agency to provide adequate, appropriate and accessible services necessary for the protection and welfare of the child.

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### **B. Procedural, Standing and Evidentiary Issues**

#### **When should the disposition hearing take place? 42 Pa. C.S. §6341(c)**

If the child has been removed from the home, disposition hearings must take place no later than 20 days after the child is adjudicated dependent.

Separate adjudication and dispositional hearings are not required by the Juvenile Act. 42 Pa. C. S. §6341(c). *In the Interest of Y.P. and T.H.*, 509 A.2d 397, 400 (Pa. Super. Ct. 1986). If a child is adjudicated dependent, the disposition hearing may take place at the same time as the adjudicatory hearing. Disposition may also be deferred, but, if the child has been removed from the home, deferral cannot extend past 20 days.

**Who has the right to receive notice of a disposition hearing? 42 Pa. C.S. §6336.1**

The 1998 amendments to the Juvenile Act provided that notice is to be given not only to the parties, children and their parents, but to foster parents, pre-adoptive parents and relatives who are caring for a child. 42 Pa.C.S. §6336.1. This requirement applies to all hearings and inquiry should be made at the disposition hearing as to whether persons caring for the child have received notice. Before determining where the child is to be placed, the court should attempt to involve all persons who can provide relevant information.

**What evidence may be presented at the disposition hearing? 42 Pa. C.S. §6341(d)**

Section 6341(d) of the Juvenile Act provides: "In disposition hearings [following a finding of dependency] all evidence helpful in determining the questions presented, including oral and written reports, may be received by the court and relied upon to the extent of its probative value even though not otherwise competent in the hearing on the petition. The parties or their counsel shall be afforded an opportunity to examine and controvert written reports so received and to cross-examine individuals making the reports. Sources of information given in confidence need not be disclosed." *But see, In the Interest of Jones*, 429 A.2d 671 (Pa. Super. Ct. 1981) (Trial court erred in permitting witness to testify in camera at a dispositional hearing. The Superior Court ruled that mother's due process rights were violated). *See also, In re T.R., J.M., C.R., & C.R.*, 731 A.2d 1276 (Pa. 1999). In *T.R., et. al.*, the trial court ordered a mother to undergo a psychological evaluation, and release the results to the court for the purpose of determining whether or not to return custody of her children after removal due to unexplained injuries. The court concluded that a mother's state constitutional right to privacy precluded the trial court from compelling her to participate in a psychological evaluation, the results of which would be disclosed to the interested parties. This case is not precedential. Only three justices joined in the rationale. Two others dissented and a third concurred in the result.

**How have appellate courts addressed other evidentiary issues arising at disposition hearings?**

In *In the Interest of Paul S.*, 552 A.2d 288, 291 (Pa. Super. Ct. 1988), the court held that a caseworker's testimony as to the ultimate issue may be admissible in a matter involving the disposition of a child. A lay or expert witness will be permitted to testify concerning the ultimate

issue to be decided by the judge, provided that the admission of the testimony does not cause confusion or prejudice. The court held that since the trial court knew of her inexperience and her employment with the agency seeking custody, a caseworker's testimony could not have been confusing or prejudicial.

A full record that will assist in determining the appropriate placement of a dependent child is the best course a trial judge can take. In one case, where the trial court had refused to allow the child's attorney to introduce any testimony, call any witnesses, cross-examine witnesses, or even state a position for the record on behalf of the child, the disposition of custody awarded to the mother was overturned. The Superior Court found that the trial court's preclusion of evidence related to the mother's history of alcoholism or other instances of improper care may have led to an inappropriate disposition. The case was remanded to the trial judge. *In re Donna H.*, 602 A.2d 1382, 1385 (Pa. Super. Ct. 1992) (Beck, J. dissenting) (The dissent noted that the trial judge had a long and comprehensive history with this matter and that his determination that one lapse on the part of mother, who was otherwise making excellent progress in dealing with her alcohol problems and was otherwise caring for the child, did not warrant the agency's request for return of the child to foster care and did not warrant remand for consideration of additional testimony).

### **What specific findings should the court make in formulating a disposition order?**

The order or record should contain case specific facts which support the disposition.

The initial disposition hearing is often the court's first opportunity to engage the parties in a dialogue about the child's immediate, as well as long-term, needs. Some questions the court should ask before formulating the order that determines the child's initial placement, whether that placement will be in or outside the home, are:

- The child's educational needs—
  - If the child is of school age, will a placement require him or her to enroll in a new school? The court should consider loss of school time and adjustment issues in making an initial placement.
  - Does the child need a special school or special services within a school?
  - Is transportation assistance necessary to get the child to a special school or appropriate school program?

- Are there summer school or after-school programs that the child should be enrolled in?

*Information about the rights of school aged children can be found in this Deskbook, Part III, Section Three.*

- The child's physical and behavioral health needs —
  - Does the child need medical or dental services? What specific services are required?
  - Does the child have emotional or mental health problems that require a special placement or can the issues be addressed by out-patient therapy? What specific mental health services are available that will serve the child in the proposed placement?
  - Can the child's problems be addressed with in-home services?

*Information about the rights of dependent children to health care can be found in this Deskbook, Part III, Section Two.*

- The needs of older youth—
  - Is the youth a candidate for an independent living program?
  - Does the youth have access to vocational training opportunities?
  - Is the youth on track to get his or her high school diploma?

*Information about the rights of older dependent youth can be found in this Deskbook, Part III, Section One. A list of specific questions the court should address in the case of an older youth can be found at page 231.*

### **C. Reasonable Efforts, Aggravated Circumstances and the Disposition Hearing**

#### **What role do reasonable efforts play at the disposition hearing? 42 Pa. C.S. §6351(b)**

Paragraphs 2-4 of 42 Pa. C.S. §6351(b) direct the court to address the reasonable efforts made by the agency in connection with the child's removal from the home. This requires more than an inquiry as to whether or not reasonable efforts were made; this requires an in-depth examination of the services the agency has put into place in its effort to prevent removal or to make reunification possible.



- Findings should be supported by a description of the preventative and reunification efforts that were made and why additional efforts could or could not have prevented or shortened the child's separation from the family.
- If child was removed and no efforts were made due to emergency placement, the court must make findings, supported by a description of the circumstances of removal, showing that the agency acted reasonably under the circumstances. The court should be able to find that removal would have been necessary despite any and all efforts.

**What role do aggravated circumstances play at the disposition hearing?**

The court need not enter findings 2-4 of Section 6351(b) if the court has previously found aggravated circumstances and that no new or additional reasonable efforts are required to prevent or eliminate the need for removing the child from the home or to preserve or reunify the family. It may be reasonable to refuse to initiate efforts or to suspend efforts to return a child safely home if:

(1) One of the enumerated aggravated circumstances exists. See 42 Pa. C.S. §6302.

(2) The court makes a finding that the agency need make no efforts to reunite the family.

(1) and (2) are *separate* findings—the judge may find the aggravated circumstance exists, but not excuse the agency from its obligation to provide services to preserve and reunify the family.

If the court finds aggravated circumstances and that no efforts to reunite the family need be made, a permanency hearing must be held within 30 days. See 42 Pa. C.S.A. §6351(e)(3)(ii). See pages 55-57 and page 95 for a discussion of aggravated circumstances at adjudicatory and permanency review hearings.

## D. Transcripts and Appeals

### Should disposition hearings be recorded? 42 Pa. C.S. §6336(c)

The Juvenile Act does not require that dependency proceedings be recorded unless requested by the parties or ordered by the court. If the proceedings are not recorded, the court is required to keep full minutes. 42 Pa. C. S. §6336(c). Prior to the start of hearings, where a stenographic or taped record is not regularly made, the parties must be informed of their right to request a transcript or recording of the proceedings. The Superior Court has recently stated that a transcript must be made in order to permit the court to hear appeals in matters involving a goal change. *In the Interest of J.H.*, 788 A.2d 1006, 1009 (Pa. Super. Ct. 2001). Recording should not be limited to goal change hearings. All courts should adopt a policy of recording every stage of dependency hearings.

A record of the proceedings may help to:

- maintain appropriate decorum in the courtroom;
- encourage attorneys to be fully prepared to present evidence and cross-examine witnesses;
- streamline future hearings; and
- provide a full record that a trial judge can rely on to review proceedings conducted by a judicial officer.

### Are appeals allowed as of right from disposition orders?

Disposition orders, following an adjudication of dependency, are considered final and appealable. *In re A.M. & P.M.*, 530 A.2d 430, 432-33 (Pa. Super. Ct. 1987). At each review of an initial disposition order, any decision that would continue a child in placement or move a child to another placement should also be considered final and appealable. See *In re E.P., J.P. & A.P.*, 841 A.2d 128 (Pa. Super. Ct. 2003) (appeal allowed from removal of children from mother's custody after second hearing to review disposition of dependent children to mother's physical custody with agency supervision). Cf., *H.S.W.C.-B & S.E.C.-B.*, 836 A.2d 908 (Pa. 2003) (in a case involving the denial of a goal change, which resulted in maintaining the *status quo* for the child, the court recognized that the *status quo* could put the child at risk and thus permitted the appeal).

## **E. Conducting a Disposition Hearing**

The following suggestions for conducting a disposition hearing are adapted from *Resource Guidelines Improving Court Practice in Child Abuse & Neglect Cases* (NCJFCJ 1995) ("Resource Guidelines").

### **CONDUCTING A DISPOSITION HEARING**

1. Introductory Remarks.
  - Identification of parties, counsel and others.
  - Advising parties of their rights.
  - Description of the proceeding: This hearing will determine whether (name of child), who was adjudicated dependent on (date), will remain in or be returned to his home and the custody of (name of parent or legally responsible person) or will be placed in another setting.
2. Adequacy of Notice and Service of Process Issues.
3. Presentation of evidence to determine the best placement for the child and whether it is "clearly necessary" to remove the child from the home.
  - Caseworker and agency testimony/safety, welfare and special needs of the child. Testimony as to the appropriateness of the proposed placement.
  - Parent, child, if appropriate, and other fact witness testimony.
  - Expert testimony, if necessary.
  - Aggravated circumstances testimony, if any.
4. Issues Related to Disposition.
  - Reasonable efforts to determine whether services that would permit reunification have been put in place or should be ordered at this time.
  - If placement outside the home, visitation for both parents and siblings and support issues.
  - If placement in the home, services in the home and non-placement reviews.
5. Issuance of Orders and Scheduling Next Hearing.
  - Finding of disposition: (a) in the home with specific services, (b) outside the home in least restrictive, most appropriate setting.
  - Order necessary assessments, order necessary services.
  - Schedule next hearing.
  - Prepare and distribute orders to all parties.
  - Explain orders, as necessary, to all parties prior to adjournment.

## F. Disposition Cases

### Standards for Removal of Dependant Child from the Home – Clear Necessity

The standard governing removal of a dependent child from his or her parents has been “clear necessity.” Clear necessity is established when it has been determined that alternatives to removal are unfeasible. *In the Interest of Y.P. and T.H.*, 509 A.2d 397, 399 (Pa. Super. Ct. 1986); see also *In re A.L.*, 779 A.2d 1172, 1175 (Pa. Super. Ct. 2001); *In re E.P., J.P. & A.P.*, 841 A.2d 128 (Pa. Super. Ct., 2003) (language used by the court is “necessary and appropriate”, however the facts, as described, indicate that efforts to keep the children in the home had not alleviated the problems and that removal to foster care was necessary).

#### CLEAR NECESSITY FOUND:

***Clear necessity is established when alternatives to separation from the parents are unfeasible. Feasibility should take into consideration all appropriate services, which, if provided, would enable the child to remain in the home.***

*In the Interest of C.S.*, 580 A.2d 418 (Pa. Super. Ct. 1990). The court affirmed the lower court’s order placing the child in foster care at the request of the mother. The father, who was serving a sentence for drug and alcohol-related offenses at the time, appealed. He argued that the daughter should have been placed in the custody of the paternal grandmother. However, the trial court’s concerns about the paternal grandfather, who had been convicted of statutory rape thirty years earlier, were deemed legitimate enough to justify the child’s placement in the foster home.

*In re A.M. & P.M.*, 530 A.2d 430 (Pa. Super. Ct. 1987). Sexual abuse, combined with the impossibility of supervising or rehabilitating the parents due to their constant moves to different jurisdictions, demonstrated a clear necessity to remove the children from the home.

*In the Interest of Y.P. and T.H.*, 509 A.2d 397 (Pa. Super. Ct. 1986). Children either suffered or were exposed to sexual abuse while in the mother’s home and a showing that it was not possible to protect the children from a repetition of these acts while they remained in their mother’s custody resulted in removal.

***In the Interest of S.M.S.***, 424 A.2d 1365 (Pa. Super. Ct. 1981). Parents did not appeal dependency adjudication, based upon physical abuse of very young child, but claimed that there was not a “clear necessity” for continued foster care. The parents cited their participation in a counseling program and claimed that it had resolved the tension in the household that led to the initial placement. However, the virtually unanimous recommendations by medical, psychological and social service experts against returning the child home led the court to affirm the continuation of the placement order. The court noted that should circumstances change, the parents should seek a new determination of the lower court’s disposition.

***If “proper care” is not available in the home for a child with particular needs, clear necessity may require removal of the child until care can be provided.***

***In re D.K.***, 58 Pa. D. & C.4th 353 (2002). Teenager was removed from home based on a voluntary entrustment agreement and placed in foster care. After three months, the youth asked to return home. The court found that a mother, who was morbidly obese herself and homebound, could not provide proper care to prevent her son, who was 5’3 and 450 pounds, from returning to his old eating habits, that she did not appreciate the seriousness of her son’s condition, and that she did not curb his absenteeism from school. Based on these findings, the court determined that the mother was unable to provide proper care; youth was adjudicated dependent and continued foster care was ordered, with reviews every three months to determine whether return home was appropriate.

***In re Joseph Lee Breisch***, 434 A.2d 815 (Pa. Super. Ct. 1981). When inadequacies are found in the child’s home and the agency’s repeated attempts to provide parental skills instruction and follow-up supervision are to no avail, a showing of clear necessity for removal of the child from the home is made. Additional evidence of clear necessity came from the parent’s inability or unwillingness to follow directions and instructions given by the agency and to cooperate in providing the child with therapy.

***In the Matter of George***, 414 A.2d 1063 (Pa. Super. Ct. 1979). A parent’s inability to provide the services and attention a child requires because of the child’s severe intellectual and emotional difficulties is enough to show a clear necessity for separating that child from his home. Fact that other children remain in the home does not contradict finding.

***In the Interest of Pernishek***, 408 A.2d 872 (Pa. Super. Ct. 1979). “Proper care” means care suited to a child’s particular needs, thus parents may be able to care for a normal child but not one with special needs. Parental care that is “necessary” and “proper” is not the best care possible, but care that (1) is geared to the particularized needs of the child and (2) at a minimum, is likely to prevent serious injury to the child. Child was a psychosocial dwarf and experts had testified that while the child might be able to maintain normal growth rates in the home, she would most likely not attain catch up growth. Removal from the home and from the foster home to a “Home for Crippled Children,” with court reviews every three months, was justified to try to prevent serious permanent injury.)

*CLEAR NECESSITY NOT FOUND OR INAPPROPRIATE STANDARD APPLIED:*

***Clear necessity standard applies whenever dependent child is subject to removal from the home either at the initial disposition or after reunification.***

***In the Interest of S.S.***, 651 A.2d 174 (Pa. Super. Ct. 1994). Child who has been adjudicated dependent and removed from the home, but is then placed back in the home, cannot be removed again except pursuant to a clear necessity standard. Case remanded for rehearing.

***In the Interest of Paul S.***, 552 A.2d 288 (Pa. Super. Ct. 1988). Dependent child temporarily placed back home. To remove the child again, evidence must rise to the level of proving removal to be clearly necessary. The trial court’s decision based on the best interests of the child, given a case workers testimony that conditions were deteriorating in the home that the child had been removed from because of a lack of electricity, adequate heat, running water and sufficient food. Case remanded for rehearing to determine whether removal clearly necessary.

***Failure to comply with agency plan does not in and of itself rise to the level of clear necessity.***

***In the Interest of James Feidler***, 573 A.2d 587 (Pa. Super. Ct. 1990). Clear necessity not shown in removal of children from home based upon parents’ failure to cooperate with all parts of the agency’s plan, including plans not contemplated by the order. Additionally, the agency must not only provide preventive and reunification services to families in need, but can be required to

provide services that are generally the province of other agencies, *citing In the Interest of S.A.D.*, 555 A.2d 123, 127 (Pa. Super. Ct. 1989).

#### *OTHER ISSUES AFFECTING DISPOSITION:*

***Constitutional right to privacy may restrict court's access to parent's psychological reports in aid of a disposition determination.***

***In re T.R., J.M., C.R., & C.R.***, 731 A.2d 1276 (Pa. 1999). The trial court could not order a mother to undergo a psychological evaluation, and release the results to the court, for the purpose of determining whether or not to return custody of her children after removal due to unexplained injuries. The Pennsylvania Supreme Court concluded that a mother's state constitutional right to privacy precluded the trial court from compelling her to participate in a psychological evaluation, the results of which would be disclosed to the interested parties. The court also disagreed with the trial court that less intrusive means were not available. This case is not precedential. Only three justices joined in the rationale. Two others dissented and a third concurred in the result.)

Note: ***In re T.R., et al.***, is discussed in ***In the Interest of J.Y.***, 754 A.2d 5 (Pa. Super. Ct. 2000). A goal change case, which held that refusal of parents to cooperate with mental health personnel can be considered, but cannot be determinative, in the goal change decision. The court held that while they may not be able to require parents to submit to treatment, they could consider the parents' refusal to do so in determining issues relating to a request for a goal change from reunification to adoption. ***Id.***, 754 A.2d at 9.)

#### **IV. Permanency for a Dependent Child 42 Pa. C.S. §6351(e)**

##### **What is permanency?**

Neither ASFA nor the Juvenile Act specifically defines permanency. Rather, both statutes outline a procedure which, if followed, is intended to solve the problems that long-term foster care and foster-care drift create for children in the dependency system. In 1999, The National Council of Juvenile and Family Court Judges adopted as one of its key principles for permanency planning for children the following statement:

## PERMANENCY FOR CHILDREN

All children are entitled to a safe, permanent and nurturing home in order to achieve their full potential as human beings.

It is preferable that permanency be accomplished within a child's own family, but if that is not possible, it should be accomplished in a family setting.

From the time a child enters the child welfare system, all participants in that system and all levels of the judicial system must strive to achieve permanency for the child.

Judges must do all they can to ensure that children 16 years of age or older receive services to prepare them for independent living, even while planning for adoption or other permanent plan.

Before ASFA and the related amendments to the Juvenile Act, permanency and permanency planning were embedded in Pennsylvania common law. The Superior Court, deciding ***In the Interest of M.B.***, 674 A.2d 702, 704 (Pa. Super. Ct. 1996) provided: "Permanency Planning is a concept whereby children are not relegated to the limbo of spending their childhood in foster homes, but instead, dedicated effort is made by the court and the children's agency to rehabilitate and unite the family in a reasonable time, and failing in this, to free the child for adoption." (Quoting, ***In re Quick***, 559 A.2d 42 (Pa. Super. Ct. 1989)). Federal and state law now mandate permanency planning and define, with limited exceptions, a "reasonable time" for the accomplishment of reunification efforts before requiring that the child's permanency goal be changed to adoption or another permanency alternative. 42 Pa. C. S. §6351(f)(9)

Permanency hearings, which must take place, according to the Juvenile Act, 42 Pa. C. S. §6351(e)(3) at least every six-months after a child is removed from the home, are intended to plot the child's future. The permanency planning hearing is intended to result in a comprehensive plan for the child that will result in a permanent placement. The Juvenile Act does not distinguish between permanency hearings and a permanency planning hearing. It may be presumed that the permanency hearings, at least two of which should take place in the first year of a child's adjudication and placement outside the home, will result in the creation of a comprehensive plan for the child during that year.

In Pennsylvania, permanency planning for a child is steered by the family service plan. 55 Pa.Code § 3130.61. If judges are to oversee properly the welfare of dependent children in Pennsylvania, they must become thoroughly versed in each child's FSP.



With respect to children placed outside their own homes, following the passage of ASFA, Pennsylvania's Office of Children, Youth and Families issued Bulletin # 3130-98-01. The Bulletin stated, in part, that “[p]ermanency planning for children begins as soon as the child enters substitute care. From the time a child enters placement, the agency must be diligent in finding a permanent family for the child.”

Permanency hearings provide the courts with the vehicle to ensure that a child's permanency goals are met.

### **A. The Permanency Hearing**

#### **What is a permanency hearing? 42 Pa. C.S. §6351(e)**

Section 6351(e) of the Juvenile Act mandates a permanency hearing at least every six months from the time a child is declared dependent and an initial disposition removing the child from the home is made. Permanency hearings are designed to determine and review three major issues: (1) whether the child's current placement provides for his or her safety, protection, and physical, mental and moral welfare; (2) the development or review of the child's permanency plan; (3) the date by which the child's permanency goal, as set forth in the permanency plan, might be achieved.

The permanency hearings must be more than rubber stamps of the initial disposition of the child. The court must inquire as to whether the FSP is proceeding on course, whether new or different services need to be offered, and whether the child's placement or the permanency goal for the child needs to be changed. ASFA requires that permanency hearings be full hearings. “Paper reviews, *ex parte* hearings, agreed orders, and hearings not open to parental, foster parents and pre-adoptive parents' participation are not permanency hearings.” *Making Sense of the ASFA Regulations: A Roadmap for Effective Implementation*, ABA, Center on Children and the Law, at 11.

#### **What questions must the court ask at each permanency hearing? 42 Pa. C.S. §6351(f)**

The Juvenile Act directs the court to address and determine numerous issues at each permanency hearing. Section 6351(f) of the Juvenile Act frames the responsibilities of the court

and others who participate in permanency hearings for dependent children. The law requires that “at **each** permanency hearing the court shall determine **all** of the following” (emphasis supplied). Alongside the required inquiries, which reflect the statutory language, we provide suggestions as to what the court should know to address each issue.

LAW	WHAT THE COURT MUST KNOW:
<p>(1) The continuing necessity for and appropriateness of the child’s placement. 42 Pa. C. S. §6351(f)(1).</p>	<p>To address necessity, the court must know the reason for the child’s placement.</p> <p>Common reasons include:</p> <ul style="list-style-type: none"> <li>• Lack of appropriate housing</li> <li>• Lack of child care</li> <li>• Limited parenting skills</li> <li>• Physical and behavioral health problems of the child or the parent</li> <li>• Substance abuse problems</li> <li>• Domestic violence</li> </ul>
<p>(2) The appropriateness, feasibility and extent of compliance with the permanency plan developed for the child. 42 Pa. C.S. §6351(f)(2).</p>	<p>To address appropriateness, the court must know:</p> <ul style="list-style-type: none"> <li>• The child</li> <li>• The type and quality of the placement</li> <li>• Details regarding the child’s experience in the placement</li> </ul> <p>The court must be fully acquainted with the child’s FSP.</p>
<p>(3) The extent of progress toward alleviating the circumstances which necessitated the original placement. 42 Pa. C.S. §6351(f)(3).</p>	<p>The court must have information about services provided since the previous hearing and whether those services have been effective.</p>

**LAW**

(4) The appropriateness and feasibility of the child's current placement. 42 Pa. C.S. §6351(f)(4).

(5) The likely date for achievement of the child's placement goal. 42 Pa. C.S. § 6351(f)(5).

(6) Whether reasonable efforts were made to finalize the permanency plan in effect. 42 Pa. C.S. §6351(f)(5.1).

**WHAT THE COURT MUST KNOW:**

The court must have knowledge of both the child and the placement and evaluate whether the placement will achieve the child's placement goals and provide for the child's needs and welfare.

The court needs to be cognizant of the child's needs, but must also acknowledge ASFA's time limitations. If reunification is not an achievable goal within ASFA's strict timetable, the court also needs to address the agency's progress in finding adoptive parents, permanent legal guardians or fit and willing relatives who can provide the child with a permanent home.

The court must thoroughly review the efforts made to see whether services were actually provided and whether those services achieved their intended result. If not, the court may have to order different services.

Each child and family presents a unique set of circumstances. Services may need to be fine-tuned to fit those needs. The court is authorized to order any services necessary. For a discussion of the power of the court to order appropriate services, see page 71.

ASFA requires **detailed** findings of the reasonable efforts made to finalize a permanency plan. 45 C.F.R. §1356.21(d).

**LAW**

(7) Whether the child is safe. 42 Pa. C.S. §6351(f)(6).

(8) For the child placed outside the Commonwealth, whether the placement remains the best suited for the safety, protection and physical, mental and moral welfare of the child. 42 Pa. C.S. §6351(f)(7).

(9) If the child is 16 or older, the services needed to assist in the transition to independent living. 42 Pa. C.S. §6351(f)(8).

**WHAT THE COURT MUST KNOW:**

The court must make a thorough inquiry. A child's safety may not be the one-dimensional issue implied by the simplicity of the question. The law requires that the court consider fully the child's physical, emotional and moral well-being. An inquiry into the child's safety should encompass at least these three prongs. If the child is in the courtroom, the judge should speak with the child, as well as the agency social worker, to make this determination. It may be appropriate to speak with the child in chambers.

The court needs to determine whether appropriate in-state placements exist and whether the costs and benefits to the child of relocation to Pennsylvania outweigh the costs and benefits of leaving the child in an out-of-state placement.

The court needs to be familiar with the developmental and transitional needs of older youth. The court should address the plan with respect to the youth's education, employment, housing and health and mental health care to ensure that when he leaves the system, he is able to function in the community. The court should also address issues of the youth's connection to family and/or caring adults, community resources and social services. For a full discussion of older children and

**LAW****WHAT THE COURT MUST KNOW:**

transition, see Part III, Section One—The Rights of Older Youth.

10) For children in placement for at least 15 of the previous 22 months or where the court has made a determination that aggravated circumstances exist and reasonable efforts need not be made, whether the county agency has filed a petition to terminate parental rights and identified, recruited and approved a qualified family to adopt the child. 42 Pa. C.S. §6351(f)(9).

The court needs to review the matter to determine if termination is indeed the best alternative for the child. The court must review the agency's plan for the child, making sure that adoption is a viable permanency plan. Termination of parental rights without an adoption plan may leave the child mired in the foster-care system, without the possibility of future familial support.

Full inquiry into the ten elements set forth above will not be required in every case (most children will not be placed outside the Commonwealth; many children are younger than 16); however, the court must address thoroughly all issues related to the child and the family appearing before the bench. To do this the court must: (a) have access to complete and comprehensive information about the child and the family; (b) have knowledge of available services and the efficacy of those services for this child and family; and (c) have up-to-date information sufficient to evaluate the progress made in achieving the goals in the FSP. Only in this way can meaningful permanency hearings take place.

**What are the exceptions to the termination and adoption inquiry required by 42 Pa. C.S. §6351(f)(9)?**

There are three exceptions to the termination and adoption inquiry that must be made in compliance with Section 6351(f)(9) (Paragraph 10 above):

1. The child is being cared for by a relative suited to the child's needs;
2. The agency has documented a compelling reason that filing a termination petition would not serve the needs and welfare of the child; or

3. The child's family has not been provided with necessary services to achieve the safe return of the child within the time frame set forth in the permanency plan. 42 Pa. C. S. §6351 (f)(9)(i)-(iii).

For a full discussion of these exceptions, see pages 112-114.

### **What can the court do to ensure effective permanency planning?**

In addition to creating a stricter time line for holding permanency hearings and moving a child out of foster care, the substantive requirements of ASFA and the Juvenile Act necessitate active judicial involvement in ensuring a permanent and safe environment for dependent children. Inquiry into the content of the FSP should be specific and definitive. What before may have been the agency's prerogative has now become part of the court's responsibility.

To fulfill its responsibility, the court should examine how the agency reached its decision with respect to a child's permanency plan. The court must have before it sufficient facts to determine that the FSP is planning for and providing the most permanent and secure environment possible for the child, consistent with the hierarchy of permanency goals. It is important to secure evidence and build an adequate record during permanency hearings. This evidence sets the stage for ultimate determinations of a child's placement, including termination of parental rights and adoption decisions. This requires a thorough inquiry into the FSP.

The court must make sure that complete records are produced at each permanency hearing. These records should include:

- All agency and independent evaluations and assessments of the child and family, including evidence of the use of alcohol or a controlled substance by the parent as required by 42 Pa. C. S. §6351(f.2).
- All relevant school records.
- All agency evaluations of kinship caregivers, pre-adoptive families or legal custodians.

The court must make sure that all persons who can provide relevant testimony are present at the hearings. Evidence may come from a variety of people who are involved in the matter. Comprehensive permanency hearings, with all relevant persons in attendance, may streamline termination of parental rights hearings, as well as present options that will avoid termination

proceedings altogether. Notice and an opportunity to be heard at permanency hearings must be provided to foster parents, pre-adoptive parents and relative caregivers. These individuals must be afforded the opportunity to be heard at all permanency hearings. 42 Pa. C. S. §6336.1. The judge or master should make sure that all those who have something to offer with respect to the child's permanency plan are in the courtroom and available to testify, including:

- Age-appropriate children
- Parents, including putative fathers
- Relatives and other adults with legal standing
- Caseworker(s) assigned to the case
- Foster parents, if child is in foster care
- Service providers
- Prospective adoptive parents
- Other lay or expert witnesses
- Probation officers

In addition, the parties' attorneys must be present.

The court must make sure that deadlines set by statute and the court can be respected. ASFA and the Juvenile Act require the court to choose a realistic date by which a child will be returned home or by which the agency will file a termination of parental rights petition, if appropriate. The new laws do not permit foster-care drift; it is the court's responsibility to make sure that the system works in a manner consistent with statutory deadlines. Under ASFA and the Juvenile Act the filing of a termination petition is mandatory, in most cases, where the child has been in foster care for 15 of the last 22 months. This may require that the court hold permanency review hearings more often than every six months. It is crucial for the court to ensure that:

- Reasonable efforts to reunite the family are made quickly and competently.
- Assessments are conducted quickly and competently.
- Court orders are incorporated into the family service plan and that the orders are carried out.

**What specific inquiries can the court make to determine whether the FSP and its goals for the child's permanent placement are appropriate and proceeding on course?**

Courts can provide effective oversight of the permanency process only when they know the family and the service providers. Knowledge requires thorough inquiry. The American Bar Association's Center on Children and the Law, *Making Sense of the ASFA Regulations, A Roadmap for Effective Implementation*, recommends that permanency hearings be "conducted as full hearings (with evidence or at least proffers of evidence), not simply as short reviews of submitted written reports."

This Deskbook cannot supply a comprehensive list of questions the courts should ask; however, a few suggestions are provided below. Additional information on issues relating to older youth, healthcare and education for dependent children are set forth in Parts III and IV of this Deskbook.

**SUBSTANTIVE QUESTIONS:**

**What are the precise issues that are keeping the child from returning home or preventing the discharge of dependency and what services would aid prompt reunification?**

- Child abuse or other domestic violence issues
  - Who is the perpetrator?
  - Is a protection from abuse order an appropriate measure?
  - What specific counseling services are available to address this issue?
- Health issues
  - Did the child have a comprehensive health evaluation within 30 days of placement in foster care?
  - What medical, dental or psychological services are necessary? Are the appropriate services being provided?
  - Are there substance abuse issues?
  - Have appropriate treatment programs been accessed?



*For a full discussion of children's health issues, see Part IV, Section One, The Rights of Dependent Children to Healthcare.*

- Housing issues
  - What housing subsidies is this child and/or family entitled to receive?
  - What other living arrangements exist that would allow the child and family to reunite?
  - Would services in the home improve conditions and enable the child to return home?
- Education issues
  - Is the child enrolled in and attending school?
  - Does the child have transportation to get to school?
  - Does the child need funds for school uniforms and school supplies?
  - Does the child need tutoring and does the FSP provide for the service?
  - Is the child entitled to an Individualized Education Plan (IEP)?

*For a full discussion of children's educational issues, see Part IV Section Two, The Rights of Dependent Children to Education.*

**What specific medical, mental health, educational, vocational, housing, drug, alcohol or family planning programs are available, either in the community or elsewhere, that would best serve this child?**

- The court should have the names and addresses of programs that exist in the county and question the agency about their appropriateness and availability to the child and her family.
- The court should be familiar with the specific programs and services identified in the FSP and question the agency, the child, where appropriate, and the parent, custodian, foster parent or other responsible adult as to whether the services were actually provided and, if provided, whether they consider them effective.

**Who is available to adopt or enter into a permanent relationship with this child if reunification with the parents is not feasible?**

- Have grandparents, close relatives or others with a significant relationship with the child been contacted and evaluated by the agency?
- Are current foster parents interested in and appropriate for consideration as adoptive parents or permanent legal custodians?
- What other steps has the agency taken to locate and secure a permanent home for the child?

**Do youth who will be transitioning out of the dependency system have independent living skills?**

The court should ask the youth:

- Whether he or she intends to pursue education and what specific programs the agency or others have in place for this purpose.
- Whether he or she has job skills and the ability to fill out an employment application and handle a job interview.
- Whether he or she has housing, or the ability to obtain housing, and the skills necessary for independent living, including skills such as cooking, cleaning and the ability to maintain a bank account and pay bills.
- Whether he or she knows how to obtain health and mental health care.
- Whether he or she has connections with family and/or caring adults or a connection with community resources and social services.

*For a full discussion of issues relating to older youth see Part III, The Rights of Older Dependent Youth*

**PROCEDURAL QUESTIONS:**

**Has the agency complied with court orders?**

- Has it provided all services ordered by the court?
- Has it provided all reports and other materials required by the court?

- Has it filed the required petitions and identified all persons who may be available to support the child's permanency goal?

**Does the court need additional evidence in order to ensure that the goals of the child's FSP are being achieved or to evaluate whether the FSP needs to be amended and its goals changed?**

- Where will the additional evidence come from?
- What does the court need to do to ensure that all necessary evidence, including testimonial evidence, is available at the next hearing? Should the court issue subpoenas to procure the attendance of witnesses or obtain documents?

*PROCEDURAL ISSUES:*

**Who has the right to receive notice of a permanency hearing? 42 Pa. C.S. §6336.1**

The 1998 amendments to the Juvenile Act provided that notice is to be given not only to the parties, children and their parents, but to foster parents, pre-adoptive parents and relatives who are caring for a child. 42 Pa. C.S. §6336.1. This requirement applies to all hearings. Before determining a child's permanency plan, the court should attempt to involve all persons who can provide relevant information.

**When must permanency hearings take place? 42 Pa. C.S. §6351(e)(3)**

Permanency hearings must proceed, by statute, as follows:

1. Within six months of a child's removal from the home of the parent, guardian or other custodian.
2. Within six months of every previous permanency hearing until the child is returned home or removed from the jurisdiction of the court.
3. Within 30 days of an adjudication of dependency at which the court determined that aggravated circumstances exist and that no efforts toward family reunification are required.

4. Within 30 days of a permanency hearing during which the court determined aggravated circumstances exist, family reunification is not warranted and the child's existing permanency plan is incomplete or inconsistent with the court's determination.
5. Within 30 days of when a child has been adjudicated dependent and an allegation of aggravated circumstances is made in accordance with 42 Pa. C.S. §6334(b) (pertaining to Aggravated Circumstances Petitions).
6. Within 30 days of the filing of a petition alleging that the hearing is necessary to protect the safety or physical, mental or moral welfare of a dependent child.

At the court's discretion, permanency hearings can occur more frequently than every six months. See, e.g., *In re Adoption of M.E.P.*, 825 A.2d 1266 (Pa. Super. Ct. 2003).

#### **Should permanency hearings be transcribed? 42 Pa. C.S. §6336(c)**

The Juvenile Act does not require that dependency proceedings be recorded unless requested by the parties or ordered by the court. If the proceedings are not recorded, the court is required to keep full minutes. 42 Pa. C.S. §6336(c). Prior to the start of hearings, where a stenographic or taped record is not regularly made, the parties must be informed of their right to request a transcript or recording of the proceedings. The Superior Court has held that a transcript must be made in order to permit the court to hear appeals in matters involving a goal change. *In the Interest of J.H.*, 788 A.2d 1006, 1009 (Pa. Super. Ct. 2001) (permanency hearing where goal changed from reunification to adoption and termination of parental rights must be recorded and transcribed).

Recording of permanency hearings may also help to:

- maintain appropriate decorum in the courtroom;
- encourage attorneys to be fully prepared to present evidence and cross-examine witnesses;
- streamline future hearings; and
- provide a full record that a trial judge can rely on to review proceedings conducted by a judicial officer.

## **B. Aggravated Circumstances, Reasonable Efforts, Concurrent Planning and Permanency Hearings**

### **What is the relevance of aggravated circumstances at permanency hearings? 42 Pa. C.S. §6351(e)(2)**

Aggravated circumstances may be raised at a permanency hearing. 42 Pa. C.S. §6351(e)(2). The county agency or the child's attorney may allege the existence of aggravated circumstances at any time during the permanency hearing period. For a discussion of "aggravated circumstances," the proofs required and judicial responses permitted, see pages 55-58.

### **What is the relevance of reasonable efforts at permanency hearings?**

Reasonable efforts remain a cornerstone of the Juvenile Act and are an important part of every permanency hearing where reunification of the child and family remain a goal of the FSP. At each and every permanency hearing, the court must inquire fully into the reasonable efforts the agency is making towards achieving the goal of reunification. The court should inquire into whether any additional services it has ordered have been incorporated into the FSP and are being provided. The court's vigilant oversight is necessary to ensure that reasonable efforts are made during the permanency review period.

The court must also inquire and make detailed, child specific findings that the agency made reasonable efforts to finalize the proposed permanency plan within the legally specified time period. If the court cannot make such a finding and the permanency plan is either rejected or delayed, the agency will lose IV-E funds.

### **What is concurrent planning?**

ASFA and the Juvenile Act make room for concurrent planning, essentially allowing for a primary plan and a back-up plan for permanent placement of a dependent child. With concurrent planning, efforts at reunification may go forward at the same time that other permanency options, including adoption, are being investigated. If the primary plan does not lead to permanency, the back-up plan is already in place, expediting a child's road to a permanent home. See *In re J.A.S.*, 820 A.2d 774 (Pa. Super. Ct. 2003) (Initial goal was reunification. The goal was then changed to

provide concurrently for reunification and adoption. Subsequently the goal was changed to adoption). Under the Chafee Act, 42 U.S.C. §677, agencies can plan for independent living and adoption concurrently as well.

When concurrent planning ceases and a single goal is ordered, particularly if that goal is adoption and termination of parental rights, the parties should receive clear notification of the order and of their right to appeal the goal change. See *In the Matter of B.L.W.*, 843 A.2d 380 (Pa. Super. Ct. 2004) (Dissenting opinion of Klein, J).

### **C. Finalizing a Permanency Plan**

**What placements options or other orders may the court require at the conclusion of a permanency hearing? 42 Pa. C.S. §6351(f.1) & (g)**

Section 6351(f.1) prescribes what the court must order based upon the answers culled from the considerations mandated by Section 6351(f). To summarize, the court must determine if and when it is best suited to the safety, protection and physical, mental and moral welfare of the child to issue any one of the following orders, which sets out the goal for a child's permanent placement:

1. Reunification. Will the child be returned to his or her parent, guardian or other custodian? If so, set a date certain when reunification should be accomplished. Put all resources into place to assure a safe, permanent reunification occurs. Reunification with the child's family of origin, when possible, is the preferred permanent placement for a child.
2. Termination of parental rights and adoption. Will the county agency file for a goal change to adoption and file a petition for termination of parental rights?
3. Placement with a legal custodian.
4. Placement with a fit and willing relative.
5. Placement in another living arrangement intended to be permanent in nature (APPLA).

These options reflect the statute's priorities; only when the preceding option has been considered and held not "best suited to the safety, protection and physical, mental and moral welfare of the child," 42 Pa. C. S. §6351(f.1) may the court move down the list and consider the next option.

## D. Goal Changes

### What is a goal change?

Most child dependency cases begin as reunification cases. Even with the application of ASFA and the Juvenile Act's aggravated circumstances provisions, most children will still appear before the court with an initial goal of being returned to their families.<sup>11</sup> A determination by the agency to change its goal for a child from reunification to adoption or to another permanency alternative is a major decision. The court must make sure that the agency's goal change recommendation is supported by the facts.

A goal change is often the first step to permanent removal of a child from his or her parents or custodians. When a goal change to adoption is ordered, a petition for termination of parental rights is the necessary legal step towards achieving that goal. When the goal change is to permanent legal custodianship, kinship care or APPLA, termination of parental rights may or may not be involved.

There are relatively few appellate cases addressing goal change orders. The cases involve goal changes to adoption and petitions to terminate parental rights. Because appellate guidance is lacking with respect to goal changes, juvenile court judges must proceed with care, at each and every permanency review hearing, to determine whether the placement of the child is appropriate, whether the services offered are effective in achieving, first and foremost, reunification of the child and family and, if a goal change is recommended, to determine whether that goal change will best serve the permanency needs of the child. In some counties, goal change hearings and termination of parental rights hearings are being consolidated. The court needs to ensure that an adequate record and a clear order is issued as to both the goal change and the termination decision as the rights of the parties on appeal and, if it occurs, upon remand may be at risk. It is important to advise the parties, in these instances, that they need to appeal from both the goal change and the termination order if they wish to seek reconsideration of both. If they do not appeal the goal change order, they may waive the right to seek the reinstitution of a goal of reunification and the right to the reasonable efforts the agency must provide in conjunction with that goal. See *In re*

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<sup>11</sup> In 2002-2003, 45 % of all children removed from their home in Pennsylvania were reunited with their family within twelve months of placement.

**A.L.D.**, 797 A.2d 326 (Pa. Super. Ct. 2002); **In re Adoption of T.B.B.**, 835 A.2d 387 (Pa. Super. Ct. 2003).

### **Can a child's goal be changed multiple times?**

Goal changes can be multiple and may occur quickly when circumstances require. See **In re J.A.S.**, 820 A.2d 774 (Pa. Super. Ct. 2003) (In February 2001, FSP goal was concurrent planning; in May 2001, goal changed to adoption). There is nothing in the Juvenile Act to prevent the agency from recommending and the juvenile court from ordering multiple goal changes during the permanency review period, if circumstances require. However, stability is important in the life of a child and the court should be wary of multiple goal changes, which may be accompanied by multiple placements, often not in a child's best interest. Once a goal change to adoption is ordered and affirmed on appeal (or, if the appeal period has passed) and a termination petition is filed, the orphans' court cannot change the goal. **In re A.L.D.**, 797 A.2d 326 (Pa. Super. Ct. 2002); *cf.*, **In re Adoption of T.B.B.**, 835 A.2d 387 (Pa. Super. Ct. 2003) (mother's failure to appeal the final orders changing the placement goals for her sons from reunification to adoption rendered the adequacy of services provided by the agency moot).

### **Who may initiate a goal change?**

It is generally the agency which recommends or requests that the court order a goal change and amends the FSP to reflect the change. **In re J.E.**, 745 A.2d 1250, 1253 (Pa. Super. Ct. 2000) (Agency requested change. Over a period of four years, parties had not progressed toward goal of reunification). However, there is nothing in the Juvenile Act that prevents the court from ordering the agency to change the goal of the FSP. See **In re Adoption of M.E.P.**, 825 A.2d 1266 (Pa. Super. Ct. 2003). The court can also recommend that the agency file a termination petition. In a recent case it appears that the magistrate instructed the county agency to file a petition to terminate parental rights. See **In the Matter of J.K. & J.K.**, 825 A.2d 1277 (Pa. Super. Ct. 2003) (children in foster care for two years, five months, mother had failed to complete counseling and maintain housing). Master recommended that the children be placed for adoption and that CYS file a termination petition. CYS complied). A parent can also agree to a goal change that allows the child to be adopted and file a petition to voluntarily terminate his or her parental rights. For a full discussion of this issue, see pages 116-117.



**Can a child initiate a goal change?**

Nothing in the language of the statute precludes a child from requesting a goal change. An attorney or GAL representing a dependent child may file a petition for termination of parental rights. 23 Pa. C.S. §2512(a)(4). Children may also testify in support of a petition for termination of parental rights and adoption. *In re J.E.*, 745 A.2d 1250, 1256 (Pa. Super. Ct. 2000) (child's testimony regarding quest for permanency and stability clearly proper); *In the Interest of Lilley*, 719 A.2d 327, 331 (Pa. Super. Ct. 1998). With respect to goal change requests, a child's GAL should be cognizant of both the wishes and best interest of his or her client.

**What happens to reasonable efforts when the court orders a goal change?**

If the juvenile court orders a goal change from reunification to another permanent alternative, it allows the agency to "give up" on the parent. The agency no longer needs to engage in reasonable efforts to reunite the family. *In the Interest of M.B.*, 565 A.2d 807-808 (Pa. Super. Ct. 1989), *appeal denied*, 589 A.2d 692 (Pa. 1990). If the goal change involves concurrent planning with reunification as one goal, the agency must continue its reasonable efforts to reunite the family, while planning for a permanency alternative at the same time.

**What role might aggravated circumstances play in goal change determinations?**

Proof of aggravated circumstances may support a goal change from reunification to another permanent alternative. The prior involuntary termination of parental rights to children has been considered an aggravated circumstance by an agency in recommending a goal change for a parent's other children. *In re J.I.R.*, 808 A.2d 934, 937 (Pa. Super. Ct. 2002) (While ASFA's aggravated circumstances provision could not be applied retroactively, five prior involuntary terminations could be considered as relevant factors in determining whether mother was capable of providing proper parental care and in supporting a termination of reunification services and a goal change to adoption); see also, *In re R.T., C.A. & K.A.*, 778 A.2d 670 (Pa. Super. Ct. 2001), *appeal denied*, 792 A.2d 1254 (Pa. 2001).

**Must there be proof that parental rights can be terminated where the proposed goal change is adoption?**

The juvenile court can order a change in a child's placement goal from reunification to adoption without proof that parental rights can, in fact, be terminated. In determining whether a goal change should occur, the juvenile court applies the "best interest of the child" standard and not the standards applicable to termination of parental rights. *In re J.S.W.*, 651 A.2d 167 (Pa. Super. Ct. 1994); *In Interest of Sweeney*, 574 A.2d 690 (Pa. Super. Ct. 1990), *allocatur denied*, 585 A.2d 469 (Pa. 1991). Best practice would be for the court to order a goal change to adoption only in cases where arguable legal grounds to terminate parental rights exist. Some courts are consolidating goal change and termination hearings. This allows the court to determine quickly, once a goal change is made, that parental rights can or cannot be terminated and that the child is or is not available to be adopted. In cases where reunification is not possible, this procedure may reduce the time a child spends in foster care or another temporary placement.

**What are some specific issues that may arise as a result of permanency and goal change orders?**

***Standing***

*In re L.J.*, 691 A.2d 520 (Pa. Super. Ct. 1997). A sibling does not have standing to appeal an order changing a dependent child's goal to adoption.

***Visitation***

*In the Interest of M.B.*, 674 A.2d 702 (Pa. Super. Ct. 1996). A goal change may also result in a change in the terms of parental visitation. Reduction of visitation to four times per year when goal change from long-term foster care to adoption—best interest of child must be evaluated with regard to change in goal from reunification to adoption.

***Identity of Pre-Adoptive Family***

*In the Interest of C.J.R.*, 782 A.2d 568 (Pa. Super. Ct. 2001). Addressed the issue of the identity of the pre-adoptive family when the proposed goal change to adoption was ordered. The court

affirmed the agency's choice of the foster parents over the grandparents, the evidence weighing in favor of the stronger bond between the foster parents and the child.

***Failure of Parents to Comply with Requirements of FSP***

***In the Interest of J.Y.***, 754 A.2d 5 (Pa. Super. Ct. 2000). Parents' refusal to cooperate with mental health personnel can be considered, along with failure to comply with other aspects of the FSP, in affirming a goal change request from reunification to adoption. Citing ***In re T.R., J.M., C.R., & C.R.***, 731 A.2d 1276 (Pa. 1999), the court held that while parents cannot be required to submit to mental health treatment, the refusal to do so can be considered in determining dispositional issues. 754 A.2d at 9.

***Goal Change Hearings Must be Recorded and Transcribed.***

***In the Interest of J.H.***, 788 A.2d 1006, 1009 (Pa. Super. Ct. 2001). Permanency hearing where goal changed from reunification to adoption and termination of parental rights must be recorded and transcribed.

**E. Conducting Permanency Hearings**

The time allotted for permanency hearings will vary from case to case. The time allotted for the hearing should be enough to address, in a thorough and judicious manner, the legal and factual issues to be determined and to ensure that the child's permanency plan is best suited to the needs and welfare of the child. See Box 3 on page 102.

The following suggestions for conducting a permanency hearing are adapted from *Resource Guidelines Improving Court Practice in Child Abuse & Neglect Cases* (NCJFCJ 1995) ("Resource Guidelines").

1. Hearing Activity

- Introductory Remarks
- Identification of parties, counsel and others
- Advising on rights
- Description of the proceeding

2. Adequacy of Notice and Service of Process Issues

3. Substantive Issues Related to Permanency Plan

4. Reasonable Efforts (service provision) and/or Aggravated Circumstances Issues

5. Permanency Plan Decision

- Permanency choice—reunification or another goal including concurrent planning/goal changes
- Time frames for achieving goal
- Activities and services needed to achieve permanency goal
- Visitation

6. Troubleshooting and negotiations between parties

7. Issuance of Order and Scheduling of Next Hearing

- Preparation, explanation and distribution of order to all parties prior to adjournment

**Box 3**

## **F. Appellate Review of Permanency Decisions**

### **Are appeals allowed as of right from an order issued at a permanency hearing?**

The right to appeal a determination from a permanency hearing is not addressed by the Juvenile Act, but it is now clear that appeals do lie where a goal change to adoption is either ordered or denied. *In the Interest of H.S.W.C.-B & S.E.C.-B.*, 836 A.2d 908, (Pa. 2003). See also, *In the Interest of M.B.*, 565 A.2d 807-08 (Pa. Super. Ct. 1989), *appeal denied*, 589 A.2d 692

(Pa. 1990). A search of opinions since the implementation of ASFA and the amended Juvenile Act provisions does not identify any appeals from goal changes from reunification to other permanency alternatives, such as permanent legal custodianship, kinship care or APPLA. Nor have there been appellate decisions reviewing a decision by the trial court to maintain a child in foster care, pending reunification, over a parent's or the child's objection. However, the Supreme Court in *H.S.W.C.-B.*, made clear that any order that changes or maintains the status quo could put the needs and welfare of a child at risk and, therefore, must be subject to immediate appellate review. The court stated, "An order granting or denying a status change, as well as an order terminating or preserving parental rights, shall be deemed final when entered." *H.S.W.C.-B.*, at 4.

***The appellate courts should expedite all permanency review orders that would significantly alter a child's placement or legal status in relation to a parent, custodian or kinship caregiver or would keep a child in foster or other alternative temporary care over the objection of a party.***

Statewide procedural rules of court governing dependency practice, including appeals, do not currently exist in Pennsylvania. In general, an appeal may only be taken from a final order unless otherwise permitted by statute or rule. See *Ben v. Schwartz*, 729 A.2d 547, 550 (Pa. 1999). Appeals lie in dependency cases after an order of disposition following an adjudication of dependency. Appeals also lie from decisions to remove children from the home and place them back in foster care. Cases deciding post-disposition reviews are discussed at page 105.

It remains to be seen whether goal changes other than termination of parental rights and adoption, which may occur during the permanency review process, are appealable. JLC suggests that goal changes to permanent legal custodianship, kinship care or APPLA are status changes and, therefore, are appealable pursuant to the Supreme Court's ruling in *H.S.W.C.-B.* JLC also suggests that the best interests of children require access to appellate consideration of permanency review decisions by the juvenile court. The field needs guidance from appellate courts. Permanency review hearings that take place every six months, but result in children remaining in foster care or other group home settings, being moved from one foster or group home to another, without a goal change and with no clear right of parents, custodians or others to appeal, contributes to a system that continues to suffer from multiple placements and poor choices for children. If a party is dissatisfied with the juvenile court's determination, they must have redress to the appellate courts. A "status change" may not come for as long as two years because most

petitions for termination will not be filed until a child has been in foster care for 15 out of the past 22 months.

One possibility is that any disposition of a child should be appealable, whether that disposition occurs immediately after a dependency determination or at any subsequent hearing. However, even if each order changing a child's placement were deemed appealable, under the current system that does not provide for expedited appeals, it would be useless. Current appellate practice is too prolonged to be timely for children who are aging in foster care or are subject to removal from one placement to another.

Some juvenile court orders may be appealable under the collateral order doctrine. See Pa.R.A.P. 313(b). Unfortunately, even if such orders are appealable, they would suffer the same time delays as any other appeal, and would be of no avail to children. For these reasons, there may be an argument for using habeas corpus as the vehicle for speedy appellate oversight of permanency review decisions. Petitions for habeas corpus have been filed by parents in the dependency context. However, to date, they have uniformly been denied. See *In the Interest of R.M.*, 790 A.2d 300, 303 (Pa. 2002) (Following allegation of child abuse, agency took child into protective custody. Parents immediately filed petition for writ of habeas corpus, which was denied by juvenile court deeming it an attempt to circumvent protections for children established in the Juvenile Act. Issue was not addressed by Supreme Court); *In the Matter of J.P.*, 573 A.2d 1057 (Pa. Super. Ct. 1990) (Habeas is unnecessary in the context of the juvenile dependency system given the availability of review hearings to monitor the case and the appropriateness of placements.); *Helsel v. Blair County Children and Youth*, 519 A.2d 456 (Pa. Super. Ct. 1986) (Habeas petition improper where there is an open dependency case; the lawfulness of the child's placement will be determined by that case.).

Nevertheless, it is important for parties in the juvenile dependency system to have a viable right to appeal determinations that impact so decisively upon the lives of children. The appellate courts should be open to parties in dependency throughout the permanency review

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It is essential that the juvenile court inform the parties of their right to appeal from goal change decisions. If an appeal is not taken within the time allowed (thirty days from the entry of an order approving the goal change), the right to appeal may be lost, and some rights, such as the right to address issues pertaining to the adequacy of agency services, may become moot. *In re Adoption of T.B.B.*, 835 A.2d 387 (Pa. Super. Ct. 2003); see also, *In re A.L.D.*, 797 A.2d 326 (Pa. Super. Ct. 2002).

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period, regardless of the child's goal. The appellate process must, at the very least, allow for review of each disposition that would alter the legal relationship between a child and his or her parent, custodian or kinship caregiver or would change the physical placement of a child. The appellate process must also provide a means by which appeals involving dependent children are heard expeditiously. Without an opportunity for meaningful appellate review, the reforms advanced by ASFA and the amended Juvenile Act will not materialize.

### **What standard of review applies to appeals from a goal change order?**

Appellate review of a goal change employs the same standards applicable in appeals from dependency adjudications. Namely, the appellate court must accept the facts found by the trial court unless the facts are not supported by the record. The appellate court is not bound by the trial court's inferences, deductions and conclusions drawn from the facts. Based upon properly supported facts, the appellate court reviews to determine if the trial court abused its discretion. **In the Interest of J.Y.**, 754 A.2d 5, 8 (Pa. Super. Ct. 2000).

### **Do third-parties have standing to appeal a goal change decision?**

A person standing *in loco parentis* has standing to appeal a goal change decision in a dependency proceeding. A sibling does not have standing to appeal an order changing a dependent child's goal to adoption. **In re L.J.**, 691 A.2d 520 (Pa. Super. Ct. 1997). For a full discussion of third party standing in dependency matters, see Part II, Section V.

## **G. Permanency Cases**

### ***Appellate Review***

**In the Interest of H.S.W.C.-B & S.E.C.-B.**, 836 A.2d 908, (Pa. 2003). There is an appeal as of right from a permanency hearing determination where a goal change to adoption is either ordered or denied. Appeals may also lie from orders granting or denying a status change.

**In re Adoption of T.B.B.**, 835 A.2d 387 (Pa. Super. Ct. 2003). The juvenile court issued two orders, which changed the placement goal from children's reunification with mother to adoption. Mother failed to appeal juvenile court order changing the placement goal. At termination hearing,

mother could not prevent termination of her parental rights by attacking agency's alleged failure to maintain the parental relationship between mother and the boys. Mother's right to appeal on that issue had expired.

***In the Interest of J.H.***, 788 A.2d 1006 (Pa. Super. Ct. 2001). Issues at permanency hearing included that child remain in foster care and that a goal change be made from reunification to termination of parental rights and adoption. Case remanded for evidentiary hearing because failure to record master's hearing precluded review on appeal.

***In re A.L.D.***, 797 A.2d 326 (Pa. Super. Ct. 2002). Orphans' court, in a termination proceeding, cannot revisit the juvenile court's order confirming a child's goal change from reunification to termination and adoption.

### ***Standing/Priority of Placement***

***In the Interest of C.J.R.***, 782 A.2d 568 (Pa. Super. Ct. 2001). Goal change as part of placement planning pursuant to 55 Pa. Code §3130.67, where trial court refused to transfer placement from foster parents to grandparents, not an abuse of discretion.

***In re L.J.***, 691 A.2d 520 (Pa. Super. Ct. 1997). Half-brother lacked standing to participate in goal change proceedings.

### ***Evidence/Record on Appeal***

***In the Interest of J.Y.***, 754 A.2d 5 (Pa. Super. Ct. 2000). Court may consider refusal to participate in mental health program at goal change hearing. Suppression hearings not provided for in statutes and rules governing dependency hearings. Mother's statements about her sexual relationship with a minor could be admitted for the purpose of determining the best possible permanency plan for the children.



### ***Visitation***

***In the Interest of M.B.***, 674 A.2d 702 (Pa. Super. Ct. 1996). Frequency of visitation between parent and child may be changed in conjunction with change in goal from long-term foster care to adoption.

## **Part II**

### **Section Four**

#### *PERMANENCY CHOICES: Reunification, Adoption and Termination of Parental Rights, Permanent Legal Custodianship, Permanent Placement with a Fit and Willing Relative and Another Planned Permanent Living Arrangement*

##### **I. Reunification**

Reunification of the child adjudicated dependent and his or her family continues to be the preferred permanency choice under ASFA and the Juvenile Act. 42 Pa. C. S. §6301(b) and §6351(f.1)(1). Only when reunification is ruled out, may the court initiate and finalize the alternative permanency options set forth below. For the majority of cases, the permanency hearings described at page 83 will have, as their focus, the agency's efforts to reunite the family as set forth in the family service plan. A decision on reunification must be based on an assessment of the risk and safety factors the child will encounter if he or she is returned to the home, as well as on the reasonable efforts the agency has made towards reunification. In sum, to determine whether a reunification plan can be finalized and the child returned home, the court should:

- Review the facts of the case and the services included in the family service plan and determine whether the services have altered the parent's behavior or skills as intended.
- Review the visitation orders and determine whether the family has complied with those orders.
- Review the child's position on the question of returning to the home.
- Review the agency's diligence in implementing the family service plan.
- Review any additional services that need to be in place to make return to the home possible and achieved with the least likelihood of disruption once the child is back in the home.
- Determine how much effort is reasonable and if additional efforts need to be made.
- Determine whether the reunification can be finalized, the child returned to the home safely and the dependency adjudication discharged.

*For more suggestions regarding the finalization of a reunification goal, see, Cecelia Fiermonte & Jennifer Renne, MAKING IT PERMANENT: REASONABLE EFFORTS TO FINALIZE PERMANENCY PLANS FOR FOSTER CHILDREN, American Bar Association Center on Children and the Law (Washington, D.C., 2002), 12-24. (Hereinafter, "MAKING IT PERMANENT").*

If reunification cannot be achieved, the court must look to the following permanency alternatives.

## **II. Adoption and Termination of Parental Rights**

After reunification, adoption is the next permanency choice on ASFA and the Juvenile Act's hierarchy for permanent placement of dependent children. Adoption requires that the rights of a child's natural or birth parents be terminated. A definite plan for adoption is crucial for children whose parents' legal rights are terminated. Termination of parental rights without adoption results in the child becoming a legal orphan. This section will discuss termination of parental rights and follow with a discussion of adoption and adoption subsidies, which provide financial assistance to adoptive parents.

### **A. Termination of Parental Rights**

#### **What is termination of parental rights?**

Termination of parental rights severs all legal and custodial ties between a child and a parent. It results in the elimination of parental rights to visit, communicate with and obtain information about the child. In the context of dependency, as well as non-dependency custody cases, after termination, parents are no longer entitled to notice of future court proceedings concerning the child and are denied any opportunity to regain custody of the child. Once their parental rights have been terminated, parents have no obligation to support the child and have no right to receive governmental funds on behalf of the child. Children no longer have the right to inherit from a parent or to receive governmental benefits as a result of the terminated parent's death or disability. *Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases*, NCJFCJ, 1995. Children who are not adopted following termination of parental rights are legal orphans. Because of the stakes, *in each case the court should carefully weigh the benefits and costs to the child when termination of parental rights is proposed.*

Termination is grave, but in some cases it is a necessary step toward a child's permanent placement in a safe environment. In the ABA's publication, *Child Law Practice*, Cecelia Fiermonte writes: "If a child cannot be safely returned home, adoption is the preferred placement because it is the most immune from future legal attack and ends the need for continued state oversight. Adoption also lasts well beyond the child's majority." *Child Law Practice*, vol.20, no. 2, 23. If return to the home is not possible and adoption is the goal for the child, under Pennsylvania's Adoption Act, a child can be freed for adoption only if parental rights are terminated.

Adoption is the only permanent placement that requires termination of parental rights. In Pennsylvania, termination of parental rights is governed by the Adoption Act. 23 Pa. C. S. §2301 *et seq.* In dependency cases, pursuant to ASFA and the Juvenile Act, petitions to terminate parental rights are filed when efforts to reunify children and their families have failed, or when aggravated circumstances are proved and the court has determined that services to reunite a family are not warranted.

#### **B. Termination of Parental Rights Pursuant to ASFA and the Juvenile Act**

**When do ASFA and the Juvenile Act require filing a petition to involuntarily terminate parental rights? 42 U.S.C. §675(5) (C), (E) 42 Pa. C.S. §6351(f)(9)**

ASFA imposed new requirements for the filing of petitions to terminate parental rights. These provisions *require* county agencies to file petitions in the following cases:

1. A child has been in foster care for 15 of the most recent 22 months;
2. Within 60 days of a judicial determination that the child is an abandoned infant; or
3. Within 60 days of a judicial determination that aggravated circumstances exist and reasonable efforts to reunite the child with his or her family need not be made. 42 U.S.C. §675(5)(C),(E).

At permanency hearings, the Juvenile Act requires the court to determine whether the agency has filed or sought to join a termination petition when the circumstances described in 1) and 3) above exist. 42 Pa. C.S. §6351(f)(9).

Some have argued that by setting strict timelines and by identifying specific situations where the legislature has predetermined that family reunification is not in a child's best interests,

ASFA has altered the balance between family preservation and family dissolution. *Developments in the Law—The Law of Marriage and Family: Unified Family Courts and the Child Protection Dilemma*, 116 Harv. L.Rev. 2099, 2102 (May, 2003). However, even with more stringent timelines for the filing of termination petitions, Pennsylvania's Juvenile Act still holds family preservation as its primary purpose. 42 Pa. C.S. §6301(b)(1). There are exceptions to the strict timelines and a court may still order reasonable efforts in the face of aggravated circumstances. It is also within the court's discretion to make determinations as to the appropriateness of ordering a goal change to termination and adoption. The court may invoke one of the Juvenile Act's exceptions either to provide for additional time and services to achieve reunification or to permit a permanency alternative that does not require termination of parental rights.

**What are the exceptions to the requirement that a termination petition be filed? 42 Pa. C.S. §6351(f)(9)(i)(ii)(iii)**

The Juvenile Act adopted, with minimal modification, ASFA's exceptions to the requirement that a county agency file a petition to terminate parental rights. These exceptions are:

- When the child is being cared for by a relative best suited to the physical, mental and moral welfare of the child;
- When the county agency has documented a compelling reason that filing a petition to terminate parental rights would not serve the needs and welfare of the child; or
- When the child's family has not been provided with necessary services to achieve the safe return to the child's parent, guardian or custodian within the time frames set forth in the permanency plan. 42 Pa. C.S. §6351(f)(9)(i)(ii)(iii).

These exceptions, used judiciously, may alleviate some of the pressure on the courts to move inappropriately towards termination proceedings in accordance with ASFA's strict timelines. Where the evidence warrants more time for services intended to preserve the family, the court retains the discretion to continue services. However, ASFA, with its mandate for permanence, frowns upon extensive use of the exceptions.

**What is the kinship care exception? 42 Pa. C.S. §6351(f)(9)(i)**

If a child is being well cared for by a kinship caregiver who is willing to provide the child with a permanent home, but who is not willing to adopt the child, the court need not require the county agency to file a termination petition. Many relatives do not want to adopt the child because it may create an adversarial relationship with the child's parents and disrupt kinship norms. Jesse L. Thorton, *Permanency Planning for Children in Kinship Foster Homes*, 70 **Child Welfare** 593, 597 (1991). The court must evaluate whether the child's permanency plan is best served by leaving the child in a kinship care arrangement that does not provide for adoption or moving to terminate parental rights so that the child can be available for adoption. If the court orders continued placement with a relative, without adoption or permanent legal custodianship, the law requires ongoing agency supervision and court oversight at permanency review hearings.

**What is the "compelling reason" exception? 42 Pa. C.S. §6351(f)(9)(ii)**

Pennsylvania's courts have not construed the "compelling reason" exception. Because the mandate to move dependent children into adoptive homes is a paramount objective of ASFA and the Juvenile Act, exceptions to the requirement that county agencies file termination petitions in prescribed circumstances must not be read too broadly. The following might constitute compelling reasons:

- The child does not want to be adopted: Children 12 and older must consent to adoption in Pennsylvania. A child, 12 or older, and particularly a child who is aging out of foster care, may not want to be adopted. It is the responsibility of the court to make sure that the youth has been advised and counseled regarding the ramifications of choosing not to be adopted. The court should ensure that the agency continues to provide the youth with a permanent living arrangement and transitional services to make sure of the youth's readiness for independent living.
- Reunification services are, in fact, working, both in terms of the parent(s) efforts and the fact that the child or youth wants to return home. The court or the county agency could use the compelling reasons exception to extend the period of reunification services beyond the set timelines or continue reunification services despite the existence of an aggravated

circumstance. The law, however, does not permit continued extensions and exceptions to the termination requirements and they will have to be applied sparingly.

- Grounds to terminate parental rights do not exist under the Adoption Act. If aggravated circumstances exist, and the judge has declined to order reunification services, there may be a period of time when grounds to terminate parental rights do not exist under the Adoption Act. There may be cases, for example where a child has a bond with a parent and severance of that bond would not serve the emotional needs and welfare of the child. In such cases, grounds for termination could not be proved under Section 2511(b) of the Adoption Act. For a full discussion of this issue, see pages 151-152.

### **What does not constitute a “compelling reason” exception?**

- If a child wants to be adopted and grounds exist to terminate, nothing should qualify as a compelling reason to delay the filing of a termination petition. *In the Interest of Lilley*, 719 A.2d 327 (Pa. Super. Ct. 1998).
- A child is “too” old. Older children require permanency as much as younger children. When all other circumstances warrant, the court should require the agency to file a termination petition regardless of the age of the child.
- A child is considered hard to place or “unadoptable.” Courts must not allow county agencies to predetermine that a child will be “unadoptable” and use this as an exception to the requirement to file a termination petition.
- The county agency has not identified an adoptive home for the child. Termination makes it easier to find adoptive homes for children. Using concurrent planning provisions, agencies can start earlier in trying to identify adoptive placements. The agency should not be excused from filing termination petitions based upon allegations of difficulty in locating an adoptive home. However, if it appears, based on evidence from the agency’s experts, that an adoptive home will not be available, the court may direct the agency to consider permanent placement with a relative or permanent legal custodianship, neither of which requires termination.

**What is the “failure to provide necessary services” exception? 42 Pa. C.S. §6351(f)(9)(iii)**

Section 6351(f)(9)(iii) can be considered a “fundamental fairness” exception. In order to invoke this exception, the court must determine that the family was supposed to receive reunification services in accordance with the FSP or court orders, and determine that the agency failed to provide those services. This exception will require the court to have adequate information about the FSP and the implementation of services. During permanency review hearings, the court should inquire extensively into whether the agency is providing appropriate services. If the six-month review hearings are conducted properly, and the provision of services is monitored carefully by the court, there should be little reason to call upon this exception.

**Does involuntary termination of parental rights affect the definition of dependency under the Juvenile Act? 42 Pa. C.S. §6302(10).**

Yes. Involuntary termination of a parent’s rights to one child within three years immediately preceding the date of birth of a second child, along with conduct by the parent that poses a risk to the health, safety or welfare of the second child, is now included in the definition of “dependent child.” 42 Pa. C.S.A. §6302 “Dependent Child” (10).

**How is involuntary termination of parental rights connected to the aggravated circumstances provisions of ASFA and the Juvenile Act? 42 Pa. C.S. §6302(5)**

Since the passage of ASFA and the amendments to the Juvenile Act, involuntary termination of a parent’s rights to one child may qualify as an aggravated circumstance, which will allow the agency to petition the court for relief from supplying reunification services to the family in connection with the parent’s other or later born children. 42 Pa. C.S. §6302(5).

Two cases, decided by the Superior Court in 2002, have brought to light an issue that arises because of this aggravated circumstances provision of the Juvenile Act. Two Superior Court panels reached different conclusions on the question of whether a parent’s voluntary termination petition takes precedence over the agency’s involuntary petition. Deciding *In Matter of Adoption of A.J.B.*, 797 A.2d 264 (Pa. Super. Ct. 2002), the court affirmed the orphans’ court termination of parental rights based on consideration of mother’s voluntary versus the agency’s involuntary petition. The court upheld the reasonableness standard applied by the orphans’ court



in reviewing mother's voluntary petition, and the agency's refusal to consent to that petition. The court noted that the agency, among other reasons, sought a finding of involuntary termination because it would affect the agency's obligation to provide services in future dependency cases involving the mother and future born or other children.

In a contrary holding, the court affirmed an agency's involuntary termination, which was granted by the orphans' court over mother's voluntary petition. ***In Matter of Adoption of A.M.B.***, 812 A.2d 659 (Pa. Super. Ct. 2002) (Musmanno, J. dissenting). In ***A.M.B.***, the court sought to distinguish voluntary termination petitions as coming outside of the dependency arena and disagreed with the reasoning of ***In Matter of Adoption of A.J.B.***, 797 A.2d 264 (Pa. Super. Ct. 2002). The court concluded that the legislative mandates of ASFA and the Juvenile Act required consideration of involuntary petitions over voluntary so as to enable the courts and agencies to move more efficiently toward terminating parental rights, not only with respect to the child before the court, but to other children the parent has or might have in the future. Concluding that a voluntary petition would give a parent "another bite at the apple" and would sacrifice the best interest of future children "to the whim of an unfit parent," the court affirmed the involuntary termination.

Applying the reasonableness standard articulated in ***A.J.B.*** allows the court discretion to determine, from the evidence presented, which petition should take precedence. The legislative mandate of ASFA and the Juvenile Act do not clearly elevate involuntary over voluntary petitions. It is the position of the National Council of Juvenile and Family Court Judges to encourage voluntary termination agreements, which the Council believes serve the best interests of the child by avoiding lengthy, contested trials and the delay presented by appeals. See *Adoption and Permanency Guidelines: Improving Court Practice in Child Abuse & Neglect Cases (Fall 2000)*. In many cases, it is better to protect the child whose case is at issue from a prolonged termination battle than to exercise concern for matters not yet ripe for decision.

### **C. Termination of Parental Rights pursuant to the Adoption Act 23 Pa. C.S. §2501 et seq.**

Termination proceedings are governed by the Pennsylvania Adoption Act, 23 Pa. C.S. §2301 et seq. This Act has not been amended to take into consideration the mandates of ASFA and the Juvenile Act.

## **1. Voluntary Termination of Parental Rights**

### **What is voluntary termination? 23 Pa. C.S. §2501**

Under the provisions of the Adoption Act, parents can voluntarily terminate their rights to their children. Voluntary termination avoids a trial on the issue of whether there is reason to involuntarily terminate parents' legal and physical ties to their child. There is no distinction in the statutory language regarding voluntary termination of dependent and nondependent children. If a parent is willing to voluntarily terminate his or her rights to a child, it is hard to conceive of a reason for the agency to object, except, as the court in **A.J.B.** pointed out, for tactical advantage in order to argue aggravated circumstances or dependency of another child based upon the involuntary termination. 42 Pa. C.S. §6302. See *In Matter of Adoption of A.J.B.*, 797 A.2d 264, 266 (Pa. Super. Ct. 2002). See also *Adoption and Permanency Guidelines: Improving Court Practice in Child Abuse & Neglect Cases (Fall 2000)*.

### **What statutory provisions govern voluntary termination of parental rights? 23 Pa. C.S. §§2501-2505**

Sections 2501-2505 of Pennsylvania's Adoption Act set forth the law governing the voluntary relinquishment of parental rights.

Petitions to voluntarily relinquish parental rights can be filed by the parent or parents of a child who has been in the custody of an agency for at least three days, or where the parent or parents have executed and delivered written notice of a present intent to transfer custody of the child to the agency. A parent can also petition to relinquish parental rights to an adult who has filed a report of intention to adopt if the child has been in that adult's exclusive care for at least three days. The court must schedule a hearing for a date not less than ten days after the petition is filed.

### **Who must receive notice in cases of voluntary relinquishment? 23 Pa. C.S. §2503(b)**

At least 10 days' notice of the hearing shall be given to the petitioner, and a copy of the notice shall be given to the other parent, to the putative father whose parental rights could be terminated pursuant to subsection (d) and to the parents or guardian of a petitioner who has not reached 18 years of age. 23 Pa. C.S. §2503(b).

**Is counseling required in voluntary relinquishments? 23 Pa. C.S. §2505(c).**

The Adoption Act requires that, prior to entering a decree of termination of parental rights pursuant to voluntary relinquishment, the court must ask any parent who is both in court and named in the decree “whether he or she has received counseling concerning the termination and the alternatives thereto. . . .” 23 Pa. C.S. §2505(c). If the parent has not received counseling from a qualified agency or individual, the court may refer the parent for counseling with that parent’s consent. A referral may not delay for more than 15 days the completion of a hearing on a petition to voluntarily relinquish rights.

**Is a court appearance required in voluntary relinquishments? 23 Pa. C.S. §2504**

If a birth parent is unable or unwilling to make a court appearance, an alternative procedure exists. Once 40 days have elapsed from the signing of the consent to adoption, a petition to confirm consent can be filed by the intermediary or, in the intermediary’s absence, by the adoptive parent or parents. No sooner than 10 days after the filing, the court must hold a hearing on the petition to confirm consent. The intermediary who is arranging the adoption must appear and testify with respect to the execution of the consent. Otherwise, a petition for involuntary termination must be filed. The notice requirements for the Petition to Confirm Consent are the same as those for a hearing on voluntary relinquishment. 23 Pa.C.S. §2504.

**2. Involuntary Termination of Parental Rights****What is involuntary termination?**

In dependency cases, involuntary termination must be sought by the agency, which is required to file petitions to terminate parental rights, with exceptions, when a child is in care for 15 out of 22 months or where aggravated circumstances exist and the court has determined that efforts to preserve or reunify the family need not be made. 42 Pa.C.S. §6351(f)(9). Involuntary termination is governed by Section 2511 of the Adoption Act.

## What are the grounds for involuntary termination of parental rights? 23 Pa. C.S. §2511

Both ASFA and the Juvenile Act provide for the involuntary termination of parental rights, requiring the filing of a petition in statutorily mandated circumstances and according to specific timelines. See pages 110-111.

The grounds for termination of parental rights are governed by the Adoption Act. The statute lists eight grounds for termination. 23 Pa. C. S. §2511. The petitioner may allege multiple grounds. Termination may be upheld on one ground alone. *In re J.E.*, 745 A.2d 1250, 1255 (Pa. Super. Ct. 2000) (termination affirmed where agency failed to prove grounds for termination under subsection 2511(a)(1), but presented clear and convincing evidence under three other grounds). Courts frequently grant termination on multiple grounds. See, e.g., *In the Interest of L.S.G.*, 767 A.2d 587, 590 (Pa. Super. Ct. 2001); *In re A.L.D.*, 797 A.2d 326 (Pa. Super. Ct. 2002).

The grounds for termination essentially establish irreducible requirements which parents must provide for their children; if a parent cannot provide these minimum requirements within a reasonable time, parental rights may be involuntarily terminated. *In re Diaz*, 669 A.2d 372, 375 (Pa. Super. Ct. 1995). However, even if these grounds exist, the needs and welfare of the child must be considered before parental rights can be terminated. 23 Pa. C. S. §2511(b).

The Adoption Act's grounds for termination are set forth in full in column A. A sampling of opinions deciding termination petitions on that ground are set forth in column B.

### Section 2511: Grounds for involuntary termination

(a) General rule—The rights of a parent in regard to a child may be terminated after a petition filed on any of the following grounds:

<b>A</b>	<b>B</b>
<b><i>Grounds for Termination</i></b>	<b><i>Opinions Deciding Termination</i></b>
(1) The parent by conduct continuing for a period of at least six months immediately preceding the filing of the petition either has	<i>In re William L.</i> , 383 A.2d 1228, <i>cert. denied sub nom.</i> ; <i>Lehman v. Lycoming County Children's Services</i> , 439 U.S. 880
<b><u>A</u></b>	<b><u>B</u></b>

**Grounds for Termination**

evidenced a settled purpose of relinquishing parental claim to a child **or** has refused or failed to perform parental duties. (Emphasis supplied.)

(2) The repeated and continued incapacity, abuse, neglect or refusal of the parent has caused the child to be without essential parental care, control or subsistence necessary for his physical or mental well-being and the conditions and causes of the

**Opinions Deciding Termination**

(1978) (parental rights of mentally retarded parent could be terminated if necessary to protect the child and the parent-child relationship is substantially weakened and cannot be reestablished); ***In the Interest of C.S.***, 761 A.2d 1197, 1201 (Pa. Super. Ct. 2000) (termination appropriate because parent, incarcerated for all but one month of child's life, had not made sufficient effort to establish and maintain a parent-child relationship, sporadic letters, birthday cards and gifts through family not enough); ***In re K.C.W.***, 689 A.2d 294 (Pa. Super. Ct. 1997) (agency failed to prove settled purpose or refusal to perform parental duties); ***In the Interest of Q.J.R.***, 664 A.2d 164 (Pa. Super. Ct. 1995) (drug addiction program did not excuse 14 month hiatus during which mother did not contact son or agency); ***In re Adoption of L.D.S.***, 665 A.2d 840 (Pa. Super. Ct. 1995) (two calls to agency, where no inquiry about child made, does not toll six month period).

***In re Geiger***, 331 A.2d 172 (Pa. 1975); ***In the Interest of L.S.G.***, 767 A.2d 587, 590 (Pa. Super. Ct. 2001) (mother, 14 and 15 years old when children born, failed to avail herself of services provided in order to address parenting, mental health and other

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incapacity, abuse, neglect or refusal cannot or will not be remedied by the parent.

(3) The parent is the presumptive but not the natural father of the child.

(4) The child is in the custody of an agency, having been found under such circumstances that the identity or whereabouts of the parent is unknown and cannot be ascertained by diligent search and the parent does not claim the child within three months after the child is found.

(5) The child has been removed from the care of the parent by the court or under a voluntary agreement with an agency for a period of at least six months, the conditions which led to the removal or placement of the child continue to exist, the parent cannot or will not remedy

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problems, which resulted in continued incapacity to parent); ***In re A.L.D.***, 797 A.2d 326, (Pa. Super. Ct. 2002) (mother failed to cooperate with services and concern that she would reunite with father, imprisoned for sexual abuse of nephews, warranted termination); ***In re Adoption of M.E.P.***, 825 A.2d 1266 (Pa. Super. Ct. 2003) (mother, because of reduced mental capacity, incapable of learning parenting skills sufficient to provide child with parental care).

***In re P.A.B.***, 570 A.2d 522 (Pa. Super. Ct. 1990) (each of the elements of this section must be considered separately and be supported by the evidence, including the needs and welfare of the child. Mentally retarded parents with whom children

**Grounds for Termination**

those conditions within a reasonable period of time, the services or assistance reasonably available to the parent are not likely to remedy the conditions which led to the removal or placement of the child within a reasonable period of time and termination of the parental rights would best serve the needs and welfare of the child.

(6) In the case of a newborn child, the parent knows or has reason to know of the child's birth, does not reside with the child, has not married the child's other parent, has failed for a period of four months immediately preceding the filing of the petition to make reasonable efforts to maintain substantial and continuing contact with the child and has failed during the

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maintained an emotional bond could not have their rights terminated.); ***In the Interest of L.S.G.***, 767 A.2d 587, 590 (Pa. Super. Ct. 2001) (mother did not avail herself of services, which would have allowed for return of children in a reasonable time); ***In re A.L.D.***, 797 A.2d 326, (Pa. Super. Ct. 2002) (child removed by agency and in mother's continuous care for only nine days out of nine years); ***In re Adoption of M.E.P.***, 825 A.2d 1266 (Pa. Super. Ct. 2003) (mother's mental handicaps requiring 24 hour intensive parenting assistance until child reached adulthood could not be ameliorated); ***In the Interest of C.S.***, 761 A. 2d 1197, 1200 (Pa. Super. Ct. 2000) (father in prison at time of child's birth. Removal from parent's care is a requirement of 2511(a) (5). If child was never in parent's care this section cannot be grounds for termination. Removal requirement applies to 2511(a) (8) as well).

**A****B**

***Grounds for Termination***

same four-month period to provide substantial financial support for the child.

(7) The parent is the father of a child who was conceived as a result of rape or incest.

(8) The child has been removed from the care of the parent by the court or under a voluntary agreement with an agency, 12 months or more have elapsed from the date of removal or placement, the conditions which led to the removal or placement of the child continue to exist and termination of parental rights would best serve the needs and welfare of the child.

***Opinions Deciding Termination***

***In re J.D.W.M.***, 810 A.2d 688 (Pa. Super. Ct. 2002) (mother, 17 at the time, placed in supervised independent living facility after her two-year-old found alone in the streets. Mother failed to comply with any aspect of the FSP; needs and welfare of children supported affirming termination); ***In re J.I.R.***, 808 A.2d 934 (Pa. Super. Ct. 2002) (termination affirmed. Child born cocaine addicted and severely premature to mother incarcerated for drug offenses whose rights to five other children had been previously terminated).

**What additional considerations are required to involuntarily terminate parental rights?**

Even if grounds to terminate exist under Section 2511(a), the court cannot terminate parental rights unless it is in the child's best interest. Part (b) of Section 2511 focuses on the needs and welfare of the child. Part (b) also seeks to assure that parental rights are not terminated on the basis of environmental factors alone that are beyond the parent's control, such as sub-standard housing conditions as a result of poverty.

Section 2511(b) provides:

(b) Other considerations.—The court, in terminating the rights of a parent, shall give primary consideration to the developmental, physical and emotional needs and welfare of the child. The rights of a parent shall not be terminated solely on the basis of environmental factors such as



inadequate housing, furnishings, income, clothing and medical care if found to be beyond the control of the parent. With respect to any petition filed pursuant to subsection (a)(1), (6) or (8), the court shall not consider any efforts by the parent to remedy the conditions described therein which are first initiated subsequent to the giving of notice of the filing of the petition. ***Matter of Adoption of Charles E.D.M., II***, 708 A.2d 88 (Pa. 1998) (where the party seeking termination did not produce any evidence regarding the needs and welfare of the child and how termination might affect the child's well-being, order of termination reversed); ***In re J.D.W.M.***, 810 A.2d 688, 692 (Pa. Super. Ct. 2002) (needs and welfare of child supported termination, teenaged mother failed to reestablish bond with one child and never had a relationship with the second); ***In the Interest of C.S.***, 761 A.2d 1197, 1203 (Pa. Super. Ct. 2000) (bond was with foster mother, who was willing to adopt, and with his two siblings who lived with same foster parents, and not with father. Psychiatrist's report, a stipulated part of the trial court record, sufficient to prove needs and welfare of child best met through termination); ***In re Adoption of S.M.***, 816 A.2d 1117 (Pa. Super. Ct. 2003) (evidence of significant bond with father required reversal of order to terminate parental rights).

### **Who may file a petition to involuntarily terminate parental rights? 23 Pa. C.S. §2512**

The Adoption Act allows any of the following parties to file a Petition for Involuntary Termination:

1. Either parent when termination is sought with respect to the other parent. 23 Pa. C.S. §2512(a)(1).
2. An agency. 23 Pa. C. S. §2512(a)(2).
3. The individual having custody or standing *in loco parentis* to the child and who has filed a report of intention to adopt. 23 Pa. C. S. §2512(a)(3). ***In re Adoption of J.M.E.***, 610 A.2d 995 (Pa. Super. Ct. 1992), *allocatur denied*, 618 A.2d 402 (Pa. 1992) (Includes non-relative caregivers who assume full parental obligations); ***In re Baby Boy S.***, 615 A.2d 1355 (Pa. Super. Ct. 1992) (Prospective adoptive parents by virtue of entrustment agreement may petition even when agreement revoked), *but see*, ***In re Adoption of W.C.K.***, 748 A.2d 223 (Pa. Super. Ct. 2000) (Where no evidence that parent intended to relinquish child to

petitioners, *in loco parentis* standing not acquired and standing to petition to terminated parental rights did not exist).

4. An attorney representing a child or a guardian *ad litem* representing a child who has been adjudicated dependent under 42 Pa. C.S. §6341(c).

It would appear that a person, granted permanent legal custodianship by the dependency court, could file a report of intention to adopt and then file a petition to terminate parental rights. Standing under this relatively new permanency alternative has not been addressed by the appellate courts.

### **May foster parents file a petition to involuntarily terminate parental rights?**

Foster parents may not petition the court to terminate the parental rights of a child in their care. See *In re Adoption of Crystal D.R.*, 480 A.2d 1146, 1152 (Pa. Super. Ct. 1984).

### **Who may hear termination petitions? 42 Pa. C.S. §6351(i)(1)-(2).**

Termination hearings are generally assigned to the orphans' court rather than the juvenile court division of the court of common pleas. However, in Philadelphia and Allegheny Counties, the juvenile court retains jurisdiction to hear termination matters. The Juvenile Act allows for a judge, who adjudicated the child dependent or who has conducted permanency or other dependency proceedings involving the child, to be assigned to the orphans' court for the purpose of hearing involuntary termination petitions and adoption petitions. 42 Pa. C.S. §6351(i)(1)-(2).

### **Can the orphans' court, hearing a termination petition, order the resumption of reunification services?**

*In re A.L.D.*, 797 A.2d 326 (Pa. Super. Ct. 2002), held that the orphans' court lacks jurisdiction to order reunification services. A goal change that alters the family's goal from reunification to another permanency alternative, in effect, closes the door on reunification unless the goal change is appealed and reversed before the matter is the subject of a termination hearing. See also, *In re Adoption of T.B.B.*, 835 A.2d 387 (Pa. Super. Ct. 2003) (The juvenile court issued two orders, which changed the placement goal from children's reunification with mother to adoption. Mother failed to appeal juvenile court order changing the placement goal. At termination

hearing, mother could not prevent termination of her parental rights by attacking agency's alleged failure to maintain the parental relationship between mother and children. Mother's right to appeal on that issue had expired).

Some courts have consolidated permanency/goal change hearings and termination hearings. Given the holding in **A.L.D.**, this procedure has the potential to jeopardize a party's appellate rights. If these two hearings are consolidated, the goal change order and the termination order should be appealed together. If the goal change order, including an order that includes concurrent planning for reunification and adoption, precedes the termination hearing, the goal change order must be appealed within the thirty days allowed for appellate action. The appealing party should not wait for a termination hearing and order before contesting the goal change order. See ***In the Matter of B.L.W.***, 843 A.2d 380 (Pa. Super. Ct. 2004).

### **What must an involuntary termination petition contain?**

The petition must contain the specific statutory grounds that justify termination. 23 Pa. C. S. §2511. These statutory grounds must be supported by facts as to each element of the legal claims made. The allegations in the petition should be precise so as to give the parties notice of the grounds upon which termination is being sought. The petitioner need only prove one of the eight grounds for termination, but may prove multiple grounds. ***In re J.E.***, 745 A.2d 1250 (Pa. Super. Ct. 2000).

Unlike the initial petition alleging abuse or other reasons for dependency, which may offer a limited number of incidents of neglect or abuse over a short period of time, termination petitions must address the agency's efforts to work with the parents, the lack of parental cooperation, and the effects of foster placement or other placement on the child.

### **Who is entitled to representation at an involuntary termination hearing? 23 Pa. C.S. §2313**

If a party is without representation when a termination proceeding is commenced, the Adoption Act provides for representation as follows:

**(a) Child.**--The court shall appoint counsel to represent the child in an involuntary termination proceeding when the proceeding is being contested by one or both of the parents. The court may appoint counsel or a guardian *ad litem* to represent any child who has not reached the age of 18

years and is subject to any other proceeding under this part whenever it is in the best interests of the child. No attorney or law firm shall represent both the child and the adopting parent or parents. See *In re Termination of Parental Rights Concerning E.F.H.*, 751 A.2d 1186 (Pa. Super. Ct. 2000).

**(a.1) Parent.**--The court shall appoint counsel for a parent whose rights are subject to termination in an involuntary termination proceeding if, upon petition of the parent, the court determines that the parent is unable to pay for counsel or if payment would result in substantial financial hardship.

**What pretrial orders should the court issue after a petition for involuntary termination is filed?**

A pre-trial date should be set within 30 days of the filing of the petition. The judge should set a pre-trial schedule that establishes the following:

- The date for discovery to be completed. This date should be in advance of any mediation or settlement conference so that the parties have access to all material that will potentially be presented at trial.
- The date for mediation, settlement or final pre-trial conferences. Immediately after this meeting the court should, if settlement is not achieved, set a trial date.
- The trial dates. The trial should be held on consecutive days and should begin within 90 days of the filing of the termination of parental rights petition. Delay is not in the best interest of the child.
- Findings of fact and conclusions of law, as well as a written opinion should be issued by the judge within 30 days of the conclusion of the trial.

**Who should be present at a termination hearing?**

- Parents, including putative fathers.
- The attorneys for all parties, including the GAL for the child/children.

- The caseworker and service providers.
- Witnesses, including foster parents and pre-adoptive parents.
- Expert witnesses who can testify as to the needs and welfare of the child/children. See **In the Interest of C.J.R.**, 782 A.2d 568 (Pa. Super. 2001).
- Age appropriate children and children willing to testify. However, parents cannot force children to testify. See **In re B.L.L.**, 787 A.2d 1007, 1014 (Pa. Super. Ct. 2001) (trial court did not err in refusing to grant mother a continuance to obtain child's testimony; however court erred in its opinion when it stated that involuntary termination proceedings focus entirely on the parenting capacity of the parent, ignoring the requirement of Section 2511 (b), which requires consideration of the best interests of the child.); **In re Child M.**, 681 A.2d 793 (Pa. Super. Ct. 1996), *appeal denied*, 686 A.2d 1307 (Pa. 1996) (mother could not force children to testify in termination proceeding). Another consideration with respect to testimony of age appropriate children is that their desires have not been considered determinative in termination and adoption matters arising out of dependency cases. **In re Adoption of S.R., A.R., L.R. & S.R.**, 837 A.2d 560 (Pa Super. Ct. 2003). Depending on the nature of the case, the need for a child's testimony should be evaluated with respect to its probative value and the hardship the testimony might cause the child.
- A court reporter. Termination cases are often the subject of appeal. A record is essential.

### What standard of proof applies in an involuntary termination proceeding?

Due process requires the State to support its allegations by at least clear and convincing evidence. This standard properly recognizes the important interests at stake. **Santosky v. Kramer**, 455 U.S. 745, (1982). Pennsylvania required clear and convincing evidence prior to **Santosky**; **In re William L.**, 383 A.2d 1228, 1233, *cert. denied sub nom.*; **Lehman v. Lycoming County Children's Services**, 439 U.S. 880, (1978); **In re Julissa O.**, 746 A.2d 1137, 1139 (Pa. Super. Ct. 2000).

Moreover, in Pennsylvania, a termination of parental rights decision requires a bifurcated evaluation. First, the moving party must establish, by clear and convincing evidence, whether at least one of the statutory grounds for termination exists. The parents' behavior is the primary subject of this inquiry. **In re J.D.W.M.**, 810 A.2d 688, 690 (Pa. Super. Ct. 2002); **In the Interest of**

**L.S.G.**, 767 A.2d 587 (Pa. Super. Ct. 2001); **In re J.A.S.**, 820 A.2d 774 (Pa. Super. Ct. 2003); **In re A.L.D.**, 797 A.2d 326, 339 (Pa. Super. Ct. 2002), *quoting*, **In the Interest of M.B.**, 674 A. 2d 702, 705 (Pa. Super. Ct. 1996), *appeal denied*, 688 A.2d 172 (Pa. 1997).

The second prong of the examination is whether the moving party has presented, by clear and convincing evidence, facts which show termination is in the best interest of the child. See **In re Adoption of S.M.**, 816 A.2d 1117 (Pa. Super. Ct. 2003). The language of the Adoption Act requires the court to “give primary consideration to the needs and welfare of the child” in making a termination decision. 23 Pa. C. S. §2511(b).

### **What evidence should the court consider in determining whether termination meets the “needs and welfare” of the child?**

Evidence that a parent is unfit is not the only evidence that the court must examine in an involuntary termination proceeding. Section 2511(b) asks whether termination of parental rights would best serve the needs and welfare of the child. When the statutory requirements for termination under one or more of the eight prongs of Section 2511(a) have been met, the court must consider evidence that reflects upon the child’s needs and determine the course of action that will serve the child’s best interests. This inquiry must focus on the bond between the child and the parents. Consideration of the bond between the child and the foster or pre-adoptive family alone does not satisfy the inquiry. **In re Involuntary Termination of C.W.S.M. and K.A.L.M.-S**, 839 A.2d 398 (Pa. Super. Ct. 2003) (termination finding reversed and remanded because petitioner did not present evidence of the emotional bond or lack thereof between parent and children); **In re Adoption of A.C.H.**, 803 A.2d 224, 228-29 (Pa. Super. Ct. 2002) (termination finding reversed and remanded because insufficient evidence of the emotional bond between mother and child adduced); **In re Adoption of A.M.R.**, 741 A.2d 666(Pa. 1999) [(reversing the Superior Court and remanding to the orphans’ court for an adequate evaluation of the needs and welfare of the children, A.M.R., J.M.M., and S.R.M., taking into account whatever bonds may exist between the children and Appellant, as well as the emotional effect that termination will have upon the children) *citing In re Adoption of E.D.M.*, 550 Pa. 595, 708 A.2d 88 (1998)]; **In re E.M.**, 620 A.2d 481 (Pa. 1993); **In re Child M.**, 681 A.2d 793 (Pa. Super. Ct. 1996), *appeal denied*, 686 A.2d 1307 (Pa. 1996). In an *en banc* opinion, the Superior Court appears to have ignored this mandate. See, **In the Matter of B.L.W.**, 843 A.2d 380 (Pa. Super. Ct. 2004). While the court finds that the record is

replete with support for the conclusion that the needs and welfare of **B.L.W.** are being met in the foster home and that B.L.W. is anxious to be adopted by her foster parents, the court makes no mention of the bond, or lack thereof, between the child and her mother. The law does not allow the court to ignore that element of the “needs and welfare” inquiry.

This second stage analysis involves an examination of the child’s intangible needs, the existence of any emotional bond, love, comfort and security that exists between a parent and child. *In re Matsock*, 611 A.2d 737, 747 (Pa. Super. Ct. 1992). Before rendering a decision to terminate parental rights, the court must consider that “continuity of relationships is important to a child for whom severance of close parental ties is usually extremely painful.” *In re William L.*, 383 A.2d 1228, 1241 (Pa. 1978). Where “ties with the natural parents are present and are an active force in the child’s life, then needs and welfare becomes a concept that argues against termination rather than fosters it.” *In re P.A.B.*, 570 A.2d 522, 525 (Pa. Super. Ct. 1990). Existence of an important bond between father and daughter supported reversal of the termination decision even where grounds for termination clearly existed under the first prong of Section 2511. It was in the child’s best interests to preserve her bond with the father, despite father’s lack of compliance with the family service plan and drug testing requirements. *In re Adoption of S.M.*, 816 A.2d 1117 (Pa. Super. Ct. 2003).

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Prior to the termination hearing, the court should make sure that the agency has secured or is in the final stages of securing an adoptive family for the child. The court should inquire as to whether the agency’s efforts toward finalizing the adoption, if and when termination is achieved, are in place. See *Adoption and Permanency Guidelines: Improving Court Practice in Child Abuse & Neglect Cases (Fall 2000)* at page 32-34 for a full discussion of adoption planning. If an adoptive family cannot be found for a child, the court may wish to suggest that the agency investigate other permanency alternatives. Terminating parental rights, without the prospect of adoption, may deprive a child of the right to receive financial support, including death benefits.

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#### **D. Conducting Termination Hearings**

The following suggestions for conducting a termination hearing are adapted from *Adoption and Permanency Guidelines: Improving Court Practice in Child Abuse & Neglect Cases (Fall 2000)*. See Box 4 on page 130.

The hearing on termination of parental rights will, in many cases, be more complex than the initial adjudicatory hearing determining dependency. Agency witnesses will testify as to the efforts made to reunify the family and alleged failures in that regard. Parents contesting the termination petition will present their own testimony as to the agency's failure to provide appropriate services. Children may be called upon to testify. Foster parents and pre-adoptive parents need to be notified of this hearing and may also be called upon to testify. Again, the involuntary termination trial is the most serious of proceedings in a dependency matter.

#### Hearing Activity

##### 1. Introductory Remarks

- Identification of parties, counsel and others
- Advising on rights
- Explanation of the proceeding

##### 2. Adequacy of Notice and Service of Process Issues

##### 3. Substantive Issues Related to Involuntary Termination

- Proof of grounds for termination of parental rights:
  - Conduct of parents. Clear and convincing evidence of each element of the grounds upon which termination is based must be offered by the moving party. If adequate proofs are not presented, the court must dismiss the petition.
- Needs and welfare of child.
  - Clear and convincing evidence with respect to Section 2511(b) of the Adoption Act must be presented. If adequate proofs of the bond between the child and the parent or a lack of such a bond are not presented, the court must dismiss the petition.

4. Inform parties as to when court will issue its findings of facts and conclusions of law. Inform parties of their right to appeal the determination of the court.

#### Box 4

Termination hearings must take place on sequential or as close to sequential days as possible. A Superior Court opinion referred to orphans' court evidentiary hearings on the agency's petition for involuntary termination that took place on: July 23, 2001, September 23, 2001, January 14, 2002, April 15, 2002 and November 25, 2002. *In re A.R.M.F. & M.B.F.*, 837 A.2d 1231, 1235 (Pa. Super. Ct. 2003). The appellate decision affirming termination was filed on December 2,



2003. It took almost two and a half years for the children in this case to be freed for adoption. *Good court practice and the achievement of timely permanency requires prompt resolution of these proceedings.*

### **What should the findings of fact and court order contain?**

The findings must clearly state the specific facts and statutory grounds upon which the order granting or denying termination is based. The findings should clearly show that the court evaluated evidence of the needs and welfare of the child, including emotional bonds with the parents, as required by Section 2511(b) of the Adoption Act. *In re Adoption of A.C.H.*, 803 A.2d 224 (Pa. Super. 2002) (Trial court's evaluation of needs and welfare of **A.C.H.** was conclusory. Insufficient evidence in the record addressing the emotional bonds between child and natural mother required reversal of termination decision.)

### **E. Appeals of Termination Orders**

#### **Are involuntary termination orders immediately appealable?**

Termination decisions are immediately appealable. *In re A.L.D.*, 797 A.2d 326, 335 (Pa. Super. Ct. 2002). Appeals must be taken no later than 30 days after entry of the order. Exceptions are no longer permitted pursuant to Orphans' Court Rule 7.1(e). *In re C.G.*, 791 A.2d 430 (Pa. Super.Ct 2002) (prior procedure of filing exceptions allowed because of delay in filing of orphans' court decision; parties and orphans' court could reasonably conclude prior procedure remained applicable, therefore, appeal permitted). *But see, In re Adoption of W.R.*, 823 A.2d 1013 (Pa. Super. Ct. 2003) (*nunc pro tunc* appeal of termination order quashed, filing of exceptions more than seven months after the effective date of amended Orphans' Court Rule 7.1(e) did not excuse mother's failure to file notice of appeal on or before the thirtieth day after the entry of the order terminating her parental rights).

**What is the applicable standard of appellate review in an involuntary termination matter?**

The standard for review in cases involving the termination of parental rights is limited to a determination of whether the trial court's order is supported by competent evidence. *In re J.D.W.M.*, 810 A.2d 688, 690 (Pa. Super. Ct. 2002); *In re Julissa O.*, 746 A.2d 1137 (Pa. Super. Ct. 2000). The appellate court is bound by the factual findings of the trial court, which have adequate support in the record as long as such findings are not capricious. *In re Diaz*, 669 A.2d 372 (Pa. Super. Ct. 1995). The trial court is also the sole determiner of witness credibility and conflicts in testimony are resolved by the trial court. *In re B.G.S.*, 614 A.2d 1161 (Pa. Super. Ct. 1992).

**F. Termination Cases**

A selection of cases involving termination of parental rights is listed below. In the first major grouping, the courts determined that the evidence was sufficient for the termination of parental rights to stand. In the second major grouping, the evidence, or lack thereof, warranted a reversal of the termination decision. Within these two major groupings, the cases are divided into several categories to enable the reader to locate a variety of fact patterns. However, each case presents complex factual situations and the reader is reminded that there is no substitute for an examination of the full opinion.

Summaries of termination cases decided beginning in the year 2000 and continuing to the present can be found on the Juvenile Law Center's website: [www.jlc.org](http://www.jlc.org) . Click on Legal Developments and look for Dependency/Adoption and Termination of Parental Rights.

**TERMINATION GRANTED*****Refusal or inability to comply with family service plan***

***In re Adoption of S.R., A.R., L.R. & S.R.***, 837 A.2d 560 (Pa. Super. Ct. 2003). Lack of appropriate housing, the cause of the initial placement, not likely to be remedied. Children bonded to foster/adoptive parents and not to parents.

***In re J.D.W.M.***, 810 A.2d 688 (Pa. Super. Ct. 2002). Teen-aged mother failed to comply with the FSP, including conditions of her supervised independent living placement and the visitation schedule set up for her and her children.

***In re C.G.***, 791 A.2d 430 (Pa. Super. Ct. 2002). Mother failed to follow through on services intended to address drug, alcohol and domestic violence and also failed to maintain contact with child for fourteen months.

***In the Interest of L.S.G.***, 767 A.2d 587 (Pa. Super. Ct. 2001). Mother failed to comply with FSP and refused to parent. Mother, a minor represented by counsel, not entitled to appointment of GAL.

***In re J.E.***, 745 A.2d 1250 (Pa. Super. Ct. 2000). Parents failed to cooperate and were incapable of benefiting from the reasonable efforts supplied by the agency over a realistic period of time. Children testified as to their opposition to returning to the care of their parents.

***In re Julissa O.***, 746 A.2d 1137 (Pa. Super. Ct. 2000). Parent failed to perform parental duties and remedy deplorable and unstable housing conditions.

***In re Diaz***, 669 A.2d 372 (Pa. Super. Ct. 1995). Agency made reasonable efforts to reunify family, mother failed to comply or to undertake her affirmative duty to parent the child.

***Incarceration***

***In re J.T. & R.T.***, 817 A.2d 505 (Pa. Super. Ct. 2003). Father was incarcerated for much of children's lives; evidence of bond was not strong enough to warrant denial of termination petition).

***In re J.L.C. & J.R.C.***, 837 A.2d 1247 (Pa. Super. Ct. 2003). Father was incarcerated during much of children's lives. Although he had a loving relationship with his sons, he did not do enough to maintain bond and termination cannot be delayed based upon future promises of reform.

***In re J.I.R.***, 808 A.2d 934 (Pa. Super. Ct. 2002). Mother incarcerated shortly after birth of J.I.R., who was born cocaine addicted and severely premature. Mother failure to attend FSP meetings or take part in objectives not excused by her incarceration or the fact that she did not receive notice of the meetings. Five prior involuntary terminations, while not considered aggravated circumstances because they occurred prior to amendment of the Juvenile Act, were considered in determining mother's ability to parent.

***In the Interest of C.S.***, 761 A.2d 1197 (Pa. Super. Ct. 2000). Incarceration of a parent does not, in itself, provide sufficient grounds for termination of parental rights; however, an incarcerated parent's responsibilities are not tolled during his incarceration. Three letters and birthday cards and no request for pictures, report cards or updates on the child over a three and one-half year period not enough to prevent termination.

***In the Interest of A.P.***, 692 A.2d 240 (Pa. Super. Ct. 1997). Incarcerated parent must utilize whatever resources are available while in prison in order to foster a continuing close relationship with his children; failure to do so warranted termination. Due process protected where incarcerated parent has counsel and participates in termination hearing telephonically.

***In re Adoption of C.A.W.***, 683 A.2d 911 (Pa. Super. Ct. 1996). Mother voluntarily terminated parental rights; father, incarcerated for sexually abusing a ten-year-old, not eligible for parole until 2024 when children will be in their thirties. Agency proved "incapacity" that could not be remedied.

***Mental incapacity/instability***

***In re Adoption of M.E.P.***, 825 A.2d 1266 (Pa. Super. Ct. 2003). Court affirmed termination of mentally impaired mother's parental rights, the record providing clear and convincing evidence that mother could not learn proper parenting skills despite intensive services.

***In re A.R.M.F. & M.B.F.***, 837 A.2d 1231 (Pa. Super. Ct. 2003). Parents continued incapacity due to low IQ, along with unsafe housing and unstable family, warranted termination.

***In re B.L.L.***, 787 A.2d 1007 (Pa. Super. Ct. 2001). Mother, a drug addict since the age of 10, refused to acknowledge her addiction and had been treated in 10 different rehabilitation facilities, suffered from depression, anxiety and panic attacks. The court concluded that Mother did not possess the mental stability to parent.

***In the Interest of Lilley***, 719 A.2d 327 (Pa. Super. Ct. 1998). Mother's incapacity to parent due to mental illness could not be remedied despite 14 years of efforts. Child's wish to be adopted by foster parents considered.

***In re William L.***, 383 A. 2d 1228, *cert. denied sub nom.*, ***Lehman v. Lycoming County Children's Services***, 439 U.S. 880, (1978). Grounds for termination may consist of a lack of capacity and not just affirmative misconduct.

***Needs and welfare/best interests of the child***

***In re Adoption of A.R., S.R., L.R. & S.R.***, 837 A.2d. 560 (Pa. Super. Ct. 2003). Lack of appropriate housing, the cause of the initial placement, not likely to be remedied. Children bonded to foster/adoptive parents and not to parents.

***In re A.L.D.***, 797 A.2d 326 (Pa. Super. Ct. 2002). Child spent only nine days of life with mother and no bond existed. Orphans' court did not have jurisdiction to order reunification services reinstituted.

***Failure to contact or inquire about child***

***In re C.M.S.***, 832 A.2d 457 (Pa. Super. Ct. 2003). Termination of father's parental rights not precluded because of deception regarding whereabouts of child. Parent must show "reasonable firmness" in overcoming obstacles to contact with child.

***In the Interest of Q.J.R.***, 664 A.2d 164 (Pa. Super. Ct. 1995). Failure to contact or inquire about son over a 14 month period not excused by mother's participation in drug addiction treatment program that precluded outside contacts.

***In re Adoption of L.D.S.***, 665 A.2d 840 (Pa. Super. Ct. 1995). Failure to fulfill parental responsibilities over an eight-month period not alleviated by two phone calls to agency.

***PROCEDURAL ISSUES***

***Voluntary versus involuntary termination petitions***

***In Matter of Adoption of A.J.B.***, 797 A.2d 264 (Pa. Super. Ct. 2002). Termination pursuant to a voluntary petition allowed, reasonableness standard adopted; concern that agency wanted to use involuntary termination to refuse reasonable efforts with respect to mother's other children.

***In Matter of Adoption of A.M.B.***, 812 A.2d 659 (Pa. Super Ct. 2002). Involuntary termination petition granted over voluntary petition; the agency's right to petition the court to deny reasonable efforts with respect to other children warranted involuntary over voluntary petition.

**Standing**

***In re Adoption of J.D.S.***, 763 A.2d 867 (Pa. Super. Ct. 2000). Stepfather, separated from natural mother, had no standing to terminate parental rights of natural father.

***In re Adoption of W.C.K.***, 748 A.2d 223 (Pa. Super. Ct. 2000). Prospective adoptive parents do not stand *in loco parentis* and do not have standing to file a petition to terminate parental rights.

***In re Adoption of Crystal D.R.***, 480 A.2d 1146, (Pa. Super. Ct. 1984). Foster parents do not stand *in loco parentis* and do not have standing to file a petition to terminate parental rights.

**Right to counsel**

***In re Termination of Parental Rights Concerning E.F.H.***, 751 A.2d 1186 (Pa. Super. Ct. 2000). Pennsylvania's Adoption Act requires that child be represented by separate counsel in contested involuntary termination proceedings.

**Other**

***In re Adoption of T.B.B.***, 835A.2d 387 (Pa. Super. Ct. 2003). Challenge to sufficiency of agency services cannot be reopened in orphans' court proceeding to terminate parental rights.

***In the Matter of J.K. & J.K.***, 825 A.2d 1277 (Pa. Super. Ct. 2003). Refusal of mother's request for additional continuance of hearing on termination petition not abuse of discretion.

***In re Adoption of W.R.***, 823 A.2d 1013 (Pa. Super. Ct. 2003). Mother's *nunc pro tunc* appeal of termination decision denied; rule requiring the filing of exceptions no longer applicable.

**TERMINATION REVERSED*****Failure to produce or consider evidence regarding emotional bond or lack thereof***

***In re Involuntary Termination of C.W.S.M. and K.A.L.M.-S.***, 839 A.2d 398 (Pa. Super. Ct. 2003).

Evidence of the emotional bond or lack thereof between parents and children is required in a termination case. Where the record is devoid of such proofs, an order granting termination cannot be sustained.

***In re Adoption of A.C.H.***, 803 A.2d 224 (Pa. Super. Ct. 2002). Trial court must address issue of emotional bonds between mother and child before involuntarily terminating parental rights.

***In re Adoption of A.M.R.***, 741 A.2d 666 (Pa. 1999). *Per Curiam* order reversing the Superior Court and remanding the case to the orphans' court for an adequate evaluation of the needs and welfare of the children, taking into account whatever bonds may exist between the children and mother, as well as the emotional effect that termination will have on the children.

***In re Child M.***, 681 A.2d 793 (Pa. Super. 1996), *appeal denied*, 686 A.2d 1307 (Pa. 1996). Needs and welfare of child must be given adequate consideration in termination matters.

***Matter of Adoption of Charles E.D.M. II***, 708 A.2d 88 (Pa. 1998). Petitioner failed to produce evidence of emotional bond or lack thereof between parent and child; without such evidence, termination decision was without adequate support in the record.

***In re E.M.***, 620 A.2d 481 (Pa. 1993). Mentally retarded mother's rights to children could not be terminated without consideration of emotional bond with children.

***In re Matsock***, 611 A.2d 737 (Pa. Super. Ct. 1992). Court failed to consider whether needs and welfare of children would be advanced in a case of termination based upon father's failure to complete sexual abuse therapy programs reversed. Father never prosecuted for sexual abuse.



***Evidence of bond required reversal of termination***

***In re Adoption of S.M.***, 816 A.2d 1117 (Pa. Super. Ct. 2003). Bond between father and daughter significant and termination order reversed despite evidence of father's failure to comply with FSP.

***In re P.A.B.***, 570 A.2d 522 (Pa. Super. Ct. 1990). Emotional bond between children and parents with limited intelligence, limited parenting skills and limited ability to understand the duties of parenting required reversal of termination of parental rights.

***Insufficient evidence of relinquishment of parental claim or failure to perform parental duties***

***In re K.C.W.***, 689 A.2d 294 (Pa. Super. Ct. 1997). Insufficient evidence that for the six-month period immediately preceding the filing of the petition, mother evidenced a settled purpose of relinquishing parental claim to her children or failed to perform parental duties. Father's abusive behavior was cause of children's removal from home and father was incarcerated so conditions that led to removal no longer present.

**III. Adoption and Adoption Subsidies**

Under ASFA and the Juvenile Act, adoption is the preferred permanency placement when a child cannot be returned to his or her birth family. Adoption gives a child a new, permanent legal family with the same legal standing and protection as a family created by birth. This includes eligibility for social security, insurance, retirement, and all other public and private benefits to which a natural child is eligible. Adoption requires termination of parental rights and, therefore, cannot be overturned based upon a future change in the parent's circumstances.

In some circumstances the best available permanency alternative will not be reunification or termination of parental rights followed by adoption. The court will have to evaluate permanent legal custodianship (PLC), either subsidized or unsubsidized, placement with a fit and willing

relative, and, in the last instance, another permanent planned placement (APPLA). In some of these cases, termination of parental rights may be involved, but, unlike adoption, it is not a necessary precursor to establishment of these permanency options.

### **What is adoption?**

Adoption is “purely a statutory right, unknown at common law.” *In re Adoption of R.B.F.*, 803 A.2d 1195, 1199 (Pa. 2002), *citing In re Adoption of E.M.A.*, 409 A.2d 10, 11 (Pa. 1979). “[A] decree of adoption terminates forever all relations between the child and its natural parents, severs it entirely from its own family tree and engrafts it upon that of its new parentage. Through the adoption process the natural parent-child relationship is extinguished and an entirely new parent-child status is created.” *In re Adoption of List*, 211 A.2d 870, 877 (Pa. 1965). quotations and citations omitted). Adoption is also the preferred permanency goal for dependent children who cannot be reunified with their families, as delineated by Pennsylvania’s Office of Children Youth and Families. Bulletin No. 3130-01-01, *The Revised Interim Implementation Guidelines for the Adoption and Safe Families Act (ASFA) of 1997*.

### **What is required for an adoption to take place?**

“To effect an adoption, the legislative provisions of the Adoption Act must be strictly complied with.” *In re Adoption of R.B.F.*, 803 A.2d 1195, 1199 (Pa. 2002), *citing In re Adoption of E.M.A.*, 409 A.2d 10, 11 (Pa. 1979). The Adoption Act can be found at 23 Pa. C.S. §2101 *et seq.*

### **What is required for an adoption to take place when parents are voluntarily relinquishing parental rights and duties?**

The parent or parents of a child may petition the court to voluntarily relinquish parental rights to a child under the age of 18 to the care of an agency or to the care of an adult intending to adopt the child. 23 Pa. C.S. §2501(a), 23 Pa. C.S. §2502(a). For a detailed explication of the law governing the voluntary relinquishment of parental rights, see pages 116-117 of this Deskbook.

**What is required for an adoption to take place when parental rights are being involuntarily terminated?**

The grounds for involuntary termination of parental rights are enumerated in 23 Pa. C.S. §2511(a) and are described in detail on page 118 of this Deskbook. Additional factors to be considered by the court in an involuntary termination decision are listed in 23 Pa. C.S. §2511(b) and are described in detail on page 122 of this Deskbook. The Adoption Act also specifies who may file for involuntary termination, 23 Pa. C.S. §2512(a); the required contents of such a petition, 23 Pa. C.S. §2512(b); and the requirements for a hearing on such a petition and for notice of the hearing, 23 Pa. C.S. §2513. The details of termination hearings are described in full on pages 110-139 of this Deskbook.

**What does the law require regarding consents to adoption?**

Consent to an adoption is required of:

1. the adoptee if he or she is over the age of 12;
2. the spouse of the adopting parent unless he or she joins in the adoption petition;
3. the parents of an adoptee who has not reached the age of 18;
4. the guardian of an incapacitated adoptee; and
5. the guardian of an adoptee under 18, or the person or persons having custody of an adoptee, whenever the adoptee has no parent whose consent is required. 23 Pa. C.S. §2711(a).

The required contents of a valid consent are specified in 23 Pa. C.S. §2711(d)(1).

In addition, the consent of the husband of the natural mother of the adoptee is required if he was the husband of the natural mother at any time within one year prior to the birth of the adoptee. 23 Pa. C.S. §2711(b). The consent of the husband of the natural mother is not required if, after notice to the husband, it is proved to the satisfaction of the court that the husband is not the natural father of the adoptee. 23 Pa. C.S. §2711(b).

23 Pa. C.S. §2713 allows a court, in its discretion, to “dispense with consents other than that of the adoptee” to a petition for adoption when (1) the adoptee is over the age of 18 or (2) the consents of parents are not required. The consent of the parent is not required when his or her parental rights have been terminated. 23 Pa. C.S. §2714.

No consent is valid if it was executed prior to or within 72 hours after the birth of the child. 23 Pa. C.S. §2711(c). However, a putative father may consent to adoption any time after receiving notice of the expected or actual birth of the child. 23 Pa. C.S. §2711(c).

The consent of a parent of an adoptee under the age of 18 must include the statement: “I understand that by signing this consent I indicate my intent to permanently give up all rights to this child.” 23 Pa. C.S. §2711(d)(1). An exception to this provision appears in 23 Pa. C.S. §2903, which provides for the continuation of the parent-child relationship when a parent consents to the adoption of his or her child by a spouse. The Pennsylvania Supreme Court has determined that although same-sex partners do not constitute a “spouse” for the purpose of this exception, the Adoption Act allows for judicial discretion – and this discretion can be used to allow persons in homosexual relationships to adopt the children of their partners without requiring relinquishment of rights by the parent. *In re Adoption of R.B.F.*, 803 A.2d 1195, 1199-1200, 1201-1202 (Pa. 2002). The source of judicial discretion is 23 Pa. C.S. §2901, which states that no decree of adoption shall be entered unless all the legal requirements are met, “[u]nless the court for cause shown determines otherwise.” In *R.B.F.*, the court held that the “cause shown” provision would permit a judge to consider whether an adoption petition should be granted even when the petitioner cannot meet the statutory requirements, such as a homosexual partner who does not meet the statutory definition of spouse. 803 A.2d 1195, 1202.

### **When are consents to adoption irrevocable?**

Consent to an adoption executed by a birth mother is irrevocable more than 30 days after the execution of the consent. Consent to an adoption executed by a birth or putative father is irrevocable more than 30 days after the execution of the consent or after the birth of the child, whichever occurs later. 23 Pa. C.S. §2711(c).

**How can an individual challenge the validity of a consent to adoption?**

An individual who executed a consent to adoption can only challenge the validity of that consent by alleging fraud or duress within (a) 60 days of the birth of the child or the execution of the consent, whichever occurs later, or (b) 30 days after the entry of the adoption decree. For a consent to adoption to be invalidated, the fraud or duress must be proven by (a) a preponderance of the evidence in the case of consent by a person 21 years of age or younger, or (b) clear and convincing evidence in all other cases. 23 Pa. C.S. §2711(c).

**Who may be adopted?**

“Any individual may be adopted, regardless of his age or residence.” 23 Pa. C.S. §2311.

**Who may adopt a child?**

“Any individual may become an adopting parent.” 23 Pa. C.S. §2312. A report of intention to adopt must be filed by “[e]very person now having or hereafter receiving or retaining custody or physical care of any child for the purpose or with the intention of adopting a child.” 23 Pa. C.S. §2531(a). However, no report is required when the person seeking to adopt is the parent, grandparent, stepparent, whole or half sibling, or aunt or uncle by blood, marriage or adoption of the adoptee. 23 Pa. C.S. §2531(c).

Foster parents must have the permission of the agency with legal custody of the children in order to pursue adoption proceedings. ***Chester County Children and Youth v Cunningham***, 656 A.2d 1346, 1347 (Pa. 1994) (holding that 23 Pa. C.S. §2531, describing who may file a report of an intention to adopt, does not encompass foster parents). In contrast, prospective adoptive parents have standing to petition for adoption. ***In re Adoption of Baby Boy McKnight***, 488 A.2d 56 (Pa. Super. 1985).

Grandparents always have standing to participate in adoption proceedings of their grandchildren. ***In re Adoption of Hess***, 608 A.2d 10, 12 (Pa. 1992). The fact that parental rights

have been terminated does not affect a grandparent's standing to participate in adoption proceedings. **Hess**, 608 A.2d 10, 12.

Single persons and persons in homosexual partnerships may also adopt. "There is no language in the Adoption Act precluding two unmarried same-sex partners (or unmarried heterosexual partners) from adopting a child who had no legal parents." **In re Adoption of R.B.F.**, 803 A.2d 1195, 1202 (Pa. 2002).

### **To what extent are adoption records confidential?**

State law expressly limits the adoption related information that can be made available. Under 23 Pa. C.S. §2905, "[a]ll petitions, exhibits, reports, notes of testimony, decrees and other papers" pertaining to an adoption proceeding are impounded and "withheld from inspection." 23 Pa. C.S. §2905(a). Inspection is only possible upon either an order of court granted upon cause shown or as otherwise provided in Section 2905. *Id.* Good cause for a court order must be shown by clear and convincing evidence. **In re Long**, 745 A.2d 673, 675 (Pa. Super. 2000) (citing the "overriding privacy concerns of the adoption process and this statute [23 Pa. C.S. §2905].") The exceptions provided for in the statute, mandatory in some instances and permissive in others, are as follows:

- (1) upon petition by an adoptee over the age of 18, or by the adoptive parent or legal guardian of an adoptee under 18, the court *shall* furnish to the adoptee "as much information concerning the adoptee's natural parents as will not endanger the anonymity of the natural parents, 23 Pa. C.S. §2905(b). "[I]nformation which can be safely disclosed will have to be developed on a case by case basis." **In re Petition to Release Adoption Records Pursuant to 23 Pa.C.S. 2905**, 653 A.2d 1254, 1256 (Pa. Super. 1995) (allowing for release of race of birth parents, the health of the adoptee at the time of adoption, the circumstances relating to the relationship between the birth parents and the reason for the adoption).
- (2) upon petition by an adoptee over the age of 18, or by the adoptive parent or legal guardian of an adoptee under 18, the court *may* "attempt to contact the natural parents, if known, to obtain their consent to release their identity and present place of residence

to the adoptee,” 23 Pa. C.S. §2905(c)(1) (this same request may be made to, and granted by, the adoption agency), 23 Pa. C.S. §2905(c)(2);

(3) an adoptee at least 18 years old, or the adoptive parent or legal guardian of an adoptee under 18, *shall* have access to any original or updated medical history information on file with the court which entered the decree of termination or the Department of Public Welfare,” as long as the release of that information will not endanger the anonymity of the natural parents. 23 Pa. C.S. §2905(d)(3); and

(4) the natural parents also have the option of placing on file a consent form granting permission for the disclosure of information upon the request of the adoptee or his/her parent or legal guardian. 23 Pa. C.S. §2905(d)(2).

Furthermore, information identifying the natural parents must be excluded both from docket entries, 23 Pa. C.S. §2906, and from certificates of adoption, 23 Pa. C.S. §2907. Officers or employees of the court, the Departments of Public Welfare or Health, or any agency who “willfully disclose[s] impounded or otherwise confidential information relating to adoption” are subject to criminal penalties. 23 Pa. C.S. §2910. The court must take any steps reasonably necessary to assure that the identity of the adoptive parent or parents is not disclosed without their consent in proceedings relating to voluntary relinquishment or involuntary termination of parental rights. 23 Pa. C.S. §2504.1.

### **What is an “open adoption”?**

An “open adoption” is an adoption where the adopted child can communicate directly with the birth parent or parents.<sup>12</sup> There are no provisions in Pennsylvania law that provide for open

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<sup>12</sup> *Openness in Adoption: A Bulletin for Professionals*, National Adoption Information Clearinghouse, U.S. Dept. of Health and Human Services, February 2003, available at [http://naic.acf.hhs.gov/pubs/f\\_openadoptbulletin.cfm](http://naic.acf.hhs.gov/pubs/f_openadoptbulletin.cfm)

adoptions.<sup>13</sup> To the contrary, state law expressly limits the adoption related information that can be made available.

### **What are adoption subsidies?**

Adoption subsidies were created by Congress in the Adoption Assistance and Child Welfare Act of 1980. 42 U.S.C.A. §670-676. Adoption subsidies in Pennsylvania are administered through county children and youth agencies in accordance with the Pennsylvania Adoption Opportunities Act, 62 Pa. C.S. §771-774, and accompanying regulations, 55 Pa. Code §3140.202-210.

Adoption subsidies provide financial support and medical insurance for children who are adopted out of the foster care system. The Pennsylvania Adoption Opportunities Act was passed to “encourage and promote the placement in adoptive homes of children who are physically and/or mentally handicapped, emotionally disturbed, or hard to place by virtue of age, sibling relationship, or ethnicity.” 62 Pa. C.S. §771. Providing an adoption subsidy can often be the key to facilitating permanent homes for children and preventing long stays in the foster care system.

### **Who is eligible for an adoption subsidy?**

Under the Pennsylvania Adoption Assistance regulations, a county agency shall certify for adoption assistance children whose placement goal is adoption and who meet the following requirements:

- (1) child is 17 years of age or younger;

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<sup>13</sup> According to the Support Center for Child Advocates, “many agencies are now permitting ‘open adoptions’ allowing parents to visit children at the child’s option and ‘open records’ allowing sharing of information regarding biological family members.” *How to Handle a Child Abuse Case: A Manual for Attorneys Representing Children*, Support Center for Child Advocates, p. 32 (2003). According to the Support Center, agreements between biological parents and adoptive parents are not enforceable. *Id.* According to the Superior Court, “a contractual agreement ‘benefiting a child’ will not *ipso facto* be categorized as against public policy without first looking at the facts of the particular case.” **Gorden v. Cutler**, 471 A.2d 449, 457 (Pa.Super. 1983) (contract whereby adoptive parents agreed to pay lying-in expenses in exchange for natural parents’ consent to adoption was not against public policy). However, the existence of specific legislation mandating the confidentiality of adoption records suggests that a contract allowing for the sharing of adoption records would be found to be against public policy. *See, e.g., Gorden v. Cutler*, 471 A.2d 449, 457 (Pa.Super. 1983) (supporting decision to enforce contract by noting “that nowhere in the adoption laws of this Commonwealth is an agreement [for the contested payment of pre-natal expenses] specifically proscribed”).



- (2) parental rights have been terminated;
- (3) the child is in the legal custody of the county agency or a private agency,<sup>14</sup> and
- (4) the child has one of the following characteristics:
  - a physical, mental, or emotional condition or handicap<sup>15</sup>
  - a genetic condition which indicates a high risk of developing a disease or handicap
  - is a member of a minority group
  - is a member of a sibling group
  - is 5 years of age or older

55 Pa. Code § 3140.202.<sup>16</sup>

### Who certifies the child as eligible for assistance?

The county children and youth agency certifies the child as eligible for adoption assistance. 55 Pa. Code §3140.202(a). *See also, York Co. Children & Youth Services v. D.P.W.*, 833 A.2d 281, 288 (Pa. Cmmw. 2003).

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<sup>14</sup> “The Pennsylvania Adoption Opportunities Act and enabling regulations specify that children who meet the child eligibility criteria and who are in either public or private agency custody are eligible to receive adoption assistance.” Office of Children, Youth and Families Bulletin No. 3140-99-01, question 2. *See also, C.B. ex rel. R.R.M. v. Com., Dept. of Public Welfare*, 786 A.2d 176, 185, 186 (Pa. 2001) (Child “effectively was, or should be deemed to have been, in the legal custody of DHS so as to satisfy the requirements of the Adoption Opportunities Act” when adoptive parents “had no permanent custody rights...and DHS presumably had the power to seek to remove the child from [their] custody.”)

<sup>15</sup> “A child who has been physically or sexually abused is considered to have an emotional condition or handicap even if current behaviors may not exhibit the condition or handicap.” Office of Children, Youth and Families Bulletin No. 3140-99-01, *Adoption Assistance Questions and Answers*, question 11.

<sup>16</sup> Adoption assistance payments qualify for federal financial participation when a child meets the eligibility requirements of the state Adoption Opportunities Act, is placed with approved adoptive applicants, and when one of the following situations exists: (1) The child is TANF (formerly known as AFDC) eligible and is living with a relative at the time the adoption petition is filed; (2) the child is receiving Title IV-E foster care placement maintenance payments at the time the adoption petition is filed; (3) the child is determined eligible by the Social Security Administration for Supplemental Security Income (SSI); or (4) the child is a child whose placement costs are covered by Title IV-E foster care maintenance payments made with respect to the child’s minor parent. 55 Pa.Code § 3140.205.

**How are the terms of subsidy agreement arrived at?**

The terms of the agreement are the result of a discussion between the prospective adoptive family and the county agency and are recorded in a binding, written agreement. 55 Pa. Code §3140.203(a); 55 Pa. Code §3140.204(a).

**What are the requirements of an adoption subsidy agreement?**

Adoption subsidy agreements must: (a) specify certain enumerated benefits and conditions, 55 Pa. Code §3140.203, 55 Pa. Code §3140.204; (b) consider certain enumerated circumstances when determining the amount of the subsidy, 55 Pa. Code § 3140.204; and (c) be executed before the date the court issues the final adoption decree, 55 Pa. Code §3140.203(a). Subsidy payments may begin after all child eligibility criteria, including the termination of parental rights, are met, the child is placed with the adoptive family, and the adoption assistance agreement has been signed by all parties. Office of Children, Youth and Families Bulletin No. 3140-99-01, *Adoption Assistance Questions and Answers*, citing 55 Pa. Code §3140.204(d).

**Can a family who adopted a child from the dependency system without a subsidy request a subsidy after the adoption has been finalized?**

A family can request a fair hearing on the issue of the child's eligibility for subsidy after finalization. The types of situations which would constitute grounds for a fair hearing include (a) relevant facts about the child were not known by the agency or presented to the family prior to finalization; (b) assistance was denied based on a means test of the adoptive family; (c) an erroneous determination was made by the county agency regarding the child's eligibility status; or (d) the agency failed to advise the family of the existence of adoption subsidy prior to finalization. Office of Children, Youth and Families Bulletin No. 3140-99-01, *Adoption Assistance Questions and Answers*, question 33. For example, a retroactive adoption subsidy was granted on appeal when the parents were originally provided with a summary of the child's medical history instead of the actual medical records and the county agency failed to inform the parents of the gravity of the child's emotional disorder. ***York Co. Children & Youth Services v. D.P.W.***, 833 A.2d 281,287-288 (Pa. Cmmw. 2003).

**What can a family do if the county agency refuses to certify the family for subsidy or the family disagrees with the terms of the agreement?**

If a family does not agree with an agency's (a) finding of ineligibility after a finding of eligibility; (b) denial or reduction of service;<sup>17</sup> or (c) termination or suspension of service, the family has a right to a hearing and appeal from the Department of Public Welfare's Bureau of Hearing and Appeals. 55 Pa. Code §3140.210. These hearings are conducted in accordance with the regulations for appeals in fair hearings at 55 Pa. Code §275.1- 275.5. The family must file an appeal of a county agency decision in writing within 15 calendar days of receiving notice of the agency decision. Office of Children, Youth and Families Bulletin No. 3140-99-01, *Adoption Assistance Questions and Answers*, question 34.

If the family loses its appeal in front of the Bureau of Hearing and Appeals (BFA), the family may ask the Secretary of Public Welfare to reconsider the BFA decision if the request is made within 15 days of the decision and/or file a Petition for Review with the Pennsylvania Commonwealth Court within 30 days of the mailing of the decision. (Both options may be pursued concurrently.) The Commonwealth Court will review the decision to determine (a) if an error of law was made; (b) whether there is substantial evidence in the record to support the BFA decision; or (c) whether constitutional rights were violated. Office of Children, Youth and Families Bulletin No. 3140-99-01, *Adoption Assistance Questions and Answers*, question 36. See also, **York Co. Children & Youth Services v. D.P.W.**, 833 A.2d 281, 285 n.11 (Pa. Cmmw. 2003).

**Can the terms of a subsidy agreement be amended?**

Yes. If family circumstances or the child's needs change over time, the family can request that the terms of the subsidy agreement be amended. If the agency declines to amend the agreement, the family can appeal that decision by requesting a fair hearing within 30 days of the agency's determination. Office of Children, Youth and Families Bulletin No. 3140-99-01, *Adoption Assistance Questions and Answers*, question 32.

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<sup>17</sup> This includes the full or partial denial of a request for an increase in subsidy. Office of Children, Youth and Families Bulletin No. 3140-99-01, *Adoption Assistance Questions and Answers*, question 32.

#### **IV. Permanent Legal Custodianship (PLC)**

##### **What is permanent legal custodianship? 42 U.S.C. §675(7), 42 Pa. C.S. §6351(f.1)(3)**

Permanent Legal Guardianship, as a permanency alternative for dependent children, was legislated by congress as part of ASFA. (ASFA uses the term “guardianship”; the Juvenile Act uses “custodianship.”) In the past, guardianship or custodianship has seldom been used as a permanency option for children in foster care. A discussion of guardianship and foster children can be found in: *Reinventing Guardianship: Subsidized Guardianship, Foster Care, and Child Welfare*, Meryl Schwartz, 22 N.Y.U. **Rev.L.& Soc.Change** 441 (1996).

Legal guardianship under ASFA is defined at 42 U.S.C. §675(7) as follows:

The term “legal guardianship” means a judicially created relationship between child and caretaker which is intended to be permanent and self-sustaining as evidenced by the transfer to the caretaker of the following parental rights with respect to the child: education, care and control of the person, custody of the person, and decision-making. The term “legal guardian” means the caretaker in such a relationship.

Federal regulations adhere closely to the ASFA definition and define the guardianship as “a judicially created relationship between child and caretaker which is intended to be permanent and self-sustaining as evidenced by the transfer to the caretaker of certain parental rights with respect to the child.” These parental rights include: protection, education, care and control of the person, custody of the person and decision making. 45 C.F.R. §1355.20(a).

In order to comply with the requirements of ASFA, Pennsylvania, in the 1998 Amendments to the Juvenile Act, established “permanent legal custodianship” as a permanency option for dependent children. 42 Pa. C.S. §6351(f.1)(3). DPW’s, Office of Children, Youth and Families (OCYF), issued its Permanent Legal Custodian Policy on August 20, 2003. Bulletin ##3130-03-01/3140-03-07. The Bulletins, discussed further below, address both PLC and subsidized

permanent legal custodianship (SPLC), a program that provides financial support to legal custodians.

As of this writing, Pennsylvania's appellate courts have not addressed the issue of permanent legal custodianship. The issue of whether a state statute regarding guardianship of a child qualified as "legal guardianship" under ASFA was addressed by the Delaware Family Court. ***In re Matter of Division of Family Services v. J.V.J.***, 820 A.2d 516 (Delaware Family Court, 2003) held that both types of Delaware guardianships, the permanent guardian, which is explicitly modeled on ASFA, and the guardian of the child, which is not, incorporate the requirements of ASFA, namely that: "The powers and duties granted by the Delaware statutes to both the guardian of the child and the permanent guardian, set forth those rights which evidence an intent, as the Federal statute states, "... *to be permanent and self-sustaining.*" The court proceeds to list the factors that make a relationship permanent and self-sustaining, namely custody and decision-making responsibilities being lodged with the guardian. ***Id.*** at 521. While noting that certain legal guardianships may have "different levels of permanency and self-sustainment" and are less permanent than termination and adoption, the court found that this alone does not invalidate the guardianship under ASFA.

### **When is PLC or SPLC an appropriate permanency goal?**

PLC or SPLC is third in the hierarchy of permanency alternatives available to the court in placing dependent children. When neither reunification nor adoption is appropriate or practical, permanent legal custodianship, either with or without a financial subsidy, may be the proper response. Sometimes parents are unable to care for their children and return home is not feasible within the limited period of time a child may remain in foster care or another temporary placement. Because PLC or SPLC, according to the OCYF Bulletin, permits parents to petition the court for a change in custody, parents who may not be able to rehabilitate themselves within the period of time children can remain in temporary foster care may be able to reunify with their child following the establishment of a PLC or SPLC. Of course, the best interests of the child will be the primary consideration in a custody dispute between a parent and a legal custodian. Another example of where PLC or SPLC may be an appropriate permanency option is a child who has a bond with a parent that will preclude termination of parental rights, thus ruling out adoption. In these cases, PLC or SPLC may be the best course of action.

**When is PLC or SPLC an inappropriate permanency goal?**

If reunification, within the time frame established by ASFA and the Juvenile Act, or termination of parental rights and adoption is possible, PLC or SPLC is **not** an available permanency alternative. However, PLC or SPLC may be an option for concurrent planning during the permanency review period, thus permitting the early identification of a legal custodian, if this becomes the best permanency choice available to the child.

The court must review the family profile of both the proposed permanent custodian and the child's biological parents to see if PLC or SPLC is in the child's best interest. Because visitation agreements are possible in PLC and SPLC arrangements, the custodian and the parent or parents must be able to maintain a cooperative relationship, with a clear understanding that decision-making responsibilities for the child now reside with the legal custodian.

Once a PLC or SPLC is established, the child is no longer a dependent child and supervision of the court and, in most instances, the child welfare agency, ceases. The child is no longer entitled to a lawyer and, therefore, may not be represented in visitation or support disputes, except as the court overseeing these disputes may deem appropriate. In Philadelphia, once a PLC or SPLC is established, the case is transferred from the juvenile branch to the domestic relations branch of the court of common pleas for resolution of issues such as custody, visitation and support. In instances where the juvenile court can foresee frequent custody or visitation disputes, the goal of PLC or SPLC should be reviewed to determine whether it is the best available permanency choice for the child. *It is important to remember that the intent of ASFA is for legal custodianships to be permanent and self-sustaining.*

**How does PLC or SPLC become a permanency goal?**

A petition for a goal change from reunification or another permanency option to PLC or SPLC is required. A hearing to determine the appropriateness and feasibility of the goal is necessary. The hearing should be conducted in the same manner as any other goal change hearing. See discussion regarding permanency and goal change hearings at pages 83-87 and 97-101.

**When may the court order PLC or SPLC?**

A child must be adjudicated dependent and placed in an approved foster family home for a period of at least six months before PLC or SPLC can be instituted. According to the OCYF Bulletin, the six months need not be consecutive. If the child is with a kinship caregiver or an emergency caregiver, the agency must approve the home according to regulations prior to the court's ordering PLC or SPLC. In Philadelphia, DHS has set other "threshold criteria" for legal custodianships, which include:

- Child has been in legal custody of the agency for at least six months.
- Child has been with the identified permanent legal custodian for at least six months.
- Child is six or older and living with kin, or child is 12 or older and living with non-kin.

**Who may be a permanent legal custodian?**

A legal custodian can be a relative, a formal kinship caregiver, an unrelated foster parent or another suitable adult individual. The person must be able to meet a child's need for a secure, legally and physically permanent relationship in a family-like setting. To be eligible for PLC or SPLC, a foster parent must meet all of the requirements for foster parenthood and cannot be on provisional status, must have obtained a fost/adopt<sup>18</sup> profile update, have current ChildLine and State Police/FBI clearances and agree, if a SPLC is established, to participate in annual reviews for continued eligibility for the subsidy.

**What authority does a permanent legal custodian exercise?**

With PLC and SPLC, the custodian, and not the agency or the parent, has decision making authority with respect to the child. A "legal custodian who receives legal custody of a child from the

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<sup>18</sup> Foster/Adoption Placements: These placements generally address children who are placed with the foster/adopt family before the parental rights of the birth parents have been legally terminated, so there is still a possibility that the child may eventually be reunited with his or her birth family. If the parental rights of the child's birth parents are terminated, the foster/adopt family will be given preference to adopt the child.

juvenile court...has the legal authority to make decisions regarding the child and to give consent for a variety of services on behalf of the child.” OCYF Bulletin ## 3130-01-02 & 3140-01-02 at 2. Before ordering a PLC or SPLC, the court must determine that the legal custodian is able to make medical, educational, travel and other decisions without the assistance of the agency or the court. Once the legal custodianship is established, the court is no longer involved on a regular basis, but may structure visitation between the parent and the child and issue orders for parental support payments.

### **What are some of the specific rights and duties of permanent legal custodians?**

The rights and duties of the permanent legal custodian, as spelled out in the 2003 OCYF Bulletins, are as follows:

- The right to physical custody of the child.
- The right to determine the care and treatment of the child, including ordinary medical care.
- The duty to provide for the care, protection, training and education, and the physical, mental, and moral welfare of the child.
- The right and duty to make decisions on behalf of the child, including decisions regarding the child’s travel, driver’s license, marriage, and enlistment in the armed forces.
- The right to petition for child support from the child’s parents.
- The obligation to pay legal expenses related to a parent’s request to change custody or visitation.
- The obligation to consult the agency, in SPLC cases, where a petition for child support is being considered.

The court must make sure that a potential legal custodian is informed of all the rights and duties he or she is undertaking.



**What are some of the specific rights and duties of parents whose children are in the custody of permanent legal custodians?**

The 2003 OCYF Bulletins set forth parental rights and duties as follows:

- The right to visitation when it does not affect the health and safety of the child.
- The right to petition the court for custody of the child.
- The right to pass on property to the child.
- The duty to pay child support.

These rights and duties apply to parents whose parental rights have not been terminated. The court must ensure that parents, whose rights have not been terminated, are informed of their rights and duties.

**What reasonable efforts inquiry should the court make before finalizing PLC or SPLC as a permanency plan?**

Before the court orders a PLC or SPLC, the following factors should be considered:

- The inter-relationship among the child, the birth parents and the prospective legal custodian.
- The concerns and capabilities of the prospective legal custodian and the ability of the legal custodian who receives a subsidy to continue to provide support for the child after the age of 18, when the subsidy ceases.
- The wishes of the child.
- The child's adjustment over the six month period he or she has lived with the legal custodian, including adjustment to the home, school and community.
- The best interests of the child, including the child's need for stability as well as continued relationships with the birth parents.

- With respect to SPLC custodians, the willingness to comply with annual eligibility review as well as the willingness to provide for the child once the subsidy ceases when the child reaches majority.

### **What does ‘permanency’ mean in the context of a PLC and SPLC?**

ASFA clearly intended legal custodianships to be permanent placements for dependent children. While clearly not the equivalent of adoption, legal custodianships should not subject the child to frequent changes in custody. Under the 2003 OCYF Bulletins, a parent or parents whose parental rights have not been terminated may petition the court for a change of custody in a PLC or an SPLC. Once a legal custodianship is created, the child is not entitled to independent legal representation in disputes involving custody or visitation. Both custodians and parents should be advised and should agree that the PLC or SPLC is intended to provide a permanent, stable placement for the child and frequent changes in custody, while they may occur, are not the anticipated outcome.

### **Is parental consent required for PLC or SPLC?**

Parental consent is not required for PLC or SPLC, although a parent should be able to challenge a goal change to PLC or SPLC in the appellate courts. As with other goal change decisions, an order establishing or refusing to establish a permanent legal custodianship as the child’s permanency goal should be considered immediately appealable. See *In the Interest of H.S.W.C.-B. & S.E.C.-B.*, 836 A.2d 908 (Pa. 2003).

### **Does PLC or SPLC require termination of parental rights?**

Unlike adoption, legal custodianship does not require termination of parental rights. If possible and appropriate, a relationship between the child and the parent can continue. A child placed in a PLC or SPLC without termination of parental rights maintains the right to inherit from a parent and to receive other forms of financial support. Termination of parental rights trials are often protracted and followed by time-consuming appellate review. Because termination is not

required in a PLC or SPLC, placement of the child in a permanent home may be achieved sooner than would be the case if termination and adoption is the goal. However, it is important to remember that, after reunification, termination and adoption is the preferred permanency choice for a child. Office of Children, Youth and Families Bulletin No. 3130-01-01, "The Revised Interim Implementation Guidelines for the Adoption and Safe Families Act (ASFA) of 1997 (P.L. 105-89)," effective February 2, 2001, at page 70.

**What are the agency's responsibilities once PLC or SPLC is ordered?**

Unless a new complaint or dependency petition is filed, the agency has no further authority over the child, the custodian or the parent. There will no longer be permanency placement reviews and the agency social worker need no longer pay monthly visits to the home, manage a family service plan or permanency plan or conduct foster-home re-evaluations. However, if it is determined that the custodial family needs in-home services to help with the success of the legal custodianship, the court may order an FSP and six month reviews to assist the "new" family. See OCYF Bulletin ## 3130-01-02 & 3140-01-02.

**What are the juvenile court's responsibilities once PLC or SPLC is ordered?**

Once PLC or SPLC is established, the dependency case is closed and the juvenile court no longer has jurisdiction over the child.

**What are some specific concerns that PLC and SPLC present?**

PLCs and SPLCs present several concerns. PLC and SPLC are meant to be permanent. However, according to the OCYF Bulletin, a parent is permitted to petition the court for a change in custody. The court should, to the extent possible, address this issue prior to establishing a legal custodianship, emphasizing the importance of permanency. A process should be put in place for the speedy resolution of all custody petitions involving PLC or SPLC orders. PLC and SPLC orders should also contain detailed visitation arrangements, where visitation is permitted, in order

to minimize disputes and preclude extended court involvement. Again, each jurisdiction should set up procedures to resolve visitation disputes expeditiously.

Like adoption subsidies, subsidies for legal custodianships end when a child reaches the age of eighteen. There are no extensions of the legal custodianship subsidy beyond this age. By contrast, youth who remain in the dependency system are eligible for extensions of care, which will allow them to receive services, under certain circumstances, until the age of twenty-one. The court should consider this fact for older youth for whom an SPLC or a PLC is being considered. In many cases, non-custodial kinship care or an APPLA may be a better alternative, leaving the youth eligible for assistance with education, job training and other essential subsidies until age 21. See Part III, Section One, of this Deskbook for a full discussion of the rights of older youth.

## **V. Subsidized Permanent Legal Custodianship (SPLC)**

### **What is subsidized permanent legal custodianship?**

Pennsylvania has a subsidy program aimed at ensuring that families willing to become permanent legal custodians have adequate financial support. The program was first announced in Children, Youth and Families Bulletin ##3130-01-02 & 3140-01-02, June 13, 2001. The terms of the program are restated and revised in Bulletin ##3130-03-01/3140-03-07 issued August 20, 2003. The subsidy is similar to the adoption subsidy and lasts only until the child reaches the age of 18.

### **When is SPLC an appropriate permanency goal?**

Where a PLC is the best permanency choice for a child, (see discussion at page 151), but where the prospective custodian cannot take on the responsibility for the child without a financial subsidy, SPLC should be considered. The custodian in a SPLC must agree to a yearly evaluation as to continued eligibility for the subsidy and must be able to provide for the child without court supervision and long-term agency involvement.

**When is SPLC an inappropriate permanency goal?**

SPLC might be inappropriate for the same reasons PLC might be inappropriate. These reasons include:

- Where the family circumstances may make it difficult to demarcate between the parent(s) and the legal custodians with respect to decision-making authority.
- Where the child is adoptable or where reunification with the family can be achieved within a reasonable time period. An extension of the time period for reunification is available in specific situations. See discussion at page 112.
- Where the child is older and might benefit from subsidies available through extensions of care, which would not be available if a SPLC is ordered.
- Where the SPLC family is not willing to provide essential support for the child beyond the age of 18, particularly if the child is older, an independent living facility or other transition program may be a better permanency choice.

**What does the subsidy provide?**

The SPLC family receives a financial subsidy, without continued court involvement, until the child reaches the age of 18. DPW requires a yearly review to determine continued eligibility for the subsidy. The amount of the subsidy is based upon the child's needs and the circumstances of the SPLC family. The subsidy may be adjusted to take into account child support paid by parents or other financial benefits the child may receive.

The child may also be eligible for Medical Assistance and in cases where the child receives Supplemental Security Income, the benefits will continue. The agency also has the option to continue family services, if deemed appropriate. See OCYF Bulletin ## 3130-01-02 & 3140-01-02 for a complete list of entitlement programs available to a child in a SPLC.

## **VI. Placement with a Fit and Willing Relative**

### **When is placement with a fit and willing relative an appropriate permanency goal? 42 Pa. C.S. §6351(f.1)(4)**

The Juvenile Act provides for permanent placement with a fit and willing relative as the fourth choice in the hierarchy of permanency alternatives available to the court in placing dependent children. The court must determine that reunification, adoption and permanent legal custodianship are not “best suited to the safety, protection, and physical, mental and moral welfare of the child” before ordering permanent placement with a fit and willing relative. A permanency hearing should address each alternative to placement with a relative in order to assure that this placement is the best permanency option available to the child and not merely a stopgap solution.

### **When is placement with a fit and willing relative an inappropriate permanency goal?**

If a child can be reunified with his or her birth parents or is eligible for adoption and the child is placed with non-relatives who are willing to adopt, placement with a relative may be inappropriate. If adoption is a viable permanency alternative, placement with relatives may detract from that goal.<sup>19</sup> However, placement with a relative “best suited to the physical, mental and moral welfare of the child” is an exception to the requirement that the court ask, when a child has been in substitute care for 15 out of the last 22 months, whether the agency has filed or sought to join a petition to terminate parental rights and to identify, recruit, process and approve a qualified family to adopt the child. 42 Pa. C.S. §6351(f)(9)(i). If the court believes the family, with more time, might be able to reunify, or that relative placement is the best permanency plan, continued placement with the relative may be appropriate. If, on the other hand, the court believes that the agency is simply using placement with a relative because it has not fully explored adoption or permanent legal custodianship, the court should not permit the exception.

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<sup>19</sup> In its 2000 report to congress, DHHS states that dependent children, placed with kin, are less likely to have adoption as part of their permanency planning. (US Dept. of Health and Human Services: Report to Congress on Kinship Foster Care, June 2000).

**What is Pennsylvania's Kinship Care Program? Act 2003-25**

Pennsylvania's Kinship Care Program, effective March 30, 2004, directs county children and youth agencies, when placing children, either under a voluntary placement agreement or when they are in the legal custody of a county agency, to give **first** consideration of placement to relatives. (Emphasis supplied).

The placement preference of the Kinship Care Program, should not affect permanency planning under the Juvenile Act and ASFA, which govern permanent placement and designate a fit and willing relative as the fourth choice of a permanency goal for a child. However, the Kinship Care Program may benefit both the relative and the child because it requires the agency to find relatives for initial placement and to qualify them for foster care payments and other services. However, the court must still address ASFA and the Juvenile Act's permanency priorities even when a child is placed with a relative pursuant to the Kinship Care Program.

**Who comes within the definition of "relative?"***ASFA & THE JUVENILE ACT*

ASFA and the Juvenile Act do not define "relative" for purposes of identifying persons with whom a child could be permanently placed. The Office of Children and Youth of the Department of Public Welfare has supplied a definition of relative for use by agencies in placing dependent children:

Children, Youth and Families Bulletin #00-03-03, effective September 29, 2003, defines kinship care as: "The full-time nurturing and protection of a child who is separated from his/her parents and placed in the home of a caregiver who has an existing relationship with the child and/or the child's family. The existing relationship involves one of the following characteristics:

- Relative of the child through blood or marriage;
- Godparent of the child as recognized by an organized church;

- Member of the child's tribe or clan; or
- Significant positive relationship with the child or the child's family.

The Bulletin's definition is more expansive than the Kinship Care Program's definition. It provides more possibilities for a child's placement with people already maintaining a positive relationship with the child or family. For example, a God parent, unrelated by blood or marriage, might be a more significant person in a child's life than a relative of the third degree through a stepparent.

### *THE KINSHIP CARE PROGRAM*

The Kinship Care Program defines a relative as "someone related within the first, second or third degree to the parent or stepparent of the child who may be related through blood or marriage and who is at least 21 years of age." The Kinship Care Program requires the agency to give first consideration to relatives when initially placing a child. Act No. 2003-25, Paragraph (b).

### **How does placement with a fit and willing relative become a permanency goal?**

A petition must be filed requesting a goal change from reunification or another permanency option to permanent placement with a fit and willing relative. The permanency hearing should be conducted in the same manner as any other goal change hearing. (See pages 83-94 for a full discussion of permanency hearings.) If a child is initially placed with a relative in accordance with the Kinship Care Program, a petition and hearing as to whether this is an appropriate permanent placement must still take place. Issues may arise, such as, which of a number of relatives is best suited to the child. Issues may also arise as to whether the relative wishes to and should adopt the child or become the child's permanent legal custodian. A non-relative may be a better choice for either temporary or permanent placement of a child. See, e.g., *In the Interest of C.S.*, 580 A.2d 418 (Pa. Super. Ct. 1990).



**Should the court order the agency to engage in concurrent planning when a child is placed with a relative?**

Concurrent planning for a child's permanent placement is an important facet of ASFA and the Juvenile Act's permanency planning for children in substitute care. The Kinship Care Program does not refer to concurrent planning in its designation of placement with a relative as the primary, initial choice for children. However, concurrent planning may prove particularly appropriate when a child is placed with a relative in the first instance. Concurrent planning will enable the agency and the court to inform the relative of alternative options for the child, including, if reunification is not possible, the child's adoption by the relative or the relative's assumption of permanent legal custodianship.

**When may the court order permanent placement with a fit and willing relative? 42 Pa.C.S. §6351 (e)(3)(ii) & (f.1)(4).**

Unlike PLC and SPLC (see discussion at page 153), DPW has not set a minimum time-frame before a relative can be considered as permanent placement for dependent children. The court must, of course, first rule out reunification, adoption and permanent legal custodianship, before placing a child permanently with a relative. If there is a finding of aggravated circumstances and the court finds that the agency need not engage in reunification efforts, and the court can rule out adoption and permanent legal custodianship, permanent placement with a relative could be ordered as soon as 30 days after a child is adjudicated dependent. 42 Pa. C.S. §6351 (e)(3)(ii) & (f.1)(4).

**What reasonable efforts inquiry should the court make before ordering permanent placement with a fit and willing relative?**

In evaluating the proposed relative, the court should consider and make sure the agency has evaluated:

- The nature and quality of the relationship between the child and the relative caregiver.
- The relative caregiver's commitment and ability to provide a stable, long-term home for the child.
- The relative caregiver's ability to provide a safe and nurturing environment for the child and, when necessary, to keep the child away from an abusive parent or parents.
- The relative caregiver's ability and willingness to work with the parents and agency and to accept services necessary to assist the relative in parenting and other issues related to the placement.
- The connections among siblings that might be preserved through placement with the relative caregiver.
- The child's wishes with respect to the placement with the relative caregiver.
- The availability or lack of an alternative permanent solution, including reunification, adoption or permanent legal custodianship.

The court should insist upon a thorough home study, which details family composition, the quality of the residence, the family's financial status, employment, mental health history, health concerns, including physical limitations, educational background and other information to assist the court in making a decision as to whether or not the relative offers the best permanency option available to the child. The court must have sufficient information to determine whether the placement is stable and long-term. Relatives may feel pressure to accept a child they do not really want. They may also take a child to prevent the agency from filing a termination of parental rights petition. The court should ferret out this information. As with every other permanency choice, placement with a fit and willing relative must be a considered choice based upon the best information available. **The court's findings should be detailed and child specific.**

**Is permanent placement with a fit and willing relative a subsidized permanency choice?**

Effective March, 30, 2004, the Kinship Care Program provides that relatives who comply with the rules and regulations governing foster parents shall receive the same foster care rate (per diem) as other foster care parents. See *also* OCYF Bulletin #00-03-03, p. 6.

If a relative becomes a subsidized permanent legal custodian, he or she would be eligible for funds and entitlements that attach through that program. See discussion at page 159.

**What are the agency's responsibilities once a child is permanently placed with a fit and willing relative?**

It is the agency's responsibility to provide kinship or relative caregivers with relevant support services and to ensure that they are informed about foster care maintenance payments, or TANF benefits and the availability of medical assistance. OCYF Bulletin #00-03-03. The court should make sure that all caregivers are fully informed of agency responsibilities. The agency should inform the relatives of adoption and permanent legal custodianships as permanent options.

If permanency planning for a child determines that the goal for the child is placement with a fit and willing relative and such placement is ordered, the dependency case remains open and six-month reviews continue. 65 Fed. Reg., 4060 (January 25, 2000). The court should ensure that relative caregivers, who wish to be relieved of court oversight, as well as agency involvement, are informed of permanent legal custodianships, with or without the subsidy or, if termination of parental rights is an option, adoption of the child in their care, with or without adoption subsidies.

The following have been recognized as service needs of relative caregivers. The court should inquire into whether these services are needed by relative caregivers and the children in their care:

- Respite care
- Educational tutoring

- Mental health assessments and treatment for children
- Summer and after-school programs
- Assistance in accessing medical and dental and other health services for the children
- Assistance in enrolling children in school and vocational training programs

**What is the legal status of a fit and willing relative with whom a child is permanently placed?**

Neither ASFA nor the Juvenile Act defines the legal status of a relative who becomes a permanent caregiver for a child. Is the relative's status that of a foster parent, in which case the relative would not have standing to challenge decisions relating to the child? Or does the relative obtain the status of a person who stands *in loco parentis* to the child? Other than grandparents or persons who stand *in loco parentis*, third parties do not have standing in child dependency cases. See discussion at pages 189-190. It is arguable that a fit and willing relative with whom a child is permanently placed does stand *in loco parentis*, however, this issue remains to be decided by the courts.

**Is a goal change to placement with a fit and willing relative appealable?**

*In the Interest of H.S.W.C.-B. & S.E.C.-B.*, 836 A.2d 908 (Pa. 2003), a case involving termination and adoption, affirmed that goal changes, or the denial of goal changes and the maintenance of the status quo, are appealable. While no reported opinions exist addressing this issue, it would seem arguable that a goal change to placement with a fit and willing relative, or refusal to order such a goal change, is also appealable.

**Pros and Cons of Relative Placement**

The court should consider the following pros and cons when determining whether permanent placement with a fit and willing relative should be ordered.

**PROS**

- Relatives often have a sense of familial responsibility and may be more committed to keeping the child on a long-term basis that will continue beyond the child's reaching the age of majority.
- It is easier to preserve the bond the child has to his biological family, including siblings.
- Placement with relatives may reduce the trauma of being removed from the home and may allow the child to adjust more easily than he or she might if placed with strangers.
- Placement with relatives allows the child to preserve his or her cultural identity and heritage.

**CONS**

- The most appropriate relative may be a grandparent who may have limitations due to age or illness.
- Relatives may protect the parent or deny maltreatment or neglect occurred, which may result in the child remaining at risk.
- Relatives may be unwilling to adopt because it means severing parental rights.
- Relatives themselves may be abusive or neglectful because they come from the same troubled family background as the parent.
- Relatives and parents may be hostile toward one another, making it harder for the agency to work with the parent than if the child had been placed with an unrelated caregiver.

Adapted from *Making it Permanent*, AMERICAN BAR ASSOCIATION CENTER ON CHILDREN AND THE LAW.

## **VII. Alternative Planned Permanent Living Arrangements**

### **What is APPLA? 42 U.S.C. §475(5)(C) and 42 Pa. C.S. §6351(f.1) (5)**

ASFA defines “APPLA” as “any permanent living arrangement not enumerated in the statute.” 42 U.S.C. §475(5)(C). The Juvenile Act does not define APPLA, but in making its determination to designate an APPLA as a permanent placement, the county agency must document “a compelling reason that it would not be best suited to the safety, protection and physical, mental and moral welfare of the child” to be placed in any of the four other permanency placements afforded by the Juvenile Act. 42 Pa. C.S. §6351(f.1)(5). APPLA is the only placement option that requires the agency to document a compelling reason for its choice.

### **When can the court consider an APPLA as a permanency goal?**

The permanency goal of APPLA is the **last** option provided for under ASFA and the Juvenile Act. While it is the last option, it is still intended to be a permanent arrangement that can be a goal for the child. APPLA is not a foster care placement that can be extended indefinitely. 65 Fed. Reg., 4036 (January 25, 2000). The court should not allow the agency to use APPLA as a pretext for a temporary plan that does not serve the permanency needs of the child.

### **What must the court address when presented with APPLA as a permanency goal?**

The court must ensure that all other permanency options—reunification with the child’s family, adoption, permanent legal custodianship and permanent placement with a fit and willing relative—are not possible for the child. The agency must document a “compelling reason” to select APPLA as a permanency goal. The compelling reason must address the safety and welfare of the child.

**When might there be a compelling reason to select APPLA as a permanency goal?**

The ASFA regulations, 45 C.F.R. §1356.21(h)(3)(i),(ii)&(iii), provide examples of reasons for choosing the APPLA option:

- When an older teen requests independent living or emancipation as his or her permanency plan.
- When a parent and child have a significant bond, which precludes termination, but the parent is unable to care for the child because of an emotional or physical disability and the child's foster parents have committed to raising the child to the age of majority and will facilitate visitation.
- When because of medical or psychiatric special needs, the child would benefit from institutional care or cannot be provided appropriate services in a family setting.

An APPLA might also be appropriate when a child is involved in both the dependency and delinquency systems and would benefit from a facility for dependent rather than delinquent children.

**Should the court order the agency to engage in concurrent planning?**

APPLA offers the most obvious occasion for concurrent planning. The court should instruct the agency to consider APPLA and another alternative, including reunification, adoption, legal custodianship or relative placement even after APPLA is finalized as the child's permanency placement. The agency should continue to search for family-centered placements for every child.

**What is – and is not – “APPLA”?**

“Another living arrangement intended to be permanent in nature” (APPLA) is not defined by the Juvenile Act. Ideally, it is an arrangement that offers the permanency similar to that provided by a family, i.e., it provides consistent emotional support and shelter until the youth achieves independence or ages out of care. The court should inquire into the specifics of such a placement

and spell out these specifics in an order, to ensure that the situation provides permanency and not just long-term foster care to the youth. As the ABA Center on Children and the Law has stated, “the agency must provide reasons why the living arrangement is expected to endure.” MAKING IT PERMANENT at p. 79. For example, the agency can identify a specific adult or couple whose relationship will continue beyond the dependency case, or a network of adults, including relatives and/or non-relative mentors, who agree to provide long-term support to the youth.

### **What types of living arrangements might qualify as an APPLA?**

APPLA can be many types of living arrangements, including supervised independent living arrangements, residential treatment facilities, institutional placements and other placements. These placements may be the most appropriate permanent placement for a child or may be an interim placement while more permanent, family-centered options are investigated and found. The court, at each permanency review hearing, should examine the APPLA and inquire thoroughly into its appropriateness and the agency’s efforts to find other permanency options that may become available.

### ***GROUP CARE/RESIDENTIAL TREATMENT***

Group care as an APPLA should require clear evidence that the child will not be able to function in a family setting before reaching adulthood. Before finalizing group care as a child’s permanency plan, the court should inquire as to whether the agency has attempted to locate or identify persons who could serve as a guardian or relative caregiver for the child. If a child is in group care, the court should instruct the agency to identify individuals who can provide a family-centered alternative on a regular basis. Group care should, in almost every case, be seen as a step towards achieving another permanency alternative. The court should periodically revisit adoption or placement with a relative or permanent legal custodian as permanency goals for these older youth in group and institutional placements. Circumstances and outlooks change over time. A youth who may not have considered adoption at age 12 may feel more comfortable with that choice at age 15. A sibling or relative who was not formerly available may become able to provide care for the youth as a kinship caretaker or a permanent legal custodian. Or the youth may have developed supportive relationships with mentors and friends who may be viable foster care or



adoption resources. Agency workers and judges should ask youth if there are relative or non-relative resources that should be explored.

### *SUPERVISED INDEPENDENT LIVING*

Supervised independent living may be likened more to the provision of specific services than a permanency goal. If independent living is chosen as the best available placement for a youth, the services should meet all of his or her physical, psychological, emotional, and educational needs. The court should ask the agency for evidence as to why it expects this living arrangement will be stable and for a specific list of services the agency will provide to ensure the child's needs are met. These needs may include the provision of:

- Safe and adequate housing
- Access to education
- Job skills training and access to employment
- Means to maintain family connections, including connections with siblings and extended family
- Means to maintain cultural identity and connections to peers
- Access to health care, including physical, mental and dental health services and gynecological services for girls
- Training in the use of transportation systems, financial management, home management and self-advocacy

### *FOSTER CARE PLACEMENT*

Finally, DPW's Office of Children, Youth & Families has stated that placement with a particular foster family will likely *not* be an acceptable APPLA unless the county agency has documented: (1) why it would serve the child's best interest not to return home, be adopted, or be placed with relatives or a permanent legal custodian; and (2) that this particular foster family intends to provide for this child permanently and their commitment to the child extends beyond the child reaching the age of 18. See Office of Children, Youth and Families Bulletin No. 3130-01-01, "The Revised Interim Implementation Guidelines for the Adoption and Safe Families Act (ASFA) of

1997 (P.L. 105-89)," effective February 2, 2001, at p. 99. The ABA Center on Children and the Law concurs that permanent placement with a foster family who has agreed to care for the child indefinitely is an acceptable permanency plan, while placement in the foster care system with no specific family identified, is not. See MAKING IT PERMANENT at p. 81

**What reasonable efforts inquiry should the court make before ordering APPLA as a permanency plan?**

As with all permanency plans, ASFA and the Juvenile Act require the court to make a finding as to whether the agency made reasonable efforts to finalize the child's permanency plan. **The court's findings in this regard should be detailed and child specific.** In the case of an APPLA as a permanency choice, the court must be exceedingly vigilant in examining and laying out the needs of the child and the agency's ability to provide for those needs. APPLA's are often considered for older children and the needs of these children, particularly those who have been a part of the foster care system for a length of time, are considerable.

The court should ask the following questions at an APPLA reasonable efforts inquiry:

- Have other permanency options been fully considered and ruled out?
  - What are the reasons other options have been ruled out?
- Has the agency made sufficient efforts to identify and recruit a permanent placement for the child in a more family-centered environment with:
  - Parents or stepparents?
  - Relatives?
  - Current or former caretakers who may qualify to become permanent legal guardians?
  - Mentors, coaches, teachers, counselors or employers who may qualify to become permanent legal guardians?
- Have the child's wishes been considered?
  - Is this APPLA placement the best way to meet the child's needs?

- For youth 16 and older, will the APPLA assist in providing transition to independent living services as required by 42 Pa. C.S. § 6351(f)(8)?

APPLA placements should be the subject of ongoing court scrutiny at each permanency review hearing.

**Can a court refuse to make a finding of reasonable efforts to achieve the permanency plan of independence if adequate independent living services are not provided?**

Yes. The Adoption and Safe Families Act added the requirement that courts make findings that reasonable efforts to achieve whatever permanency plan is chosen for the youth at each permanency review hearing. See Office of Children, Youth and Families Bulletin No. 3130-

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The court has the power to induce the agency to provide for the child. Until the court makes a positive finding that the placement may be finalized in that it meets the needs of the child, the agency is ineligible for IV-E dollars.

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01-01, "The Revised Interim Implementation Guidelines for the Adoption and Safe Families Act (ASFA) of 1997 (P.L. 105-89)," effective February 2, 2001, 28-29, 51. Pennsylvania's Juvenile Act was amended on December 9, 2002, by Act 215, to reflect this requirement. This finding must be made for the state to receive Title IV-E reimbursement. If the court does not believe that the youth is being provided with sufficient services to actually allow him or her to meet the goal of independence, no finding of reasonable efforts should be made. The court should scrutinize the efforts being made to help a youth achieve independence in the same manner that it reviews efforts made to reunify youth with their families or find adoptive homes. See Karen Aileen Howze, HEALTH CARE FOR TEENS IN CARE, American Bar Association Center for Children and The Law (Washington, D.C., 2002) (discussing this theory in depth).

## Part II

### Section Five

#### *OTHER LEGAL ISSUES RELATING TO DEPENDENCY MATTERS*

##### I. The Rights of Third Parties

In the context of this Deskbook, third-parties are persons, other than biological or adoptive parents whose parental rights have not been terminated, who seek to participate in a dependency proceeding.<sup>20</sup> Third parties can include relatives, (including siblings), non-relatives, foster parents, prospective adoptive parents, and biological and adoptive parents whose parental rights have been terminated. *Silfies v. Webster*, 713 A.2d 639, 643 (Pa. Super. Ct. 1998) (persons other than the child's parents are considered 'third parties'); *In re Adoption of S.P.T.*, 783 A.2d. 779 (Pa. Super. Ct. 2001) (biological mother who had previously terminated her parental rights was a third party and lacked standing to bring adoption petition when adoptive parent died). Siblings have also been considered third-parties in the context of dependency proceedings. *Ken R. on behalf of C.R. v. Arthur Z.*, 651 A.2d 1119 (Pa. Super. Ct. 1994), *aff'd.*, 682 A.2d 1267 (Pa. 1996).

##### A. The Rights of Grandparents

**When do grandparents have standing to assert the right to partial custody or visitation regarding a dependent child? 23 Pa. C.S. §5311; 23 Pa. C.S. §5312; 23 Pa. C.S. §5313(a)**

Grandparents have statutorily conferred standing to petition for partial custody or visitation in three instances. The application of this statute is not confined to dependent children.<sup>21</sup>

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<sup>20</sup> The landscape of third-party rights to standing, custody, adoption, notice and the right to be heard in regard to dependent children has historically been determined by state-level case law, primarily superior court opinions. Third-party rights have also been partially codified and augmented in three sets of statutes: (1) provisions of the Juvenile Act that have implications for "relatives providing care," 42 Pa.C.S.A. § 6301 *et seq.*; (2) the Adoption Act, 23 Pa.C.S.A. § 2101 *et seq.*; and (3) Sections 5311- 5314 of the Domestic Relations code outlining the rights of grandparents to petition for custody and visitation.

<sup>21</sup> Non-dependency cases are discussed in this section because the holdings and/or theories in these cases have been or may be applied in the dependency context.

1. When the parent of an unmarried child is deceased, the parents of the deceased parent have standing to seek partial custody or visitation rights to their grandchild. 23 Pa. C.S. §5311.
2. Grandparents have standing to seek partial custody or visitation when the parents' marriage is dissolved or the parents have been separated for at least six months. 23 Pa. C.S. §5312. Section 5312 allows biological grandparents to seek partial custody and/or visitation even with a grandchild born out of wedlock where the child's parents' relationship has ended. **Malone v. Stonebrook**, 843 A.2d 1278 (Pa. Super. Ct. 2004); **Rigler v. Treen**, 660 A.2d 111, 113 (Pa. Super. Ct. 1995). Grandparents have standing to seek visitation even when parents' relationship was only a "brief encounter," and parents never married or cohabited. **Bishop v. Piller**, 637 A.2d 976, 977, 978 (Pa. 1994).
3. Grandparents have standing to seek partial custody or visitation when (1) a grandchild has resided with his or her grandparents for a period of 12 months or more and (2) is subsequently removed from the home by his or her parents. 23 Pa. C.S. §5313(a); **Gordon v. Lowell**, 95 F.Supp.2d 264, 269 (E.D. Pa. 2000).

The above statutory provisions limit grandparents' standing to seek partial custody or visitation to these three instances.<sup>22</sup> As discussed at page 177, though grandparents have *limited* standing to seek *partial* custody and visitation, the Pennsylvania Supreme Court has held that grandparents have *automatic* standing to pursue *full* physical and legal custody. **R.M. v. Baxter**, 777 A.2d 446, 451 (Pa. 2001). The limitation on visitation or partial custody, which could potentially interfere with a parent's relationship with his or her child, in contrast to full custody, which essentially replaces the parent-child relationship, is in keeping with the U.S. Supreme Court's decision in **Troxel v. Granville**, 530 US 57 (2000). In **Troxel**, the court held that a state statute allowing "any person" to petition for visitation rights, and authorizing courts to grant visitation whenever it would serve the best interest of the child, was unconstitutionally broad in

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<sup>22</sup> The state Superior Court, which noted the "Supreme Court's expansive, rather than restrictive, reading of statutory language conferring standing upon grandparents in matters pertaining to visitation and custody" has read the Supreme Court's decision in **R.M. v. Baxter** to hold that grandparents have automatic standing to pursue custody and visitation of a [dependent] grandchild." **Adoption of J.D.T. and J.T.T.**, 796 A.2d 992, 995 (Pa. Super. Ct. 2002). See also, **K.B. II, K.B. and B.B. v. C.B.F.**, 833 A.2d 767 (Pa. Super. Ct. 2003) ("automatic standing provision of 23 Pa. C.S.A. § 5313 applies to grandparents pursuing custody and visitation of a child."). However, **R.M. v. Baxter** held only that grandparents have automatic standing to pursue full *physical and legal custody* of a dependent grandchild. The court did not address grandparents' standing regarding partial custody and visitation. 777 A.2d 446, 451 (Pa. 2001). Therefore, despite the Superior Court holdings, it is not clear that grandparents would have standing to pursue partial visitation and custody as against parents independently of the three situations identified by statute (deceased parent, parents separated, child lived with grandparent for 12 months).

violation of parents' fundamental liberty interest in the care, custody and control of their children. 530 US at 65.<sup>23</sup> This standard would not be fully applicable to cases where the child has been declared dependent and is placed outside the home. In this situation, the parents' interest in the care and control of their child has already been compromised.

Even if there is some doubt as to whether a grandparent has standing, the court should err on the side of taking testimony in accordance with its obligation to consider all evidence that has a bearing on the child's best interests. *In re Adoption of Hess*, 608 A.2d 10, 15 (Pa. 1992) ("A child's interests are best served when all those who demonstrate an interest in his or her welfare are allowed to be heard.").

The termination of biological parent's rights alone does not terminate the visitation rights of biological grandparents. *Rigler v. Treen*, 660 A.2d 111 (Pa. Super. Ct. 1995). However, a grandparent no longer has standing if the child is adopted by third parties who are not the stepparents or the grandparents of the child. 23 Pa. C.S. §5314; *Rigler v. Treen*, 660 A.2d 111, 113 (Pa. Super. Ct. 1995), citing *Suroviac v. Mitchell*, 500 A.2d 894 (Pa. Super. Ct. 1985).

Independent of a grandparent's right to standing, the Juvenile Act empowers the court to transfer either temporary or legal custody of a child to a qualified relative. 42 Pa. C.S. §6351(a)(2)(i) (court can transfer temporary legal custody to any relative found to be qualified to receive and care for the child); 42 Pa. C.S. §6351(a)(2.1) (court can transfer permanent legal custody to any relative found to be qualified to receive and care for the child). The court may also determine that the child be placed with a fit and willing relative as part of the child's permanency plan. 42 Pa. C.S. §6351(f.1)(4).

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<sup>23</sup> Note that "the *Troxel* court cited *with approval* statutes comparable to [Pennsylvania's grandparent visitation statute], which do not contain the broad, sweeping language like that in the [contested] statute." *Douglas v. Wright*, 801 A.2d 586, 591, n. 1 (Pa. Super Ct. 2002)

**What is the legal standard for evaluating grandparents' claims for partial custody or visitation of a dependent child?**

The statutory provisions granting grandparents standing to pursue partial custody or visitation state that “reasonable partial custody or visitation rights, or both” should be granted when (1) it would be “in the best interests of the child” and (2) it “would not interfere with the parent-child relationship.” 23 Pa. C.S. §5311; 23 Pa. C.S. §5312; 23 Pa. C.S. §5313(a). See, **Douglas v. Wright**, 801 A.2d 586, 591, n. 1 (Pa. Super. Ct. 2002) (“the paramount concern in both custody and visitation cases, including those in which grandparents are seeking rights, is the best interests of the child”); **Johnson v. Diesinger**, 589 A.2d 1160, 1164 (Pa. Super. Ct. 1991) (“the polestar in any child custody dispute is to reach a decision which serves the best interest of the child”).

There is no clear case law evaluating the possible interference with a parent-child relationship that could be caused by grandparent visitation when the child is in state custody (i.e. foster care). However, it stands to reason that if a child is placed in foster care and the permanency goal is *adoption*, interference with the parent-child relationship is significantly less problematic. Furthermore, 23 Pa. C.S. §5301 *et seq.* “demonstrates an intention on the part of the legislature to encourage the maintenance of family relationships wherever possible.” **In re Adoption of Hess**, 608 A.2d 10, 13 (Pa. 1992). When a dependent child is separated from his or her parent/s it may be even more important to facilitate connections with other family members. In contrast, if a child has been adjudicated dependent but the permanency goal is *reunification*, grandparents should only be granted standing to seek partial custody when the implementation of such custody would not be unduly disruptive to the parent-child relationship or in violation of the parent’s constitutional right to the care, custody and control of his or her child. See **Troxel v. Granville**, 530 US 57, 65 (2000).

**When do grandparents have standing to assert the right to full physical or legal custody of dependent grandchildren? 23 Pa. C.S. §5313(b), 42 Pa. C.S. §6351(a)(2)(i) & (a) (2.1), 42 Pa. C.S. §6351(f.1)(4)**

Grandparents have automatic standing to pursue physical and legal custody of a grandchild after the child has been adjudicated dependent. *R.M. v. Baxter*, 777 A.2d 446, 451 (Pa. 2001); *K.B. II, K.B. and B.B. v. C.B.F.*, 833 A.2d 767 (Pa. Super. Ct. 2003); *Adoption of J.D.T. and J.T.T.*, 796 A.2d 992, 995 (Pa. Super. Ct. 2002).<sup>24</sup>

A grandparent would not have standing to pursue full physical or legal custody once the child is adopted by third parties who are not the stepparents or the grandparents of the child. 23 Pa. C.S. § 5314, *Rigler v. Treen*, 660 A.2d 111, 113 (Pa. Super. Ct. 1995), citing *Suroviec v. Mitchell*, 500 A.2d 894 (Pa. Super. Ct. 1985).

Independent of a grandparent's standing, the Juvenile Act empowers the court to transfer either temporary or legal custody of a child to a qualified relative. 42 Pa. C.S. §6351(a)(2)(i) (court can transfer temporary legal custody to any relative found to be qualified to receive and care for the child); 42 Pa. C.S. §6351(a)(2.1) (court can transfer permanent legal custody to any relative found to be qualified to receive and care for the child).<sup>25</sup> The court can also determine that the child be placed with a fit and willing relative as part of the child's permanency plan. 42 Pa. C.S. §6351(f.1)(4).

**What is the legal standard for evaluating grandparents' claims for full physical or legal custody? 23 Pa. C.S. §5313(b)**

The "requirements a grandparent must establish to prevail on the merits of a custody claim" are laid out in 23 Pa. C.S. §5313(b)(1)-(3). *R.M. v. Baxter*, 777 A.2d 446, 451 (Pa. 2001). These requirements are that (1) the grandparent has genuine care and concern for the child; (2) the grandparent's relationship with the child began with the consent of a parent of the child or pursuant

<sup>24</sup> See footnote 22.

<sup>25</sup> The recently enacted Kinship Care Act, (Act 2003-25), effective March 30, 2004, amends P.L. 31, No. 21 and requires that a county agency placing a dependent child "shall give first consideration of placement to relatives before other forms of placement are explored."



to an order of the court; and (3) the grandparent (a) for 12 months assumed the role and responsibilities of the child's parent, or (b) assumes the responsibility for a child who has been determined to be a dependent child, or (c) assumes or deems it necessary to assume responsibility for a child who is substantially at risk due to parental abuse, neglect, drug or alcohol abuse or mental illness. The fact that a child has been declared dependent "does not negate the fact that [a grandparent] 'deems it necessary to assume responsibility for a child who is substantially at risk due to parental abuse.'" **Martinez v. Baxter**, 725 A.2d 775, 778 (Pa. Super. Ct. 1999), *aff'd*, **R.M. v. Baxter**, 777 A.2d 446 (Pa. 2001).

The child's best interests must still prevail over a grandparent's right to custody. The superior court affirmed an order placing a child in foster care at the mother's request. The father, who was serving a sentence for drug and alcohol-related offenses at the time, appealed. He argued that the daughter should have been placed in the custody of the paternal grandmother. However, concerns about the paternal grandfather, who had been convicted of statutory rape thirty years earlier, were deemed legitimate enough to justify the child's placement in the foster home over the grandparents' home. **In the Interest of C.S.**, 580 A.2d 418 (Pa. Super. Ct. 1990).

### **When do grandparents have standing to petition for termination of parental rights?<sup>26</sup> 23 Pa. C.S. §2512**

A grandparent has standing to petition for the termination of parental rights if he or she is "the individual having custody or standing *in loco parentis* to the child." 23 Pa. C.S.A. § 2512(a)(3). "Custody" in [this provision of the statute] refers to legal custody, not merely physical custody." **In re Adoption of Crystal D.R.**, 480 A.2d 1146, 1148 (Pa. Super. Ct. 1984). A person acting *in loco parentis* is a person "who puts himself in the situation of assuming the obligations incident to the parental relationship without going through the formality of a legal adoption. The status of *in loco parentis* embodies two ideas: first, the assumption of parental status, and second, the discharge of parental duties." **In re Adoption of W.C.K.**, 748 A.2d 223, 230 (Pa. Super. Ct. 2000) (citations omitted). "In order for there to be a legitimate assumption of parental status, it is not necessary for the natural parent to expressly consent to adoption, but at the very least, the natural parent must agree to a permanent placement of his or her child." **In re Adoption of W.C.K.**, 748 A.2d 223, 230

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<sup>26</sup> For more information, see the section on termination of parental rights at page 115.

(Pa. Super. Ct. 2000). A grandparent who is “in effect, a baby-sitter for the child, albeit a frequent caretaker” does not stand *in loco parentis* to the grandchild. **Argenio v. Argenio**, 703 A.2d 1042, 1044 (Pa. Super. Ct. 1997). In contrast, a grandparent who was granted custody of her grandchild by court order and who cared for the child for three years did stand *in loco parentis*. **Walkenstein v. Walkenstein**, 663 A.2d 178, 180 (Pa. Super. Ct. 1995).

### **When do grandparents have standing to seek to adopt their grandchildren?**<sup>27</sup>

Grandparents always have standing to participate in adoption proceedings of their grandchildren. **In re Adoption of Hess**, 608 A.2d 10, 12 (Pa. 1992). Grandparents have standing in adoption proceedings “even where the relationship does not include periods of extended custody or frequent visitation. It is the fact of consanguinity that confers standing upon the grandparents to seek adoption of their grandchildren.” **Adoption of J.D.T. and J.T.T.**, 796 A.2d 992, 994 (Pa. Super. Ct. 2002). In addition, “grandparents are exempt from the requirement of agency approval in pursuing adoption of their grandchildren because of consanguinity. Their standing to maintain the adoption petition is not dependent upon the consent of the social service agency or upon the extent of their past or current contacts with their grandchildren.” **Adoption of J.D.T. and J.T.T.**, 796 A.2d 992, 995 (Pa. Super. Ct. 2002).

The fact that parental rights have been terminated does not affect a grandparent’s standing to participate in adoption proceedings. **In re Adoption of Hess**, 608 A.2d 10, 12 (Pa. 1992). *But see*, **In re Adoption of D.M.H.**, 682 A.2d 315, 319 (Pa. Super. Ct. 2002) (not an abuse of discretion for the trial court to hold that familial relationship is of continued, but reduced significance once parental rights are terminated).

### **What is the legal standard for evaluating grandparents’ adoption petitions?**

The paramount consideration in adoption proceedings is the best interests of the child. **In re Adoption of Hess**, 608 A.2d 10, 13 (Pa. 1992). “[T]here is neither a presumption for, nor a presumption against, grandparents who want to adopt their grandchildren.” **In re Adoption of**

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<sup>27</sup> For more information, see the section on adoption at page 109.

**D.M.H.**, 682 A.2d 315, 319 (Pa. Super. Ct. 2002) (affirming award of custody to adoptive parents rather than grandmother based on child's best interest). The Adoption Act "clearly does not exclude grandparents from being considered as prospective adoptive parents." In fact, it "contemplates that a grandparent might choose to adopt his or her grandchild." **In re Adoption of Hess**, 608 A.2d 10, 13 (Pa. 1992). The Supreme Court found further "indicat[ion] that a relationship between the proposed adoptive parent and the adoptee is a relevant consideration" in the requirement that a grandparent seeking to adopt "must indicate the relationship to the child in the Petition to Adopt. 23 Pa. C.S. §2701(1)." **Id.** The court also noted that the grandparent is allowed "to benefit from the relationship to the child by relieving the grandparent of the obligation to file a Report of Intention to Adopt. 23 Pa. C.S. §2531(c)." **In re Adoption of Hess**, 608 A.2d 10, 13 (Pa. 1992).

### **When do grandparents have a right to be heard in a dependency proceeding?<sup>28</sup>**

If a grandparent is providing care for the child, the Juvenile Act gives the grandparent a right to be heard at any dependency hearing. 42 Pa. C.S. §6336.1 ("The court shall provide the ... relative providing care for the child the opportunity to be heard at any hearing under this chapter").

Even if the grandparent is not providing care, a proper application of the best interests' analysis requires affording the grandparent an opportunity to be heard. "The 'best interests' standard can only be applied with the full participation of all interested parties during hearings in which all pertinent facts are placed before the court." **In re Adoption of D.M.H.** 682 A.2d 315, 322 (Pa. Super. Ct. 1996) (citations omitted). "A child's interests are best served when all those who demonstrate an interest in his or her welfare are allowed to be heard." **In re Adoption of Hess**, 608 A.2d 10, 15 (Pa. 1992).

### **When do grandparents have the right to notice in a dependency proceeding?**

If a grandparent is providing care for the child, the Juvenile Act gives the grandparent a right to timely notice of dependency hearings. 42 Pa. C.S. §6336.1 ("The court shall direct the

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<sup>28</sup> For more information, see the section on adjudication at page 50.

county agency or juvenile probation department to provide the ...relative providing care for the child with timely notice of the hearing”).

Even if the grandparent is not providing care, the provision of notice allows the court to secure the presence of all parties whose participation is critical to a proper best interests’ analysis. “The ‘best interests’ standard can only be applied with the full participation of all interested parties during hearings in which all pertinent facts are placed before the court.” ***In re Adoption of D.M.H.***, 682 A.2d 315, 322 (Pa. Super. Ct. 1996) (citations omitted).

### **When do grandparents have the right to notice in an adoption proceeding?**

The Adoption Act “entitles grandparents to notice of adoption proceedings only if they are the child’s guardians.” ***Gordon v. Lowell***, 95 F.Supp.2d 264, 270 (E.D. Pa. 2000) (citing 23 Pa. C.S. §2503).

Even if the grandparent is not the child’s guardian, the court can direct that notice be given to any person. 23 Pa. C.S. §2721. The paramount consideration in adoption proceedings is the best interests of the child. ***In re Adoption of Hess***, 608 A.2d 10, 13 (Pa. 1992). The provision of notice allows the court to secure the presence of all parties whose participation is critical to a proper best interests’ analysis. “The ‘best interests’ standard can only be applied with the full participation of all interested parties during hearings in which all pertinent facts are placed before the court.” ***In re Adoption of D.M.H.***, 682 A.2d 315, 322 (Pa. Super. Ct. 1996) (citations omitted).

### **B. The Rights of Foster Parents**

The rights of foster parents are circumscribed by the long-established rule that foster parents do not stand *in loco parentis* to their foster children. A person acting *in loco parentis* is a person “who puts himself in the situation of assuming the obligations incident to the parental relationship without going through the formality of a legal adoption. The status of *in loco parentis* embodies two ideas: first, the assumption of parental status, and second, the discharge of parental duties.” ***In re Adoption of W.C.K.***, 748 A.2d 223, 230 (Pa. Super. Ct. 2000) (citations omitted).

Foster care is explicitly temporary: “[w]hen foster parents enter into their relationship with the child, they know that the relationship is temporary; that the agency has the authority to remove the child.” ***In re Adoption of Crystal D.R.***, 480 A.2d 1146, 1151 (Pa. Super. Ct. 1984). Furthermore, “the relationship between a foster parent and child is *not* distinguished by ‘rights and liabilities...exactly the same as between parent and child,’ but is a subordinate relationship, supervised by the agency and in turn by the court.” ***In re Adoption of Crystal D.R.***, 480 A.2d 1146, 1151-1152 (Pa. Super. Ct. 1984), *citing* ***Spells v. Spells***, 378 A.2d 879, 881-882 (Pa. Super. Ct. 1977). *See also*, ***Smith v. Organization of Foster Families for Equality and Reform***, 431 U.S. 816, 845 (1977) (“whatever emotional ties may develop between foster parent and foster child have their origins in an arrangement in which the State has been a partner from the outset”); ***Chester County Children and Youth Services v. Cunningham***, 656 A.2d 1346, 1350 (Pa. 1995) (foster parents have a “subordinate status” “vis-à-vis both a placement agency and adopting parents”). As a result of their temporary and subordinate relationship with their foster children, foster parents do not stand *in loco parentis*. *See, e.g., In re Adoption of Crystal D.R.*, 480 A.2d 1146, 1151-52 (Pa. Super. Ct. 1984).

It is possible for persons who begin a relationship with a dependent child as foster parents to gain the status of prospective adoptive parents. ***In re Griffin***, 690 A.2d 1192, 1201 (Pa. Super. Ct. 1997). In ***Griffin***, the status of the foster parents changed to that of prospective adoptive parents “at least as early as [the date] when the juvenile court directed CYS to assist [the former foster parents] in adopting [the dependent child].” 690 A.2d 1192, 1201.

### **Do foster parents have standing to petition for termination of parental rights?**

Foster parents do not have standing to petition for termination of parental rights. ***In re Adoption of Crystal D.R.***, 480 A.2d 1146, 1153 (Pa. Super. Ct. 1984). A person has standing to petition for the termination of parental rights only if he or she is “the individual having custody or standing *in loco parentis* to the child.” 23 Pa. C.S. §2512(a)(3). “‘Custody’ in [this provision of the statute] refers to legal custody, not merely physical custody.” ***In re Adoption of Crystal D.R.***, 480 A.2d 1146, 1148 (Pa. Super. Ct. 1984). Foster parents do not have legal custody of foster children; foster children are in the legal custody of the agency. ***In re Adoption of Baby Boy Wims***, 685 A.2d 1034, 1037 (Pa. Super. Ct. 1996) (describing agency as legal guardian and noting

that foster parents had *physical* custody). Neither do foster parents stand *in loco parentis* to foster children. ***In re Adoption of Crystal D.R.***, 480 A.2d 1146, 1151-52 (Pa. Super. Ct. 1984).

### **Do foster parents have standing to assert the right to custody or visitation?**

Foster parents do not have standing to seek or contest awards of custody concerning their foster children. ***In the Interest of G.C.***, 735 A.2d 1226, 1230 (Pa. 1999) (describing the foster parent/child relationship as “uniquely limited and subordinate, state-created, [and] agency-maintained”); ***Priester v. Fayette County Children and Youth Services***, 512 A.2d 683, 683 (Pa. Super. Ct. 1986).

### **Do foster parents have standing to seek to adopt their foster children?**

Foster parents must have the permission of the agency with legal custody of the children in order to pursue adoption proceedings. ***Chester County Children and Youth Services v. Cunningham***, 656 A.2d 1346, 1347 (Pa. 1994), *decided by an equally divided court*; ***In re Adoption of Baby Boy Wims***, 685 A.2d 1034, 1037 (Pa. Super. Ct. 1996) (former foster parents could not properly file a petition for adoption because they “did not have the consent of the persons with physical custody or the agency that functioned as the legal guardian”); ***In re Adoption of S.C.P.***, 527 A.2d 1052, 1054 (Pa. Super. Ct. 1987) (the statute “which describes who may file a report of intention to adopt, does not encompass foster parents”). 23 Pa. C.S. §2531(a) lists the persons who may file a report of intention to adopt, including “[e]very person now having...custody or physical care of any child...with the intention of adopting [the] child.” However, foster parents know that they are “embarking on a temporary relationship” and thus can have no legitimate intention of adopting. ***Chester County Children and Youth Services v. Cunningham***, 656 A.2d 1346, 1349 (Pa. 1994), *decided by an equally divided court* (quotations and citations omitted).

23 Pa. C.S. §2713 allows a court, in its discretion, to “dispense with consents other than that of the adoptee” to a petition for adoption when the consents of parents are not required. The consent of the parent is not required when parental rights have been terminated. 23 Pa. C.S. §2714. “Accordingly, it seems clear that if the court determines that the agency consent is being

withheld unreasonably, the court may dispense with the requirement of 2711(a)(5) that the agency consent to the adoption.” ***In re Adoption of Hess***, 608 A.2d 10, 14 (Pa. 1992).

**When do foster parents have a right to be heard in dependency proceedings? 42 Pa. C.S. §6336.1**

Under § 6336.1 of the Juvenile Act, “[t]he court shall provide the child’s foster parent...the opportunity to be heard at any hearing under this chapter.”

**When do foster parents have a right to notice in dependency proceedings? 42 Pa. C.S. §6336.1**

Under § 6336.1 of the Juvenile Act, “[t]he court shall direct the county agency...to provide the child’s foster parent...with timely notice of the hearing. The provision of notice allows the court to secure the presence of all parties whose participation is critical to a proper best interests’ analysis. “A child’s interests are best served when all those who demonstrate an interest in his or her welfare are allowed to be heard.” ***In re Adoption of Hess***, 608 A.2d 10, 15 (Pa. 1992).

**C. The Rights of Prospective Adoptive Parents**

Prospective adoptive parents are distinct from foster parents. However, it is possible for persons who begin a relationship with a dependent child as foster parents to gain the status of prospective adoptive parents. ***In re Griffin***, 690 A.2d 1192, 1201 (Pa. Super. Ct. 1997). In ***Griffin***, the status of the foster parents changed to that of prospective adoptive parents “at least as early as [the date] when juvenile court directed CYS to assist [the former foster parents] in adopting [the dependent child].” 690 A.2d 1192, 1201.

When children are placed with prospective adoptive parents, the intention is that the placement will be permanent. ***In re Adoption of J.M.E.***, 610 A.2d 995, 998 (Pa. Super. Ct. 1992); ***Mitch v. Bucks County Children and Youth Social Service Agency***, 556 A.2d 419, 422 (Pa.

Super. Ct. 1989). “[P]rospective adoptive parents, unlike foster parents, are urged to form long-term emotional bonds with the children placed in their care.” ***Mitch v. Bucks County Children and Youth Social Service Agency***, 556 A.2d 419, 420 (Pa. Super. Ct. 1989). The absence of public agency supervision or participation in the care of a child can contribute to a finding that parties are prospective adoptive parents. See e.g., ***In re Adoption of J.M.E.***, 610 A.2d 995, 998 (Pa. Super. Ct. 1992) (citing absence of participation by agency in determination that parties were prospective adoptive parents). However, persons caring for a child can be prospective adoptive parents even when the child was placed in their care by an agency. See e.g., ***Silfies v. Webster***, 713 A.2d 639, 645 (Pa. Super. Ct. 1998) (“whether adoption process proceeds through an agency or a private party is irrelevant” to prospective adoptive parents’ standing); ***Mitch v. Bucks County Children and Youth Social Service Agency***, 556 A.2d 419, 420 (Pa. Super. Ct. 1989) (parties were prospective adoptive parents even when custody received from agency when placement of child was intended to be permanent).

Unlike foster parents, prospective adoptive parents can be found to stand *in loco parentis* to the children in their care. A person acting *in loco parentis* is a person “who puts himself in the situation of assuming the obligations incident to the parental relationship without going through the formality of a legal adoption. The status of *in loco parentis* embodies two ideas: first, the assumption of parental status, and second, the discharge of parental duties.” ***In re Adoption of W.C.K.***, 748 A.2d 223, 230 (Pa. Super. Ct. 2000) (citations omitted). The status of *in loco parentis* cannot be obtained in defiance of a biological parent’s wishes. ***B.A. and A.A. v. D. and C.***, 741 A.2d 1227, 1229 (Pa. 1999) (citations omitted) (reversing grant of custody to prospective adoptive parents when biological father opposes adoption and seeks custody).

The status of *in loco parentis* must be assumed “through some legally cognizable means, predicated on [the parent’s] consent to an adoptive placement.” ***In re Adoption of W.C.K.***, 748 A.2d 223, 229 (Pa. Super. Ct. 2000) (couple who cared for child for approximately one year did not stand *in loco parentis* when mother never intended to permanently place the child). “In order for there to be a legitimate assumption of parental status, it is not necessary for the natural parent to expressly consent to adoption, but at the very least, the natural parent must agree to a permanent placement of his or her child.” ***In re Adoption of W.C.K.***, 748 A.2d 223, 230 (Pa. Super. Ct. 2000). The fact that a parent later revokes consent to adoption or permanent placement does not negate the standing of prospective adoptive parents. ***Silfies v. Webster***, 713 A.2d 639, 645 (Pa.



Super. Ct. 1998) (“neither the lack of a formal award of custody, nor revocation of prior consent to adoption by a minor child’s mother will operate to deprive prospective adoptive parents of standing to utilize our court system in a proceeding involving a minor child”) (citations omitted). *See also*, **Mollander v. Mollander**, 675 A.2d 753 (Pa. Super. Ct. 1996) (prospective adoptive parents stood *in loco parentis* when mother signed, but later revoked, adoption agreement); **In re Baby Boy S.**, 615 A.2d 1355 (Pa. Super. Ct. 1992) (prospective adoptive parents stood *in loco parentis* when mother signed, but later revoked, entrustment agreement). Because prospective adoptive parents stand *in loco parentis*, they have “a legally cognizable and protectable interest” that entitles them to judicial review of their petitions for termination, custody and adoption. **Silfies v. Webster**, 713 A.2d 639, 645 (Pa. Super. Ct. 1998).

**Do prospective adoptive parents have standing to petition for termination of parental rights? 23 Pa. C.S. §2512(a)(3)**

In non-dependency cases, prospective adoptive parents have been allowed standing to petition for the termination of parental rights. **T.J.B. v. E.C.**, 652 A.2d 936, 942 (Pa. Super. Ct. 1995); **In re Adoption of J.M.E.**, 610 A.2d 995, 999 (Pa. Super. Ct. 1992). *See also*, **In re Adoption of Michael J.C.**, 486 A.2d 371 (Pa. Super. Ct. 1984) (prospective adoptive parents successfully petitioned for termination of mother’s parental rights).

A petition to terminate parental rights can be filed by “the individual having custody or standing *in loco parentis* to the child.” 23 Pa. C.S. §2512(a)(3).” ‘Custody’ in [this provision of the statute] refers to legal custody, not merely physical custody. **In re Adoption of Crystal D.R.**, 480 A.2d 1146, 1148 (Pa. Super. Ct. 1984). Prospective adoptive parents can be found to stand *in loco parentis* to the children in their care. *See, e.g.*, **Mitch v. Bucks County Children and Youth Social Service Agency**, 556 A.2d 419, 420 (Pa. Super. Ct. 1989) (parties were prospective adoptive parents when placement of child was intended to be permanent). The reasoning in these cases should apply to permanent legal custodians, as well as to fit and willing relatives with whom a child is permanently placed, allowing them standing to pursue termination of parental rights petitions.

## Do prospective adoptive parents have standing to assert their right to custody and to adopt?

The legal standards regarding custody and adoption petitions are intertwined in the case law: prospective adoptive parents who petition for custody may be protesting the removal of a child they intended to adopt and may be using the custody petition to advance that right. **Silfies v. Webster**, 713 A.2d 639, 641, 643 (Pa Super. Ct.1998); **T.J.B. v. E.C.**, 652 A.2d 936, 943 (Pa. Super. Ct. 1995) (“The reality of this case is that [the prospective adoptive parents] are not seeking custody of [the child]; they want to adopt him.”); **Mitch v. Children and Youth Social Service Agency**, 556 A.2d 419, 419 (Pa. Super. Ct. 1989) (prospective adoptive parents filed custody petition to protest the removal of child they intended to adopt).

Prospective adoptive parents have standing to sue for custody. **Silfies v. Webster**, 713 A.2d 639, 644-645 (Pa. Super. Ct. 1998); **In re Griffen**, 690 A.2d 1192, 1201 (Pa. Super. Ct. 1997); **Mollander v. Mollander**, 675 A.2d 753, 756 (Pa. Super. Ct. 1996); **Mitch v. Children and Youth Social Service Agency**, 556 A.2d 419, 419 (Pa. Super. Ct. 1989). This means that prospective adoptive parents can protest the removal of a child from their home by the placing agency, separate and apart from a petition to adopt. **Mitch v. Children and Youth Social Service Agency**, 556 A.2d 419(Pa. Super. Ct. 1989).

These prospective adoptive parents also have standing to petition for adoption. Even “revocation of prior consent to adoption by a minor child’s mother” will not “operate to deprive prospective adoptive parents of standing to utilize our court system in a proceeding involving a minor child.” **Silfies v. Webster**, 713 A.2d 639, 645 (Pa. Super. Ct. 1998). See also, **In re Adoption of Baby Boy McKnight**, 488 A.2d 56 (Pa. Super. Ct. 1985) (standing of prospective adoptive parent seeking to adopt not questioned by court).

## What is the legal standard for evaluating prospective adoptive parents’ adoption petitions?

The paramount consideration in adoption proceedings is the best interests of the child. **In re Adoption of Hess**, 608 A.2d 10, 13 (Pa. 1992). This same standard applies in cases where prospective adoptive parents are seeking to adopt. See e.g., **In re Adoption of Baby Boy**

**McKnight**, 488 A.2d 56 (Pa. Super. Ct. 1985) (affirming decision to deny adoption petition of prospective adoptive parent because it was not in the child's best interest).

**When do prospective adoptive parents have a right to be heard in dependency proceedings? 42 Pa. C.S. §6336.1**

The Juvenile Act gives prospective adoptive parents a right to be heard at dependency hearings. 42 Pa.C.S. §6336.1 ("The court shall provide the child's... preadoptive parent ...the opportunity to be heard at any hearing under this chapter").

**When do prospective adoptive parents have a right to notice in dependency proceedings? 42 Pa. C.S. §6336.1**

The Juvenile Act gives prospective adoptive parents a right to timely notice of dependency hearings. 42 Pa. C.S. §6336.1 (the court shall direct the county agency or juvenile probation department to provide the child's...preadoptive parent ...with timely notice of the hearing.)

**D. The Rights of Other Third-Parties**

**When do other third-parties have standing to petition for partial or full custody or visitation?**

In non-dependency cases, other third-parties have been allowed standing to petition for partial or full custody when they stand *in loco parentis* to the child. See e.g., **McDonel v. Sohn**, 762 A.2d 1101 (Pa. Super. Ct. 2000) (aunt and uncle who stand *in loco parentis* to child have standing to sue for custody). "Cognizable rights to seek full or partial custody may also arise ...by virtue of the parties' conduct, as in cases where a third party who has stood *in loco parentis* has been recognized as possessing a *prima facie* right sufficient to grant standing to litigate questions of custody..." **T.B. v. L.R.M.**, 753 A.2d 873, 882 (Pa. Super. Ct. 2000) (former same-sex partner had standing to seek partial custody or visitation of a minor child, when former partner stood *in loco parentis* to the child by virtue of having lived with child for first 3 years and shared rights and

responsibilities of child rearing), *quoting J.A.L. v. E.P.H.*, 682 A.2d 1314, 1318-1319 (Pa. Super. Ct. 1996) (internal citations omitted).

Third parties bear a heavier burden of proof when they are pursuing partial custody as opposed to visitation. “The distinguishing factors between visitation and partial custody are the length, frequency, and place of visits and who has effective control of the child during the visits.” ***Bucci v. Bucci***, 506 A.2d 438, 443 (1986). “In a visitation case, the third party need only convince the court that it is in the child’s best interest to have some time with the third party. As the amount of time requested moves the visit further from a visit and closer to custody, the reasons offered in support of the request must become correspondingly more convincing.” ***T.B. v. L.R.M.***, 753 A.2d 873, 889 (2000), *quoting Commonwealth ex rel. Williams v. Miller*, 385 A.2d 992, 994 (1978).

Siblings do not have standing to seek visitation. ***Ken R. on behalf of C.R. v. Arthur Z.***, 651 A.2d 1119 (Pa. Super. Ct. 1994), *aff’d.*, 682 A.2d 1267 (Pa. 1996). See also, ***In the Interest of C.F.***, 647 A.2d 253 (Pa. Super. Ct. 1994) (Minor sibling had no right to visitation with sister; adoptive parents abandoned boy causing him to become dependent, parents could not be compelled to produce child’s natural sibling, still in their custody, for visitation).

### **When do other third-parties have standing to appeal a goal change decision in a dependency proceeding?**

A person standing *in loco parentis* should have standing to appeal a goal change decision in a dependency proceeding. A sibling does not have standing to appeal an order changing a dependent child’s permanency goal to adoption. ***In re L.J.***, 691 A.2d 520 (Pa. Super. Ct. 1997).

### **When do other third-parties have standing to petition to terminate parental rights? 23 Pa. C.S. §2512(a)(3)**

A petition to terminate parental rights can be filed by “the individual having custody or standing *in loco parentis* to the child.” 23 Pa. C.S. §2512(a)(3). “‘Custody’ in [this provision of the statute] refers to legal custody, not merely physical custody.” ***In re Adoption of Crystal D.R.***, 480

A.2d 1146, 1148 (Pa. Super. Ct. 1984). A person acting *in loco parentis* is a person “who puts himself in the situation of assuming the obligations incident to the parental relationship without going through the formality of a legal adoption. The status of *in loco parentis* embodies two ideas: first, the assumption of parental status, and second, the discharge of parental duties.” ***In re Adoption of W.C.K.***, 748 A.2d 223, 230 (Pa. Super. Ct. 2000) (citations omitted).

### **When do other third-parties have standing to petition for adoption? 23 Pa. C.S. §2531(a)**

Pursuant to 23 Pa. C.S. §2531(a), a report of intention to adopt can be filed by “[e]very person now having or hereafter receiving or retaining custody or physical care of any child for the purpose or with the intention of adopting a child.”

### **When do third-parties have a right to notice and to be heard in dependency proceedings?**

If the third-party is a relative and is providing care for the child, the Juvenile Act gives that person a right to be heard at dependency hearings. 42 Pa. C.S. §6336.1. (The court shall provide the ... relative providing care for the child the opportunity to be heard at any hearing under this chapter.) A relative providing care for the child also has the right to timely notice of dependency hearings under the Juvenile Act. 42 Pa. C.S. §6336.1. (The court shall direct the county agency or juvenile probation department to provide the ... relative providing care for the child with timely notice of the hearing.)

Even if the third-party is not a relative or is not providing care, a proper application of the best interests’ analysis would require affording the third-party notice and an opportunity to be heard. “The ‘best interests’ standard can only be applied with the full participation of all interested parties during hearings in which all pertinent facts are placed before the court.” ***In re Adoption of D.M.H.***, 682 A.2d 315, 322 (1996) (citations omitted). See also, ***In the Matter of the Adoption of A.M.T. and C.C.T.***, 803 A.2d. 203, 209 (Pa. Super Ct. 2002) (refusal to allow intervention of paternal aunt and uncle in adoption proceedings initiated by maternal aunt and uncle was, “as in Hess,” reversible error because it “barred the presentation of potentially relevant evidence concerning the BEST interests of the children”) (emphasis in text); ***In re Adoption of Hess***, 608

A.2d 10, 15 (1992) (a child's interests are best served when all those who demonstrate an interest in his or her welfare are allowed to be heard). The provision of notice allows the court to secure the presence of all parties whose participation is critical to a proper best interests' analysis.

### **E. Selected Third Party Cases**

The following is a selection of cases discussed in the preceding section. Additional relevant cases are contained in the text.

#### ***Grandparents***

***Troxel v. Granville***, 530 U.S. 57 (2000). State statute allowing "any person" to petition for visitation rights, and authorizing courts to grant visitation whenever it would serve the best interest of the child, was unconstitutionally broad in violation of parents' fundamental liberty interest in the care, custody and control of their children.

***R.M. v. Baxter***, 777 A.2d 446, 451 (Pa. 2001). Grandparents have automatic standing to pursue physical and legal custody of a grandchild after the child has been adjudicated dependent.

***In re Adoption of Hess***, 608 A.2d 10 (Pa.1992). Grandparents always have standing to participate in adoption proceedings of grandchildren.

#### ***Foster parents***

***In the Interest of G.C.***, 735 A.2d 1226 (Pa.1999). Foster parents do not have standing to seek or contest awards of custody concerning their foster children.

***Chester County Children and Youth v. Cunningham***, 656 A.2d 1346 (Pa. 1994). Foster parents must have the permission of the agency with legal custody of the children in order to pursue

adoption proceedings.

***In re Adoption of Crystal D.R.***, 480 A.2d 1146 (Pa. Super. Ct. 1984). Foster parents do not have standing to petition for termination of parental rights.

### ***Prospective adoptive parents***

***In re Griffen***, 690 A.2d 1192 (Pa. Super. Ct. 1997). Prospective adoptive parents have standing to sue for custody.

***T.J.B. v. E.C.***, 652 A.2d 936 (Pa. Super. Ct. 1995). Prospective adoptive parents have standing to petition for the termination of parental rights.

***Mitch v. Bucks County Children and Youth Social Service Agency***, 556 A.2d 419 (Pa. Super. Ct. 1989). Parties were prospective adoptive parents when placement of child was intended to be permanent.

### ***Other third-parties***

***McDonel v. Sohn***, 762 A.2d 1101 (Pa. Super. Ct. 2000). Aunt and uncle who stand *in loco parentis* to child have standing to sue for custody.

***T.B. v. L.R.M.***, 753 A.2d 873 (Pa. Super Ct. 2000). Former same-sex partner had standing to seek partial custody or visitation of a minor child, when former partner stood *in loco parentis* to the child by virtue of having lived with child for first 3 years of the child's life and shared rights and responsibilities of child rearing.

## II. Visitation

### A. The Importance of Visitation

The primary goal of the Juvenile Act is to preserve the unity of the family whenever possible. 42Pa.C.S. §6301(b)(1). When a child is temporarily removed from the home, visitation should be a part of the family service plan whenever the health and safety of the child permit. It is the court's responsibility at permanency hearings to review visitation provisions and ensure that the agency is making reasonable efforts to facilitate visitation in as safe and regular a manner as possible and to make sure the parents understand the importance of regular visitation to the goal of reunification.

**What is the legal standard for granting or denying visitation rights by the parents in the case of a child adjudicated dependent? 42 Pa. C.S. §6351(a)(2.1)**

The Juvenile Act does not contain explicit statutory provisions that address visits with dependent children who are temporarily removed from the home. *In the Interest of M.B.*, 674 A.2d 702, 705 (Pa. Super. Ct. 1996). Section 6351(a)(2.1) allows the court to set forth temporary visitation rights for parents of children when the court has ordered the transfer of permanent legal custody to an individual resident in or outside of the Commonwealth. 42 Pa. C.S. §6351(a)(2.1). This would apply to placements with permanent legal custodians and fit and willing relatives. Issues related to continuing visitation by the parent are to be referred to the section of the court of common pleas that regularly determines visitation. *Id.*

The appellate courts have established certain guidelines for granting or denying visitation between a dependent child and his or her parents. As a general rule, the standard for evaluating visitation is based upon the best interests of the child. *In re Long*, 459 A.2d 403 (Pa. Super. Ct. 1983); *In re E.F.V.*, 461 A.2d 1263 (Pa. Super. Ct. 1983). Using this standard, visitation should not be denied unless there is a "grave threat" to the child. See, *In re B.G.*, 774 A.2d 757 (Pa. Super. Ct. 2001); *In Interest of Rhine*, 456 A.2d 608, 613 (Pa. Super. Ct. 1983). This standard incorporates the Juvenile Act's primary goal of preserving the family.



**How does the child's permanency goal affect the right to visitation?**

The right to have visitation and the extent of visitation with a dependent child is also related to whether or not the goal for the family is reunification or another permanency alternative. **In re C.S.**, 729 A.2d 89, 95 (Pa. Super. Ct. 1999) ("In dependency cases...the standard against which visitation is measured also depends on the goal mandated in the family service plan.") When reunification is not the goal for a family, "grave threat" is not the proper guide. **In the Interest of M.B.**, 674 A.2d 702, 705 (Pa. Super. Ct. 1996). The court in M.B. wrote, "To determine whether visitation is in the child's best interest the court may consider all evidence relating to the child's best interest including but not limited to the following factors: (1) length of separation from natural parents; (2) effect of visitation on the child; (3) the age, sex and health of the child; (4) the emotional relationship between child and parents; (5) the special needs of the child; and (6) the effect of the child's relationship with the current caregiver, usually the foster parents. *Id.*, at 706. See also **In re E.F.V.**, 461 A. 2d 1263 (Pa. Super. Ct. 1983) (Goal of termination, continued visitation would undermine child's stability and engender severe developmental and behavioral problems).

**Do children have standing to seek visitation with a dependent sibling?**

Children do not have standing to seek visitation with dependent siblings. **Ken R. on behalf of C.R. v. Arthur Z.**, 651 A.2d 1119 (Pa. Super. Ct. 1994), *aff'd.*, 682 A.2d 1267 (Pa. 1996). Nor can parents be compelled to produce children for visitation with a minor sibling. **In the Interest of C.F.**, 647 A.2d 253 (Pa. Super. Ct. 1994) (minor sibling had no right to visitation with sister; adoptive parents abandoned boy causing him to become dependent, parents could not be compelled to produce child's natural sibling, still in their custody, for visitation).

For a full discussion of the rights of third-parties, including grandparents, to visit dependent children, see pages 174-193.

## **B. Visitation Cases**

### ***Parental Visitation***

***In re B.G.***, 774 A.2d 757 (Pa. Super. 2001). Termination of visitation reversed, agency failed to demonstrate that, given the circumstances presented, the maintenance of a normal relationship between B.G. and her parents, facilitated by limited supervised visitation, would pose a grave threat to child's well-being.

***In re C.S.***, 729 A.2d 89, 95 (Pa. Super. Ct. 1999). Visitation with incarcerated parents properly limited to times when parents were in nearby county prison for court proceedings.

***In the Interest of M.B.***, 674 A.2d 702 (Pa. Super. Ct. 1996). Reduction of visitation to four times per year when goal change from long-term foster care to adoption—best interest of child to be evaluated with regard to change in goal from reunification to adoption, adverse effect of visitation on child, weakened bond between parents and child and the child's need for permanency and stability.

***In re Mary Kathryn T.***, 629 A.2d 988 (Pa. Super. Ct. 1993). Order terminating parental visitation reversed, not based on competent evidence. Record showed foster mother actively sought to interfere with reunification efforts.

***In re Damon B.***, 488 A.2d 53 (Pa. Super. Ct. 1985). Goal of termination of parental rights reversed, reunification plan with review of increased visitation ordered.

***In re E.F.V.***, 461 A. 2d 1263 (Pa. Super. Ct. 1983). Goal of termination, continued visitation would undermine child's stability and engender severe developmental and behavioral problems.

***Sibling visitation***

***In the Interest of C.F.***, 647 A.2d 253 (Pa. Super. Ct. 1994). Minor sibling had no right to visitation with sister; adoptive parents abandoned boy causing him to become dependent, parents could not be compelled to produce child's natural sibling, still in their custody for visitation.

***Ken R. on behalf of C.R. v. Arthur Z.***, 651 A.2d 1119 (Pa. Super. Ct. 1994), *aff'd* ., 682 A.2d 1267 (Pa. 1996). Children do not have standing to seek court-ordered visitation with siblings.

***In Interest of Rhine***, 456 A.2d 608 (Pa. Super. Ct. 1983). Parental visitation should be denied only where the parents pose a "grave threat to the child".

## **Part III**

### ***THE RIGHTS OF DEPENDENT OLDER YOUTH***

Youth typically experience important life changes between the ages of 15 and 21. Adolescence and the transition to adulthood are traumatic and full of ups and downs for youth and their caretakers, even in the best of situations. During these years, youth try to figure out who they are, where they belong, and what they need to do to satisfy the expectations of the adult world.

In addition to the growing pains that all adolescents experience, young people in out-of-home care face unique challenges as they assume increasing levels of independence and responsibility. Overwhelming research has shown that foster children have a more difficult time than their non-foster care peers in becoming resilient and competent adults. Many young people who are raised in families remain in their parents' homes and draw on parental support -- both financial and non-financial -- well after reaching the age of majority. By contrast, youth in care do not have this option and often are cut off from their sole and limited support system at age 18.

The juvenile court has the opportunity -- and a special obligation -- to ensure that youth entrusted to the state's care have the support they need to age out of care as self-sufficient, healthy, and productive adults. To do this, the court must be aware of the age-appropriate needs and milestones that all adolescents experience, as well as the special needs of foster care youth who are making the transition to adulthood.

#### **I. Current Federal and State Law Focusing on Older Youth**

##### **A. The Foster Care Independence Act**

#### **What are the rights of older youth in foster care?**

Since 1985, federal law has recognized that older youth in foster care deserve special attention and programming. In that year, the Independent Living program was added to the Social Security Act. In 1999, the Act was further amended by the Chafee Foster Care Independence Act

(FCIA) to respond to the limitations and perceived ineffectiveness of the Independent Living program. Testimony and reports submitted before Congress revealed that while approximately 20,000 youth age out of foster care each year, many are not prepared to live independently upon discharge, and few mechanisms were in place to track these youth and hold agencies accountable for their outcomes. Many youth are discharged from care without attaining basic education goals, such as graduating from high school or attaining a GED. Many become unemployed, homeless, and dependent on public assistance. See U.S. Department of Health and Human Services, TITLE IV-E INDEPENDENT LIVING PROGRAMS: A DECADE IN REVIEW (U.S. Government Printing Office, 1999); U.S. Department of Health and Human Services, FOSTER CARE: EFFECTIVENESS OF INDEPENDENT LIVING SERVICES UNKNOWN (GAO/HEHS-00-13) (U.S. General Accounting Office, November 1999); R. Cook, A NATIONAL EVALUATION OF TITLE IV-FOSTER CARE INDEPENDENT LIVING PROGRAMS FOR YOUTH: PHASE 2 (Westat, Inc., Contract No. OHDS 105-87-1608, U.S. Department of Health and Human Services, 1991).

In enacting FCIA, Congress found that:

States are required to make reasonable efforts to find adoptive families for all children, including older children, for whom reunification with their biological family is not in their best interest. However, some older children will continue to live in foster care. These children should be enrolled in an Independent Living program, designed and conducted by the State and local government to help prepare them for employment, postsecondary education, and successful management of adult responsibilities.

P.L. 106-169, Title I, Subtitle A, § 101(a), Dec 14, 113 Stat. 1823.

Congress also stated that:

The Nation's State and local governments, with financial support from the Federal Government, should offer an extensive program of education, training, employment, and financial support for young adults leaving foster care, with participation in such programs beginning several years before high school graduation and continuing, as

needed, until the young adults emancipated from foster care establish independence or reach 21 years of age. *Id.*

### **What does FCIA require of the states?**

- Serve youth up until age 21 if they were in care at age 16, even if they are no longer in care. Thus, a youth who has been discharged from care can still receive services from the children and youth agency until s/he reaches the age of 21.
- Youth can now have up to \$10,000 in savings as opposed to \$1,000 and still be eligible for Title IV-E services.
- Create a role for young people in designing independent living services in their state.
- Use a portion of FCIA money to train staff and providers on how best to work with this age group on acquiring independent living skills.
- Develop outcome measures for programs that use FCIA dollars so that the federal government can evaluate performance. This was an important change as states have not focused on outcomes for older youth in care with the same rigor as outcomes for younger children who may be returning home or are being adopted. FCIA makes clear that states are accountable for the performance of their Independent Living programs and the outcomes and competencies achieved by aging-out youth. (Because they have frequent contact with these youth, judges can offer their experience and expertise in helping the state establish these outcomes.)

Under FCIA, states also are permitted to:

- Use up to 30% of their FCIA money to provide room and board for youth who have aged out of the system and are over age 18 but under 21. This is an important change. While FCIA monies still cannot be used to pay for room and board for older youth *still committed* to agency care, FCIA allows the unprecedented opportunity for counties to address the unmet housing needs of youth aging out of care through the use of FCIA funds. Pennsylvania has allowed each county to decide whether to provide room and board.

- Extend Medicaid coverage until age 21 for youth who have left foster care. To date, Pennsylvania has not decided to extend Medicaid coverage. To do so, the state Medicaid agency must amend its state Medicaid plan and submit it to its regional U.S. Health & Human Services Medicaid office for approval. *For a full discussion of health insurance see Section IV, Part One.*

### **Which youth are eligible to receive Independent Living services?**

Independent Living services must be provided to all youth in care who are age 16 and above, no matter what placement they are in and regardless of their permanency plan. (A youth does not have to be in a Supervised Independent Living *placement* to qualify for Independent Living *services*. See below.) Independent Living services can include, but are not limited to: career counseling and placement, educational counseling and support, instruction in budgeting and home management, family-planning and sexual health counseling, and instruction in self-advocacy.

It should be noted that FCIA does not change the preference that youth be raised in a setting as family-like as possible, such as with their biological families, or with adoptive parents or relatives. Older and younger youth alike should be considered for adoption and permanent legal custodianship. Independent Living services should be provided to youth while all efforts to achieve permanence are pursued; independent living skills are competencies that youth need regardless of placement. In fact, FCIA provides increased funding for adoption incentive payments, making clear that adoption should still be sought for teenagers in care. See 42 U.S.C. § 673b.

### **What is the difference between Independent Living *services* and Supervised Independent Living *placements*?**

Supervised Independent Living placements, often referred to as SIL placements, are living situations in which an older youth has a greater degree of independence than would be allowed in group or institutional care. While a youth is committed to a children and youth agency, SIL placements are primarily funded entirely by Title IV-E placement maintenance funds. Counties can also supplement these federal funds with local and state dollars to maximize the number of youth

served. While SIL placements take various forms, the most common situation is one in which the youth is placed in an apartment, alone or with roommates. The placement agency: (1) pays the rent; (2) supervises the youth; and (3) provides the youth with independent living and life skills instruction. SIL programs often require that youth engage in some kind of educational, vocational, or treatment activity as well as work.

However, while SIL placements typically provide Independent Living services, such services are not limited to youth living in SIL placements. All youth in care who are age 16 and older should receive Independent Living services, no matter where they live, so that they can master their independent living skills in a supportive environment.

**Can FCIA money be used by counties to increase the number of Supervised Independent Living (SIL) beds, which are often in short supply?**

No. FCIA monies cannot be used to provide room and board, which would include SIL placements, for youth *currently in the custody of a children and youth agency*. Counties can use non-FCIA, Title IV-E monies and their needs-based budgeting process to fund more SIL beds to meet the age-appropriate needs and permanency goals of older youth. Judges who must sign off on their county's needs-based budget should inquire into whether the needs of the youth in their county warrant additional funds. See pages 34-35 explaining how judges can assist in acquiring funds for needed services in their counties.

However, counties do have the option of using up to 30% of their FCIA money to provide room and board for youth who have left care at age 18 and are under age 21.

**Does FCIA make any provisions for education and training?**

Yes. In January 2002, the Social Security Act was further amended by the Promoting Safe and Stable Families Act of 2001 (P.L. 107-133), adding section (i) to 42 U.S.C. § 677, which is the FCIA. Youth who are eligible for FCIA services under the state plan may also obtain vouchers to



fund education and training until age 23. These vouchers cannot exceed \$5,000 or the cost of attendance.

**What other services should older youth in care receive in addition to Independent Living services funded by FCIA?**

The county agency's obligation to older youth goes beyond providing FCIA-funded Independent Living services. The court must ensure that older youth receive many of the same services that youth in care of any age should receive. This includes the court's fundamental inquiry into the appropriateness of the youth's placement and permanency plan. The placement must reflect and address the youth's needs as he or she approaches adulthood. For some, a referral for a Supervised Independent Living placement may be appropriate so that they may practice and master independent living skills while adoption, kinship care, or permanent legal custodianship are still sought. Other youth may be in stable, supportive foster homes with caretakers who are committed to being in the youth's life even after the youth reaches the age of majority; in these cases, services, including independent living services, should be provided to maintain the placement.

**B. The impact of ASFA and the Juvenile Act on older youth**

**Can independence be a permanency plan?**

Yes. Independence – as contrasted to Independent Living services – can be a permanency goal if the placement and services delineated in the permanency plan provide the youth with supportive and family-like relationships and the skills and competencies needed to eventually live on his/her own. As discussed below, it is preferred that the permanency plan for youth be as family-like as possible: every effort should be made to place older youth with adoptive families, relatives, or with a permanent legal custodian, if they cannot be reunified with their parents. However, for some youth independence will be an acceptable permanency plan. Independence is distinct from emancipation as a permanency plan in that:

Independent living contemplates an arrangement that is stable and secure, and the focus is on features of the plan which enhance stability and permanency, whereas “emancipation” implies a discharge from foster care by virtue of one’s age.

(MAKING IT PERMANENT, pp. 81-82). As Mark Kroner has noted:

Permanency for many of these youths means learning to live independently. Even if they do spend time with their family members, their chances for success are improved if they learn to count on themselves to solve their daily problems-and have the knowledge, experience and skills to do so.

Testimony of Mark Kroner before the House Ways and Means Subcommittee on Human Resources for the Hearing on Foster Care Independent Living (May 13, 1999).

A youth placed in “another planned permanency living arrangement” (see definition and discussion at page 168) may have the permanency goal of independence as long as the court has documented that it is not in the child’s best interest to return home, be referred for termination of parental rights, be placed for adoption, or with a relative or guardian. See Chafee Foster Care Independence Program Questions and Answers, [www.acf.dhhs.gov/cb/laws/chafee.html](http://www.acf.dhhs.gov/cb/laws/chafee.html). Indeed, federal regulations recognize an older teenager’s request that independent living be his/her permanency plan as a compelling reason not to pursue reunification. See 45 C.F.R. 1356.21(h)(3)(i); see also Office of Children, Youth and Families Bulletin No. 3130-01-01, “The Revised Interim Implementation Guidelines for the Adoption and Safe Families Act (ASFA) of 1997 (P.L. 105-89),” effective February 2, 2001, 45.

### **Can long-term foster care be a permanency goal for older youth?**

No. ASFA eliminated long-term foster care as a permanency goal for youth. For many older youth in care, the permanency plan will be “another living arrangement intended to be permanent in nature.” Pennsylvania Department of Public Welfare’s Office of Children, Youth and

Families has referred to this as “another planned permanent living arrangement,” or APPLA. For a full discussion of what an APPLA can and cannot be, see pages 169-172.

### **Should youth 16 and older have a special family service plan?**

For youth 16 and over, the family service plan must include an Independent Living plan that delineates the services they are receiving to help them become self-sufficient, productive adults. Federal law requires that each youth age 16 and older have an IL plan as part of their FSP. Pennsylvania has required that each county submit an IL form – much like the FSP form – to use in developing IL plans for individual youth.

The court should ensure that every youth in care, at age 16, is provided with “a written description of the programs and services which will help such a child prepare for the transition from foster care to independent living.” 42 U.S.C. §675 (1)(D). *See also* 42 Pa. C.S. §6351(8); 55 Pa. Code §3130.72. (The court also should review a youth's Independent Living plan at the permanency review hearings as part of its determination as to whether reasonable efforts are being made to achieve a permanency goal of independent living, if that is the youth's goal. 45 C.F.R. §1356.21(b)(2).) The plan should be designed to help the youth develop competencies and connect him/her to services in the following areas:

**Education** - offering referrals to school retention support programs as well as help in gaining access to post-secondary education and training (i.e., assistance in the application and funding processes).

**Vocational and Career Services** - training, job placement and support, and career counseling.

**Physical and Mental Health Care** - teaching methods to obtain health insurance and navigate the health care system as well as access to age-appropriate health care services such as family planning and sexual health.

**Housing** - helping youth find appropriate housing in the private and public markets, and establishing the youth's eligibility for housing benefits such as Section 8 vouchers.

**Relationships with Caring Adults** - providing family counseling (even if the permanency plan is not reunification) or connecting the youth to a mentoring program, peer support group, or civic activities.

**Knowledge of Community Resources and Public Benefits/Services** - informing youth about options available in the public health system, about transportation, and about benefits such as cash assistance and food stamps.

**Expertise in Daily Living Skills** - teaching basics, such as budgeting and saving.

**Can a court refuse to make a finding of reasonable efforts to achieve the permanency plan of independence if adequate independent living services are not provided?**

Yes. ASFA requires that courts make findings whether reasonable efforts have been made to achieve whatever permanency plan is chosen for the youth at each permanency review hearing. See Office of Children, Youth and Families Bulletin No. 3130-01-01, "The Revised Interim Implementation Guidelines for the Adoption and Safe Families Act (ASFA) of 1997 (P.L. 105-89)," effective February 2, 2001, at pp. 28-29, 51. Pennsylvania's Juvenile Act was amended on December 9, 2002, by Act 215, to incorporate this requirement. This finding must be made for the state to receive Title IV-E reimbursement. If the court does not believe that the youth is being provided with sufficient services to actually allow him or her to meet the goal of independence, no finding of reasonable efforts should be made. The court should scrutinize the efforts being made to help a youth achieve independence in the same manner that it reviews efforts made to reunify youth with their families or find adoptive homes.

**What specific issues should be determined at permanency hearings for older youth?**

Generally, at six-month permanency hearings the court is charged with determining:

- the appropriateness of the youth's current placement.
- the appropriateness and feasibility of the youth's placement goal, i.e., is it a placement that will provide the youth with the benefits of a secure family or the most family-like setting available?

- the appropriateness, feasibility and extent of compliance with the permanency plan developed to achieve that placement goal. For youth 16 years of age and older, the permanency plan must include services that will assist the youth's transition to independent living.
- any other services which are "best suited to the protection and physical, mental, and moral welfare of the child."

42 Pa.C.S. §6351 (a), (f).

***A complete checklist to guide the court's inquiry at permanency hearings for older youth can be found at page 231. A worksheet designed to help county children and youth caseworkers prepare for permanency hearings, but which can also be helpful to the court in conducting permanency hearings, is posted at [www.JLC.org/transitions/deskbooksupl.html](http://www.JLC.org/transitions/deskbooksupl.html).***

### **C. Pennsylvania Regulations Affecting Older Foster Youth**

**Has Pennsylvania amended its regulations to incorporate the changes created by the FCIA?**

No. Chapters 3130 (regulating county children & youth agencies) and 3140 (same) of Title 55 of the Pennsylvania Code have not yet been amended to reflect the changes in FCIA or ASFA.

But while Pennsylvania's regulations have not yet been amended, Pennsylvania has promulgated pre-FCIA Title IV-E Independent Living program regulations, which are found at Appendix A of the Chapter 3140 regulations. In this Appendix, many of FCIA's goals and standards are reiterated in Pennsylvania's descriptions of how IL services should be provided and the goals of these services. Noting that the opportunity for meaningful, self-sustaining employment or further education is critical for achieving meaningful self-sufficiency and independence, Pennsylvania suggests that IL programs include:

- services to develop vocational and educational competencies including career planning, preparation for GED or higher education, job readiness, job search assistance, job placement, and tutoring or other remedial education.
- training to develop basic living skills in such areas as money management, home management, consumer skills, identifying and using community resources, use of transportation, health care, locating housing, problem solving/decision making, time management, and communication skills.
- individual and group counseling to aid youth in the development of self-esteem, self-confidence, and interpersonal skills as well as to facilitate the transition to independence.
- monies that can be used to fund security deposits for apartments and furnishings as well as education and training.

#### **D. Dependent Youth over the Age of 18**

**For how long and under what conditions can a youth over age 18 stay in foster care? 42 Pa. C.S. §6302**

In Pennsylvania, youth who have been adjudicated dependent before their 18<sup>th</sup> birthday can continue in foster care until age 21. This is often referred to as an "extension of care" or, in some counties such as Philadelphia, as a "board extension." A dependent child is entitled, upon demand, to stay in care beyond the 18<sup>th</sup> birthday if he or she was:

adjudicated dependent before reaching the age of 18 years and who, while engaged in a course of instruction or treatment, requests the court to retain jurisdiction until the course has been completed, but in no event shall a child remain in a course of instruction or treatment past the age of 21 years.

42 Pa. C.S. §6302 (emphasis added); *see also* 55 Pa. Code §3130.5.

Under the Juvenile Act, an extension of care **must** be permitted when the youth is in a course of instruction or treatment. Unfortunately, some county children and youth agencies as a

matter of practice violate the law by seeking to drop youth from care when they turn 18. The court should hold a hearing to determine whether the youth is engaged in a course of instruction, which would permit the court to retain jurisdiction until the youth reaches the age of 21. 42 Pa. C.S. §6302. It is important to note that under the Juvenile Act, a youth should not be discharged from care without a permanency review hearing being held that addresses the possible removal of the youth from the court's jurisdiction upon reaching the age of 18. 42 Pa.C.S. §6351(e)(3)(i)(B). This hearing should include a thorough review of the benefits the child may gain from continuing under the court's jurisdiction until he or she reaches the age of 21. Most youth, even in the best circumstances, are not completely self-sufficient at age 18. The unique challenges that youth in care face – including dealing with the trauma of abuse, neglect, and separation from family members as well as multiple placements – make it more difficult for them than other youth to achieve true independence at age 18.

### **What is “a course of treatment or instruction”?**

The Juvenile Act does not define “a course of treatment or instruction.” Absent an explicit definition, the juvenile court should apply common sense and broadly interpret “course of treatment or instruction” so as to effectuate one of the Juvenile Act's central purposes: “[t]o **provide for the care, protection, safety and wholesome mental and physical development of children coming within the [juvenile] court's jurisdiction.**” 42 Pa. C.S. §6301 (emphasis added). A broad interpretation also furthers FCIA's goals of helping youth achieve self-sufficiency and stability in certain core areas. These core areas include not only education and employment but also how to acquire and maintain stable housing, daily living skills such as budgeting and financial management, and preventative health care, as well as how to navigate the health care system. FCIA additionally requires states to address the needs of youth with disabilities or developmental delays. The course of treatment or instruction that these special needs youth require may not fit into traditional models of school or therapy.

Thus, a “course of instruction or treatment” is what a youth needs to learn how to grow up. It includes the wide array of services and programs youth are engaged in to facilitate their transition to adulthood and address their special needs. Supportive services to complete high school followed by enrollment in a community college with career counseling is one typical “course of instruction or treatment.” For another youth, the “course of instruction or treatment” may include

training in how to find and maintain housing and obtain medical insurance and medical care. What is important is that the course of instruction or treatment be specifically tailored to meet that individual youth's needs and aspirations.

### **Under what conditions can the juvenile court discharge a youth from foster care?**

Pennsylvania has no regulations or standards for discharging youth from care, although local court systems, such as Philadelphia, are developing discharge protocols. Thus, currently the court must be guided by the Juvenile Act's general purposes as well as by due process principles regarding notice and the opportunity to be heard.

Regardless of age, a dependent youth should not be discharged from care, including discharge into a permanent legal custodianship, unless the court has conducted a rigorous inquiry, including requiring that the county children and youth agency conduct an investigation into the situation and circumstances to which the child is to be discharged, or requiring that particular conditions be met prior to discharge. The court should apply the same rigor when inquiring into an agency's plan to discharge a teenager to live on his/her own as it would if the agency proposed to return a child to his/her parents' home, or to free the child for adoption or placement with a permanent legal custodian.

Moreover, a youth should not be discharged without being present at the hearing. At the very least, the court should be satisfied that the county agency has tried to locate the youth and give him/her notice of the discharge before it occurs. The court may even consider holding the agency to the same "due diligence" standard that applies when the agency must identify and locate parents before terminating parental rights. At the least, a court should ask searching questions before accepting a children and youth agency's assertion that a youth cannot be found. The time just before a court date is often troubling for youth, who may leave placement temporarily to seek solace from a friend or relative. In these situations, the youth's whereabouts are often easily discovered, and the absence from care is often temporary. When a youth is absent from the hearing, the court should err on the side of keeping a case open, since closing a case ends all services to the youth, which may be the only source of support s/he has. And in most instances,



closing the case is irreversible, as the youth over the age of 18 cannot again be adjudicated dependent.

**What should a juvenile court require before discharging a youth?**

Discharge, like any disposition, should serve the youth's best interest and promote safety, permanency, and well-being. The court should require the county agency to present a discharge plan that covers all of the core areas, including:

- education
- employment
- housing
- health and mental health care
- health insurance coverage
- connections with family and/or caring adults
- connections with community resources and social services
- competencies in daily living skills

The court should not accept a plan that simply states where the youth will be living. The court should also reject discharge plans which do nothing more than refer youth to homeless shelters or county public assistance offices, since these "plans" on their face do not fulfill the permanency goal of independence and self-sufficiency.

The court also should consider holding an evidentiary hearing if the county agency seeks to discharge the youth on the grounds that the youth is "not cooperating" or is "ungovernable." Developmental experts and common sense tell us that it is normal for teenagers to "act out" or rebel as they approach adulthood. This behavior is normative, and should not be accepted as the basis for petitions to discharge a youth from county care. Ironically, agencies that seek to discharge a youth because of "ungovernable" behavior are justifying their request on the very grounds that lead to adjudicating children dependent in the first instance. The county agency is

often a caretaker of last resort. It should not be permitted to abandon the youth for some of the same reasons and behaviors that brought them into the system in the first place.

Finally, the court should consider deferring its decision to close the case when the judge is unsure of the youth's ability to live independently. For example, the court can discharge the commitment of physical or legal custody to the county children and youth agency, but maintain supervision by the children and youth agency and list the case for a status review in 90 days. This time period will serve as a trial discharge. At the status listing, the court can consider whether the youth's discharge plan has helped him/her to achieve the permanency goal of independent living. If the youth's discharge plan has not worked, the court can order the county agency to fashion a new transition plan.

### **How should the court respond if the youth requests discharge?**

If the youth is requesting discharge or agreeing to a discharge, the juvenile court should conduct a colloquy to inquire as to the reasons for the request, and explore whether alternatives to discharge have been explored. It is important to keep in mind that youth may ask for discharge for reasons that have nothing to do with their readiness to live on their own. Some youth ask to be discharged because multiple placements have not met their needs and they feel that there is no more that the system can do for them. Other youth seek discharge because the placement they are in is not appropriate. For example, a youth may have outgrown her group placement, but may feel that she is going to be there indefinitely while awaiting an SIL placement. She may ask for or agree to a discharge because the wait has become too long. Discharges based on these reasons may not be in the youth's best interest and will not meet the youth's short and long-term goals.

Thus, the court should inquire of youth what they will need to succeed. The court should give the youth's counsel wide latitude in making a record of his or her client's needs, of the youth's experience in care, and of the youth's reason for agreeing to discharge. Again, as discussed above, deferring discharge and listing the case for review after a reasonable period of time may be the best course of action.

## **E. Obligation to Older Non-Foster Youth Seeking Assistance**

### **Should the court adjudicate a 16 or 17-year-old dependent?**

A youth who wants to enter the children and youth system can and should be adjudicated dependent if there is no other alternative and if there is clear and convincing evidence that he or she meets the definition of a dependent child. 42 Pa. C.S. §6302. The Pennsylvania legislature has decided that a child can be found to be dependent up until his or her 18<sup>th</sup> birthday. Youth who cannot return home, or who have no home to return to, for example, meet the definition of dependency up to reaching the age of 18. Courts must enforce the child welfare agency's responsibility to these youth. Many of these youth need the support that foster care offers. Often these older youth are most in need of the assistance of the court and child welfare agency because they are turned away by agencies which serve the adult population. Without the assistance of the child welfare system these minors will likely remain on the street or in unstable and potentially dangerous living situations.

### **Should the court “emancipate” these older youth seeking assistance from the child welfare agency and family court?**

In most cases, the answer is no. Many older youth under age 18, who are seeking assistance because they are homeless or without parental support, are told that emancipation will solve their problems. Youth in these circumstances will rarely meet the criteria for judicial emancipation. While there is no statewide procedure for emancipation, youth generally must provide proof that they are able to support themselves and live outside the care and control of an adult. See JLC Emancipation Fact Sheet posted at [www.JLC.org](http://www.JLC.org). Emancipation itself rarely provides stability for youth unless they are already in a position where they are fairly independent and self-supporting. Most youth who are seeking the help of the children and youth agency and the court are not in a stable situation, and are seeking assistance precisely because they are not yet able to support themselves and live on their own. These youth should be provided with services and, possibly, adjudicated dependent rather than told to request an emancipation decree.

**What other services are available to families in need of assistance to help their older youth?**

As with families with children of any age, the county children and youth agency should make every effort to help the family stay together prior to any court involvement being initiated. The children and youth agency has an obligation to offer a family with an older youth services to prevent placement and maintain family stability. A youth or parent can ask for these services.<sup>29</sup>

The court can also direct families and youth to seek assistance from their county mental health system, Office of Vocational Rehabilitation (OVR) agency, or the network of social service agencies that exist in the county. Many counties also have agencies which receive funding under the Runaway and Homeless Youth Act. These agencies can provide counseling, and sometimes shelter, to a youth who has run away or is homeless, and to families who need help in addressing the issues of their older youth.

**F. Ensuring Older Youth's Well-Being at Permanency Review Hearings: Requirements, Entitlements, and Benefits under Federal and State Laws**

In addition to promoting safety and permanency, courts and child welfare agencies have a duty to ensure overall well-being of each child in foster care. The juvenile court has wide latitude in ensuring that the county children and youth agency provides a disposition which provides for "the care, protection, safety and wholesome mental and physical development of children," 42 Pa. C.S. §6301(b), and which is best suited "to the protection and physical, mental, and moral welfare of the child." 42 Pa. C.S. §6351(a). Regardless of age, a youth should be placed "in a family environment whenever possible, separating the child from parents only when necessary for his welfare, safety or health or in the interests of public safety." 42 Pa. C.S. §6301(b). Youth in care have a right to "treatment best suited to meet [their] needs" and the county agency must provide any service ordered by the court that furthers the goals of the Juvenile Act. *In re Tameka M.*, 580 A.2d 750, 755 (Pa. 1990).

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<sup>29</sup> In Philadelphia, a family in need of assistance with older youth can contact the REAAP (Reasonable Efforts in Assessment, Access and Prevention) Unit at family court. REAAP, which is located in the family court building, links youth and families to services without a formal adjudication of dependency.

At a minimum, federal and Pennsylvania law require these entities to develop, implement and document individualized health and education plans for adolescents in care. They must also address needs in those and other areas as part of an adolescent's plan to transition from foster care to independent living. To plan well for teenagers, child welfare professionals and judges must be familiar with the entitlements that youth have to various health, education and other services, and how these services can be obtained. As explained in this section, some entitlements are particular to adolescents in foster care, while others are applicable to qualified youth whether they are or are not in the child welfare system.

## *HEALTH CARE*

Children in foster care are a medically vulnerable group.<sup>30</sup> Several studies have confirmed that children in foster care, compared with other indigent children, experience elevated rates of acute and chronic physical health problems, developmental delays, and emotional, behavioral and mental disorders. Studies indicate not only that many received inadequate health care prior to placement, but also show that many children receive insufficient health services after entering foster care. See Judith Silver, et al., *YOUNG CHILDREN AND FOSTER CARE*, Paul H. Brooks Publishing Co.(Baltimore, Maryland, 1999); Karen Aileen Howze, Esq., *HEALTH CARE FOR TEENS IN CARE: A JUDGE'S GUIDE*, American Bar Association Center on Children and the Law (Washington, D.C., 2002). Below are some specific health care issues that relate to older youth. For a full discussion of health care for the dependent child, see Part III, Section Two.

### **What does the law require child welfare agencies and courts to do with respect to health care planning for adolescents in care?**

The child welfare agency is responsible for securing appropriate health care for children committed to its custody.<sup>31</sup> Case plans must include an identification of those health services to be provided to the child, and a timetable for the delivery of these services. Updates specifying what services have actually been provided and any changes to the health plan must be submitted to the

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<sup>30</sup> For a discussion of the rights of children in placement to health care see, Part III, Section Two.

<sup>31</sup> When parental rights have not been terminated, parents retain the right to participate in making health care decisions and, absent a court order, often still have to give their consent depending on the type of testing or treatment at issue. It is important to note, however, that under Pennsylvania law, adolescents may consent on their own to a variety of medical testing and treatment.

court at permanency hearings. At a minimum, the agency is required to ensure that a teenager receives:

- a complete physical examination by a physician within 60 days of admission to foster care, and an annual physical exam thereafter;
- a dental examination within 60 days of admission, and a dental examination every nine (9) months thereafter;
- immediate medical attention for all problems identified at these examinations; and
- all necessary medical care when the minor is ill.

The Juvenile Act, 42 Pa.C.S.A. §§ 6301(b)(1.1), 6351(f)(2); 55 Pa. Code §§ 3130.31(3), 3130.34(4), 3130.38, 3130.61, 3130.67, 3700.51.

Case plans also must record the child's medical problems (including known physical, mental or emotional disabilities), the names and addresses of the child's health care providers, any medications the child is taking, the child's immunization records, and any other relevant health information. This information must be reviewed and updated each time a child changes placement, and provided to the child's new foster care provider to ensure continuity of care. 42 U.S.C. §675(1)(B); 55 Pa. Code §§3130.67, 3700.39.

### **What services are adolescents entitled to if they are covered by Medicaid?**

The Early and Periodic Screening, Diagnosis and Treatment Program -- commonly known as EPSDT -- is a federal program that provides special protections to children enrolled in Medicaid, from birth until their 21st birthday. See 42 U.S.C. §1396d(r). For a full discussion of EPSDT and other entitlements to health care, see Section IV, Part One.

**What happens to Medicaid coverage when a youth is discharged from the dependency system?**

When a youth is discharged from the county children and youth agency's custody, it is required to inform the County Assistance Office (CAO), which then closes that youth's individual medical assistance (MA), or Medicaid, case. If the youth is discharged into the custody of a parent or legal guardian, that individual must apply to the CAO to have the child placed on his/her MA case (assuming that the individual is eligible for MA). *See, income eligibility criteria*, posted at [www.JLC.org/transitions/deskbooksupl.html](http://www.JLC.org/transitions/deskbooksupl.html). **When discharge and return to the family or to a permanent legal custodian is planned for a youth, the county children and youth agency is legally required to take steps to assure that the child's MA eligibility is continued without interruption.**

Specifically the agency must inform the child's parent/legal guardian sufficiently prior to discharge about the change, and provide instructions about what the parent/legal guardian needs to do to maintain the child's MA eligibility once s/he returns home, including helping the family complete a timely application for MA if requested. **This is true even if the youth is discharged at age 18 and the plan is to return to the parent's care.** *See supplemental appendix, excerpt on Medicaid from Office of Children, Youth & Families Bulletin No. 3140-01-01, "Revised Policies and Procedures: Title IV-E Placement Maintenance Eligibility and Reimbursability, Title IV-E Adoption Assistance Eligibility and Title XIX Medicaid Eligibility," issued April 4, 2001*, posted at [www.JLC.org/transitions/deskbooksupl.html](http://www.JLC.org/transitions/deskbooksupl.html).

**What types of health insurance can adolescents obtain once they are discharged from foster care?**

- If the youth is under 21 and returns to his or her parent's care, he or she may be eligible for MA as part of the family's case if the family meets the income guidelines. *See supplemental index, income eligibility criteria for MA*, posted at [www.JLC.org/transitions/deskbooksupl.html](http://www.JLC.org/transitions/deskbooksupl.html).
- If the youth is under 19 and returns to his parent's care but the family is not eligible for MA, the family still may be able to obtain insurance for the youth at little or no cost through the

Children's Health Insurance Program (CHIP). *See supplemental index, income eligibility criteria for CHIP*, posted at [www.JLC.org/transitions/deskbooksupl.html](http://www.JLC.org/transitions/deskbooksupl.html).

- If the youth is under 19, and discharged to live independently, the youth can apply for MA on his or her own and likely will qualify.
- If a youth is 19 years of age or older and does not qualify for MA, s/he may still be able to purchase Adult Basic Coverage from the state. This program costs \$30 a month. It does not cover mental health or dental treatment. It provides only a limited discount for prescription medication. *See income eligibility criteria attached at supplemental appendix, posted at [www.JLC.org/transitions/deskbooksupl.html](http://www.JLC.org/transitions/deskbooksupl.html).*
- Youth age 19 and older who are a family of one, and who are working full or part time, should apply for MA. These youth, however, will generally not qualify for MA unless they are receiving some other public benefit, like TANF, Government Assistance (GA), or Supplemental Security Income (SSI). That is because youth who are working full time and earning at least minimum wage most likely will not be income eligible for MA. Nevertheless, these youth should apply because there may be some case specific facts that would allow the youth to establish eligibility.
- A disabled youth who receives Supplemental Security Income will continue to receive MA after discharge as long as SSI eligibility is maintained.
- A youth under age 21 may also qualify for MA regardless of family income if the minor meets the criteria for disability for SSI benefits. *See information in supplemental appendix, posted at [www.JLC.org/transitions/deskbooksupl.html](http://www.JLC.org/transitions/deskbooksupl.html).*
- A youth who receives general assistance or TANF will generally qualify for MA.
- Most pregnant teenagers and teen mothers will qualify for MA whether or not they are in foster care.
- Youth with HIV/AIDS may qualify for MA.
- Youth taking Health Sustaining Medications may qualify for MA. *See Stacey A. Coggins, A GUIDE FOR DETERMINING YOUR ELIGIBILITY FOR FREE HEALTH CARE COVERAGE THROUGH MEDICAL ASSISTANCE (Pennsylvania Health Law Project, 2001), at [www.phlp.org/healthinfo/phlp\\_ma\\_manual.pdf](http://www.phlp.org/healthinfo/phlp_ma_manual.pdf) for more detail on establishing MA eligibility.*



**Are there supportive housing options for youth with mental health impairments after they are discharged from care?**

Most counties offer supportive housing arrangements for persons with mental health impairments. However, most counties also have waiting lists for this housing, in some cases up to a year. For that reason, youth with mental health impairments who will require supportive housing upon discharge from foster care should be identified as soon as possible prior to discharge. The referral forms for supportive housing require detailed information about the youth's diagnosis and needs. Specifically, when the dependent child is between the ages of 16½ and 17, the court should inquire as to whether the youth will need supportive housing services through the county office of mental health. The court can then direct the county children and youth agency to obtain the necessary evaluations and prepare the forms to make the application on behalf of the youth. The court should ensure that advocates and children and youth workers contact their county office of mental health/mental retardation at least one year prior to the youth's anticipated discharge to learn about the supportive housing referral process. Addresses and telephone numbers for county offices can be found at the Department of Public Welfare's website:

[www.dpw.state.pa.us/omhsas/omhao.asp](http://www.dpw.state.pa.us/omhsas/omhao.asp).

**Can youth consent to mental health and drug treatment?**

Yes. Youth can consent to mental health treatment without the consent of a parent, guardian or custodian when they are age 14 or older. They can consent to drug treatment at any age. To facilitate access to treatment for teenagers who may either be embarrassed to seek help or be more likely to do it on their own without the involvement of a social worker or foster parent, a judge can inform youth in court that they can seek and consent to treatment on their own. For a full discussion on consent to treatment, see Section IV, Part One.

**What other health care needs should be addressed in a teenager's IL plan?**

One of FCIA's major focuses is on prevention services, particularly in the areas of teenage pregnancy and drug and alcohol addiction. Instruction on family planning topics should be a part of almost every teenager's IL plan. A youth's IL plan also should address mental health and/or

substance abuse treatment if these are issues in his/her life. All teenagers should receive instruction on the numerous types of health care services they can consent to on their own without parental or agency involvement, even if they are under the age of 18. *See supplemental appendix, excerpt from* CONSENT TO TREATMENT AND CONFIDENTIALITY PROVISIONS AFFECTING MINORS IN PENNSYLVANIA *(describing when minors may consent medical testing and treatment)*, posted at [www.JLC.org/transitions/deskbooksupl.html](http://www.JLC.org/transitions/deskbooksupl.html). Minors under the age of 18 can consent to testing and treatment related to sexual health and family planning, except in the case of abortion. To encourage youth to address these issues and seek treatment and education when needed, the court should inform youth of their right to obtain treatment on their own.

**What are the most important steps that the court can take to ensure that a teenager receives appropriate health care, both while in care and after discharge?**

The court should:

- Ensure that youth have continuous health insurance coverage as they change placements and at discharge. This is critical, particularly for youth with special health care needs. If the youth will not be eligible for MA once discharged, the discharge plan should specify what insurance the youth will obtain and how the cost of insurance will be covered.
- Inquire at court hearings if the county children and youth agency has collected the youth's medical history, and if there are any medical issues that need follow up.
- Ensure that youth are properly evaluated while they are in care to identify any special health care needs, by issuing court orders authorizing the evaluations or obtaining parental consent at permanency hearings.
- Ensure that older youth understand how they can obtain and consent to services, such as mental health and treatment related to sexual health.

## **G. Education and Special Education**

National data reveals that many youth aging out of foster care experience poor educational outcomes. See Blome, W.W., *What Happens to Foster Kids: Educational Experiences of a Random Sample of Foster Care Youth and a Matched Sample of Non-Foster Youth*, 14 CHILD AND ADOLESCENT SOCIAL WORK JOURNAL 41-53 (1997). In large numbers, these youth are not completing high school or getting their GED. Many are so far behind their age group in school that they feel embarrassed to return to school despite their entitlement to public education and, for eligible children with disabilities, a special education.<sup>32</sup>

The unique barriers that foster children face to prompt school enrollment and receipt of an appropriate education contribute to these poor results. For example, when children change placements and thus schools frequently, problems arise, including delays in enrollment and records transfer as well as loss of school days. Difficulty in obtaining parental consent delays access to services, particularly disability related services. This situation is complicated in Pennsylvania by the lack of uniform statewide protocols for enrollment and transfer of records. Youth in foster care are often more likely to be placed in the most restrictive educational placements and also are often not appropriately identified for special education services.

The consequences to youth can be severe. As researchers have noted, given the current economy “a GED only is insufficient and may be a deterrent to stable employment, and by itself, a high school diploma no longer assures employment beyond a poverty level wage.” E.V. Mech, *Foster Youth in Transition: Research Perspectives on Preparation for Independent Living*, 73 CHILD WELFARE 614, 606-623 (1994). Thus, ensuring that youth in care receive appropriate educational services is crucial to promoting a successful transition.

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<sup>32</sup> For a discussion of the rights of children in foster care to education services, including the educational rights of older children, see Section IV, Part Two.

As with health care, the county children and youth agency is responsible for securing appropriate educational services for children committed to its custody.<sup>33</sup> Family service plans must include a record of the names and addresses of the child's school/educational providers, the child's grade level, his or her complete school record, the child's physical, mental or emotional disabilities, if any, and any other relevant educational information. This information must be reviewed and updated each time a child changes placement, and provided to the child's new foster care provider to ensure continuity of care. 42 U.S.C. §675(1)(B); 55 Pa. Code §3130.67.

## *REGULAR EDUCATION*

### **What entitlement do children in Pennsylvania have to a basic education?**

All youth, until they graduate or reach the age of 21 (whichever occurs first), are entitled to attend public school in the school district where they live with a parent or guardian. Even if a student drops out of school, the student has a right to re-enroll if he or she has not yet received a high school diploma and is under the age 21. The county children and youth agency must ensure that children in its care are enrolled or have access to education in compliance with the Public School Code, 24 P.S. §§1-101-27-2702. See 55 Pa. Code §3130.87(a). If the youth is beyond the age of compulsory school attendance, the agency must ensure that the youth has the opportunity to obtain career counseling or continuing education. 55 Pa. Code 3130.87(c). For a full discussion of a dependent child's right to education, see Section IV, Part Two.

## *SPECIAL EDUCATION*

Children with disabilities in foster care face the same barriers to education as regular education students, but may suffer even greater harm when they are denied the educational services to which they are entitled. Sadly, children with disabilities will often regress to a lower level of functioning when their educational programming is interrupted. They require an

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<sup>33</sup> When parental rights have not been terminated, parents retain the right to participate in making educational decisions and often still need to give their consent with respect to special education services. Please see the next section for more information on the rights of children in foster care who require special education services, and who is responsible for securing such services.

appropriate educational program provided in a consistent and timely manner to make meaningful educational progress. This is especially true for older youth, who must develop and master skills that will help them to transition to their desired post-school outcomes. For a full discussion of a dependent youth's right to special education, see Part IV, Section Two.

## **H. Other Services for Youth with Disabilities**

Foster youth with disabilities are entitled to independent living services to the same degree as all other youth in care. FCIA makes clear that Independent Living (IL) services must be provided for youth "at various stages of independence," including youth with disabilities. 42 U.S.C.A. §677 (b)(2)(C). Youth with disabilities may need additional and different programming to help them achieve independence, and county children and youth agencies must provide developmentally appropriate IL services. Often youth with disabilities are excluded for IL services because they need more support and instruction, and providers do not feel they are able to handle IL programming. These youth must be prepared so they can live independently upon discharge from the custody of the county children and youth agency.

### **What special transition planning should be done for a youth who is mentally retarded?**

A youth who is classified as mentally retarded should be receiving services through both the office of mental retardation and the children and youth agency. It is critical that these youth be classified as mentally retarded before age 18 – if they are not, they will not be eligible for services through the mental retardation system as adults.<sup>34</sup> A county's base service unit is responsible for completing an intake with the youth and determining eligibility and level of service. Connecting these youth to the mental retardation system is crucial as that system provides specialized housing, treatment, educational, and employment services.

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<sup>34</sup> While state regulations require that the onset of mental retardation occur before an individual's 22nd birthday, 55 Pa. Code ' 4210.101a, age 18 is an important marker for most clinicians because the definition of mental retardation provided by the Diagnostic and Statistical Manual of Mental Disorders (4th ed.) requires that the onset occur before age 18. See DSM-IV, Mental Retardation, at 39. Because most clinicians use the DSM-IV definitions for diagnosis, it is important to identify a mentally retarded youth for services as soon as possible prior to reaching age 18.

**Should the county agency apply for Supplemental Security Income on behalf of a youth with disabilities?**

Yes. Supplemental Security Income (SSI) is a means-tested federal benefit provided to persons with disabilities. The application is filed with the Social Security Administration and the applicant is required to submit medical and mental health information to demonstrate that he or she has a impairment that affects the ability to function in daily life or to work. The disability standard differs depending on whether the applicant has reached age 18. See 42 U.S.C. §1382c(a)(3)(A) for the adult disability standard and 42 U.S.C. §1382c(a)(3)(C)(I) for the childhood standard.

It is particularly important to identify and establish SSI eligibility for youth who will soon be aging out of care. While a youth may not receive, or be eligible for, the full financial benefit of SSI while in care,<sup>35</sup> the children and youth agency should use some portion of the SSI funds to help the youth address any of his/her special needs or receive medical and rehabilitative treatment not covered by Medical Assistance.

Establishing eligibility while in care can facilitate the transition upon discharge, whether it is to a supportive living situation or to independence. Upon discharge, the SSI benefit will be a key resource to youth in establishing their independence. An SSI eligible individual is also eligible for Medical Assistance, a critical benefit for youth who need consistent medical and mental health treatment to maintain stability. The Social Security Act also contains several provisions that encourage young adults as well as adults to participate in programs and attempt to work while continuing to receive support.<sup>36</sup> Of great importance is the provision that allows individuals who are "actively participating" in a vocational rehabilitation plan that will likely "enable the person to work permanently" to remain on SSI until the completion of the program. 42 U.S.C. §425 (b); 20 C.F.R. §416.2212.

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<sup>35</sup> The Social Security Administration counts Title IV-E money used for a youth's placement as the child's income for the purpose of determining income eligibility for SSI.

<sup>36</sup> Disability-related work expenses, including tools, medical devices, or modifications that enable work, are deducted from gross earnings in determining income eligibility. 20 C.F.R. ' 416.1112(c)(6). There are other earned income exclusions, particularly for youth under 22 who are attending school. See, e.g., 20 C.F.R. " 416.974(a)(2) and 416.1112(c). Of great importance is the PASS Program--Plan for Achieving Self-Support. 20 C.F.R. ' 416.1112(c)(9). The PASS program allows an SSI recipient to exclude money from the income determination that is being set aside to meet a work-related goal, such as attending a vocational or educational program, or purchasing tools or aids that will help in attaining an employment goal. A particular PASS plan must be written for the youth to take advantage of this option. See Martha Matthews, *SSI Benefits for Teens with Disabilities in the Post-Welfare Reform Era*, XX YOUTH LAW NEWS 1 (JAN/FEB 1999) for more information on this subject.

*If the court has a youth before it who may have a disability, it should inquire whether an application for SSI has been made. At the very latest, this inquiry should be made one year prior to the youth turning age 18.*

## **I. Services for Youth Who Have Children**

**When a dependent child has a child while in foster care, is that child also automatically dependent?**

No. A dependent child's baby should not be adjudicated dependent unless one of the criteria for dependency exists for that baby. Merely being born to a dependent youth is not grounds for dependency. A dependent child who has a baby has the same parental rights and constitutional rights to family integrity as any other parent.

**Should a dependent child be placed with her child?**

A dependent youth is entitled to an appropriate placement and to services which "best suit" his or her needs. For most dependent youth who have a child, an appropriate placement means being placed with the child. Every effort should be made to place the mother and child together in accordance with the purposes of the Juvenile Act. 42 Pa. C.S. §6301(b). Among the placements that may be appropriate are mother-baby Supervised Independent Living programs and mother-baby foster homes.

**What IL services should be provided to a dependent youth with a child?**

A dependent mother or father should be offered many of the same IL services as other youth. Youth who are parents may need some additional services to assist in developing their parenting capacities, including parent skills training and support groups to help them deal with the challenges of being a young parent.

**Should dependent youth who are parents be provided with day care services?**

Dependent youth who are parenting should be provided with day care services for their children so that they can pursue their educational, vocational, and treatment goals. Meeting these goals is of particular importance for these youth because upon discharge they will be supporting both themselves and a child. They should not be prevented from going to school, attending a training program, attending treatment or working because they do not have day care. Dependent youth who are parents may receive day care services through their children and youth mother-baby placement or through their school or educational program. Counties also provide subsidized day care for eligible parents. Most parenting dependent youth will be eligible for this subsidy given their income, but they may need help from the children and youth agency to establish eligibility. The Child Care Works helpline, at 1-877-4-PA-KIDS, can provide more information about this subsidy.

**J. Other Benefits That Youth May Be Able to Obtain as Part of a Discharge Plan****What post-discharge benefits are youth entitled to under Title IV-E?**

Under FCIA, when youth are discharged from foster care they are entitled to receive aftercare services until they reach the age of 21. The court should insist that the county provide youth with information about what supportive services are available post-discharge and how the youth can obtain these services.

In addition, counties have the option to provide room and board services to youth who are discharged. Often these programs provide a step-down structure: the youth gradually takes on more responsibility in paying for living expenses and in a certain time period becomes responsible for all expenses. The youth is also required to follow the program rules, which often include working or being involved in educational or vocational training. Like SIL programs, these programs are a way for youth to be given degrees of freedom and responsibility while still receiving some support and instruction. If the county provides room and board after discharge, the court should make sure that the youth has been offered this opportunity. In addition, most counties provide



stipends to older youth when they complete IL programs or upon discharge. Courts should be aware of the stipend policy for their county.

**What public benefits may an aging-out youth be eligible to receive?**

When a youth is discharged from foster care, referral to the county public assistance office does not constitute an acceptable discharge plan. To qualify for public benefits, a young person must be categorically and income eligible. If youth have truly achieved their permanency plan of independent living, they should not need public assistance. There are, however, public benefits that young people should be made aware of upon discharge so that they know what is available to them if the need arises.

*TEMPORARY ASSISTANCE TO NEEDY FAMILIES (TANF)*

Youth who are parents when they are discharged from foster care may be eligible for TANF, which provides cash assistance for the family. TANF has work requirements, which sometimes can be met through enrollment in education or training programs. Because TANF is time limited and rarely provides enough income for a family to raise itself from poverty, families should utilize it only when necessary. Families also receive Medical Assistance when they are found eligible for TANF.

*GENERAL ASSISTANCE (GA)*

General assistance is state cash assistance. In addition to an individual's meeting the income criteria, there are various categorical grounds for GA eligibility. The relevant categorical grounds for eligibility for the aging out population, found at 55 Pa. Code §141.61, are the following:

- An individual between the ages of 18 and 20 years old who is attending secondary school or an equivalent vocational or technical program full-time and who is expected to complete the program before reaching age 21.

- An individual who has been determined by a physician or psychologist to be permanently or temporarily disabled and unable to work.
- An individual who is undergoing treatment for substance abuse in an approved program and the treatment precludes the individual from engaging in employment. (Assistance can only be approved on this basis for a lifetime maximum of nine months.)
- A pregnant woman.
- A victim of domestic violence. (Assistance can only be approved on this basis for a lifetime maximum of 9 months.)

### *SUPPLEMENTAL SECURITY INCOME (SSI)*

SSI provides financial support for individuals with disabilities. The Social Security Administration now provides many incentives for recipients to work or engage in rehabilitative and other supportive services without losing eligibility. Pennsylvania Protection & Advocacy (1-800-692-7443 x. 309) provides advice and assistance in planning in this area.

### **What housing resources are available to aging-out youth?**

Finding and maintaining affordable housing is one of the greatest challenges for aging-out youth. Among the most disturbing poor outcomes is the high incidence of homelessness among former foster youth. See, e.g., *YOUTH IN THE STREETS AND ON THEIR OWN: YOUTH HOMELESSNESS IN ILLINOIS* (Chicago Coalition for the Homeless, 2001); Nan Roman and Phyllis Wolfe, *WEB OF FAILURE: THE RELATIONSHIP BETWEEN FOSTER CARE AND HOMELESSNESS* (National Alliance to End Homelessness, 1995); *ALONE AFTER DARK: A SURVEY OF HOMELESS YOUTH IN CHICAGO* (Chicago Coalition for the Homeless, 1992). Many youth have not completed high school and do not yet have the skills to maintain a job that will provide income for affordable housing. Many of these youth do not have family they can rely on to provide housing resources until they complete a program of education or training. Without stable and affordable housing, aging-out youth are often unable to continue or maintain efforts towards self-sufficiency that they made while in care. Planning for a youth's post-discharge housing is crucial to the long-term effectiveness of the transition plan.

The lack of affordable housing is a problem faced by adults of all ages as well as aging-out youth. However, aging-out youth often feel the lack more acutely because they lack family support and resources. As described below, there are several ways that county children and youth agencies can provide housing for aging-out youth. Many counties have not taken full advantage of available housing options.

#### *USE OF FAMILY UNIFICATION PROGRAM (FUP) HOUSING CHOICE VOUCHERS*

The Family Unification Program (FUP) Housing Choice Vouchers were created for families in the child welfare system to facilitate reunification when the main reason for placement is lack of adequate housing. This program has existed for more than a decade and is administered by the U.S. Department of Housing and Urban Development (HUD). Local housing authorities can apply for these vouchers. HUD provides the housing vouchers and, generally, the county children and youth agency provides the support services. The local public housing agency and the child welfare agency are required to enter into a memorandum of understanding that details each agency's responsibilities.

In 2001, federal law was changed to allow FUP vouchers to be used for youth aging out of foster care. The following category of youth became eligible:

A FUP-eligible youth is a youth that the public child welfare agency has certified is a youth at least 18 years old and not more than 21 years old (has not reached his/her 22nd birthday) who left foster care at age 16 or older and who does not have adequate housing, and that the Public Housing Authority has determined is eligible for a housing choice voucher.

66 Fed. Reg. No. 133 (Wed. July 11, 2001). These vouchers can only be used for 18 months. To use these vouchers for aging-out youth, the local housing authority must amend its selection criteria and the county children and youth agency must certify youth as eligible. This action would help many youth who are making the transition from care achieve stability at little cost to the children and youth agency, as the housing costs are borne by the local housing authority and HUD.

The combination of affordable housing and supportive case management can be very effective in helping a youth make the transition to independence.

### *CHAFEE ROOM AND BOARD PROGRAMS*

The Chafee Act permits counties to use up to 30% of Chafee dollars for youth discharged from care who are over 18 and under 21. Currently, only a small portion of counties have elected to take this option. These funds can be used in various ways to provide housing services to this group and can expand upon the existing SIL programs in the county to provide a more comprehensive continuum of care.

### *TRANSITIONAL LIVING PROGRAMS UNDER THE RUNAWAY AND HOMELESS YOUTH ACT*

Among the programs funded under the Runaway and Homeless Youth Act, which is part of the Juvenile Justice and Delinquency Prevention Act of 1974, is the Transitional Living Program for Older Homeless Youth (TLP).

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Because of the limited funds available for TLP programs, the demand for TLP beds far exceeds the supply. Often the waiting list for these programs is over six months.

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Grantees provide housing and independent living services to homeless youth age 16 to 21. As with IL services in foster care, these programs seek to help youth transition to self-sufficiency.

For a list of resources relating to the rights of older youth, see Appendix A.

**Court Checklist for Permanency Hearings Involving Youth Ages 16-21*****PLACEMENT***

- ☐ What is the youth's permanency plan goal?
- ☐ What is the youth's current placement and how long has s/he been there?
- ☐ Is this a long-term placement (planned to continue past age 18)?
- ☐ *For a youth who is a parent:* is the youth placed with her child?
  - ☐ If no, why is the youth not placed with her child?
- ☐ Is there a relative involved with the youth?
  - ☐ If yes, is this relative a placement resource for the youth? What services would enable this relative to become a placement resource?
- ☐ Is there any other supportive adult involved with the youth?
  - ☐ If yes, is this adult a placement resource for the youth? What services would enable this adult to become a placement resource?
- ☐ Has adoption been re-explored with the youth?
- ☐ Has the youth been referred for a Supervised Independent Living placement?
  - ☐ If not, what is the reasoning behind not making a referral at this time?

***INDEPENDENT LIVING SKILLS***

- ☐ What skills does this particular youth still need to develop in order to make a successful transition to independence?
- ☐ To what services has this youth been referred to assist him/her in acquiring independent living skills?
  - ☐ When were these referrals made?
  - ☐ If referrals have not been made, what are the reasons?
- ☐ What services is the youth currently receiving to help him/her acquire independent living skills?

**EDUCATION AND VOCATIONAL TRAINING**

- ☐ Is the youth involved in any academic or training program?
  - ☐ If yes, what are the goals of the program?
- ☐ Does the youth require any support services to complete this academic or training program?
  - ☐ If yes, what services does s/he need? Are they currently being provided?
- ☐ Is the youth currently employed?
  - ☐ If yes, where?

**PHYSICAL HEALTH, MENTAL HEALTH AND OTHER NEEDS**

- ☐ Does the youth have any special physical or mental health needs? Any need for substance abuse treatment?
  - ☐ If yes, what services is the youth currently receiving to address these special needs?
    - ☐ What is the plan for continuing these services?
- ☐ Does the youth have access to family planning services and education?
- ☐ *If the youth has special mental health needs:* will the youth need supportive housing?
  - ☐ If yes, has a referral been made to the county office of mental health?
    - ☐ When was the referral made and what is the current status of the referral?
- ☐ *If the youth has a physical health condition:* will the youth need supportive housing?
  - ☐ If yes, has a referral been made to the appropriate housing resources which can provide support or accommodations?
    - ☐ When was the referral made and what is the current status of the referral?
- ☐ *If the youth is a parent:* is the youth receiving parenting skills training?

**YOUTH WITH DISABILITIES**

- ☐ Is the youth eligible for special education?

- ☐ If yes, are the youth's parents able to participate in the special education planning process or does the school district need to appoint a surrogate parent?
- ☐ If yes and the youth is age 16 or older, what transition services are listed in the youth's Individual Education Plan?
- ☐ Has a referral to the Office of Vocational Rehabilitation (OVR) been made?
  - ☐ If yes, when was referral made?
  - ☐ If no, what is the reason for not making the referral?
- ☐ What services is OVR providing?
- ☐ Has the youth been identified or assessed as mentally retarded?
  - ☐ If yes, has the youth been assigned a county MH/MR coordinator?
  - ☐ If yes, what specialized services has the youth received?
- ☐ Has the youth applied for SSI?
  - ☐ If yes, was the youth found eligible?
  - ☐ If no, what is the reason for not making the application?

***DISCHARGE OF YOUTH UPON 18TH BIRTHDAY***

- ☐ Has the youth been informed of entitlement to stay in care until age 21 by requesting an extension of care?
- ☐ If youth has opted for an extension of care, what is the youth's course of treatment or instruction?
- ☐ If the youth has not opted for a board extension, what is the youth's reason for making this choice?
- ☐ Has the youth been informed that he or she can receive services from the children and youth agency until age 21 after being discharged?
- ☐ Has the youth been informed of the county's stipend policy?
- ☐ Has the youth been informed of the county's room and board policy?

## Part IV

### Section One

#### *THE RIGHTS OF DEPENDENT CHILDREN TO HEALTH CARE*

With the passage of the Adoption and Safe Families Act (ASFA) of 1997, Congress **mandated** that child welfare agencies take steps to ensure children's **health** as well as their safety and permanence. Children in foster care must have access to quality and timely health care, early intervention, and behavioral health services to promote their healthy well-being and support their opportunities for stable placements and permanency. Courts and child welfare professionals are at a unique advantage to ensure that these services are in place. At every hearing, the court can determine whether children are receiving all appropriate health care by requiring child welfare professionals to document what specific health and related services are in place.

This section of the Deskbook is intended as a practical guide to securing resources for children in substitute care. It outlines what the court and child welfare professionals can do to support children's healthy development and to comply with federal mandates. Ultimately, if the courts require that children under their jurisdiction receive comprehensive care, it will go a long way towards improving children's outcomes, promoting their permanency, and supporting their families.

#### **The Health Care Needs of Children in Foster Care**

Children in foster care are a medically vulnerable group. Most receive inadequate health care prior to placement. Their health and development are further compromised by risks such as parental substance abuse and experiences of physical abuse, sexual abuse, and severe neglect. Many children in foster care continue to receive insufficient health services even after placement due to bureaucratic obstacles. Barriers include turnovers in child welfare personnel, changes in placements, lack of available medical records, and a lack of sufficient community capacity to provide mental health and dental services. When children change placements they usually change health care providers. This change disrupts their continuity of health care. Additional barriers include poor coordination of physical health, behavioral health, and child welfare services, as well as poor communication among the different systems and with foster and biological parents.



## What federal and state laws and regulations govern the provision of health care to children in placement in Pennsylvania?

ASFA mandates that states implement standards to ensure that both public and private child welfare agencies provide quality health services to children in foster care.<sup>37</sup> Similarly, Pennsylvania's Juvenile Act charges the child welfare system with providing for the "wholesome mental and physical development" of children in its care.<sup>38</sup>

The county children and youth agency ("agency") is responsible for securing appropriate health care for children committed to its custody.<sup>39</sup> The FSP must include an identification of those health services to be provided to the child, and a timetable for the delivery of these services.

**Updates specifying what services *actually* were provided and any changes to the health plan must be submitted to the court at permanency hearings.** At a minimum, the agency is required to ensure that a child receives:

- A complete physical examination by a physician within 60 days of admission to foster care, as well as periodic well-child visits for routine preventative health care.
- A dental examination within 60 days of admission, and check-ups every 9 months thereafter.
- Immediate medical attention for all problems identified at these examinations.
- All necessary medical care when the minor is ill.
- A case plan that records the information listed below. **This information must be reviewed and updated each time a child changes placement, and provided to the child's new foster care provider to ensure continuity of care:**
  - All medical problems, including known physical, mental or emotional disabilities.
  - Names and addresses of the child's health care providers.
  - All medications the child is taking.
  - Immunization records.
  - Any other relevant health information.

<sup>37</sup> 42 U.S.C. §671(a).

<sup>38</sup> The Juvenile Act, 42 Pa. C.S. § 6301(b)(1.1).

<sup>39</sup> 42 U.S.C. § 675(1)(B); 42 Pa. C.S. §§6301(b)(1.1), 6351(f)(2); 55 Pa. Code §§3130.31(3), 3130.34(4), 3130.38, 3130.61, 3130.67, 3700.39, 3700.51.

In addition, all children in agency custody are eligible for the federal Medicaid program, which is called Medical Assistance (MA) in Pennsylvania. As MA recipients, children from birth to their 21<sup>st</sup> birthday are entitled to comprehensive health care according to ***EPSDT guidelines (Early Periodic Screening, Diagnosis and Treatment)***. Under EPSDT, children are entitled to:

- Periodic screening examinations. These include a physical examination, laboratory tests, and assessments to identify mental health problems and disorders, and developmental delays or disorders such as mental retardation.
- All medically necessary follow-up care that the child needs to:
  - correct a condition discovered during the screens; OR
  - lessen the condition's effects; OR
  - achieve and maintain maximum functional capacity to perform daily functions.

See page 238 for additional information on EPSDT.

Medical Assistance (MA) is the most comprehensive program through which children can obtain health services as it pays for all medically necessary treatment for enrolled children. Some counties still provide MA through the traditional fee-for-service system. However, many Pennsylvania counties currently provide MA through a managed care system named HealthChoices. Under the HealthChoices managed care system, the Pennsylvania Department of Public Welfare contracts with physical health and behavioral health managed care organizations – PH-MCOs and BH-MCOs – to provide treatment and services to MA recipients in certain counties. MA recipients in HealthChoices counties must select among network providers to obtain physical and behavioral health services

### **What is comprehensive health care for children in foster care?**

As explained above, the law requires that children in foster care receive comprehensive health care services to address their physical, dental, developmental, mental and emotional health needs. However, the laws and regulations do not provide sufficient detail regarding what these services should include, nor do they take into account the medical complexity of the health care needs of children in foster care as documented by national and local studies. To redress this gap,

the following section presents the basic standards necessary to ensure the healthy development of children in foster care. These guidelines were developed by pediatric health care professionals with expertise in treating children in the foster care system.

## PHYSICAL HEALTH

**Each child in foster care should have an identified primary health care provider and medical home.**

Primary Care services provide continuous preventive health care, including well-child visits (“check-ups”) for screening and evaluations, immunizations, and guidance for the child and caregiver to enhance health and development. The primary care professional creates a **medical home** where children receive care for acute and chronic illness, coordination of medical subspecialty care, and where information on health history, services and insurance coverage is housed. It is crucial that children in foster care have a medical home because they are a medically complex population with high rates of chronic illness, infectious disease, developmental and behavioral health needs. Multiple changes in homes, caregivers, and caseworkers also increase their need for a consistent health care provider who will get to know them well. All of their health care services (routine preventive, acute illness, chronic illness) should be available at one site.

Although current state regulations require the evaluation to take place within 60 days of placement, more stringent practice is warranted. Too many children in foster care have undiagnosed and unmet health care needs.<sup>40</sup> By failing to identify and document such conditions, these children are at risk for medical crises.

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JLC recommends that children have a comprehensive health evaluation within 30 days of placement in foster care.

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A comprehensive health evaluation includes a review of all available data and medical history about the child, a physical examination, and screenings to identify medical, developmental

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<sup>40</sup> U.S. General Accounting Office (1995). *Foster Care: Health Needs of Many Young Children Are Unknown and Unmet* (GAO/HEHS-95-114). Washington, D.C.

and/or mental health problems that require attention. Based on this information, the health care professional develops an individualized treatment plan. To do this well, the health care professional relies on the child welfare professional to provide information on past medical history, which in turn depends on the release of medical records.

**Each child should receive on-going primary health care in accordance with EPSDT standards.**

Under the EPSDT periodicity schedule, children must receive EPSDT exams at the following specified intervals:

- Infants: Due to their rapid growth and greater vulnerability, infants have the most intensive schedule, requiring EPSDT exams at birth, 2, 4, 6, 9, and 12 months of age
- Toddlers: 15 and 18 months of age
- From 2 – 5 years: Exams every year
- From 6 – 21 years: Exams are recommended every two years by EPSDT. But as noted above, Pennsylvania state foster care regulations require annual examinations

EPSDT exams must include:

- an unclothed physical exam
- evaluation of hearing and vision
- immunizations
- laboratory tests (including tests for anemia and lead)
- mental health and developmental screenings

**HIV testing should be considered on a case-by-case basis for each child in substitute care.**

Children and adolescents in foster care, just as those who are not in care, may acquire HIV infection as a consequence of many factors:

- Perinatal transmission during birth
- Sexual abuse/sexual assault
- Drug abuse with unclean hypodermic needles
- Unprotected sexual activity

Many children who have HIV will not have ANY symptoms for 3 to 10 years following infection. Currently medications are available to treat children with HIV infection, which can greatly extend their lives and improve their health. HIV testing should be *strongly* considered for ALL children in substitute care with one or more risk factors, because HIV is uniformly fatal when undiagnosed and untreated. ***The court should review a child's FSP with this in mind.***

The HIV test is *not* considered a routine test, and separate consent from the child's legal guardian must be obtained to perform HIV testing. See page 248 on obtaining consent.

**Reproductive health must be addressed for all appropriate youth in foster placement.**

The sexual health of adolescents in foster placement often is influenced by their histories of abuse and neglect. Many teens in care have been sexually abused or sexually assaulted, and these experiences place them at risk for early sexual activity and high-risk behavior. Reproductive health interventions for teens in foster placement also should be sensitive to the issues of gay, lesbian, bisexual and transgender teens. ***Parent/guardian consent is NOT required for reproductive health visits or services.*** See pages 244-250 on consent and information-sharing issues. See also, pages 215- 220 on issues related to specific health care needs of older youth and Part Three on the rights of dependent older youth.

**Chronic medical conditions may require specialty care.**

If the primary health care provider identifies a health problem during the EPSDT exam, the child may be referred to a medical specialist and/or allied health specialist, who may be located elsewhere. Specialty care providers include neurologists, ophthalmologists, orthopedic specialists,

allergists, and numerous others. The specialist will conduct additional evaluations and may provide necessary treatment and/or make referrals to other physicians or to allied health professionals. Children with chronic illnesses or developmental disorders often have these conditions monitored by specialty care providers, while their primary care needs for preventive and routine care, health guidance and treatment of acute illness continue to be met by the primary care provider. Children in foster care have much higher rates of chronic conditions and need continuity in terms of the specialists who care for their often complex conditions. Thus, when children who change placements change primary health care providers, it is essential that they continue to have follow-up visits with the various medical specialists who monitor their conditions.

## *DENTAL HEALTH*

**Every child in foster care should have an identified dentist.**

Dental decay is epidemic among children in foster placement. The oral exam also can reveal evidence of abuse. The consequences of poor dental health include an inability to eat or speak well, gum and facial infections, pain, and poor self-image. Dental services are covered under EPSDT and MA. Although MA will not pay for routine examinations until the child is 3 years-old, any sign of dental decay, especially “baby bottle caries” where the front teeth are obviously decayed, are covered at any age, due to the urgent need for intervention.

## *EARLY INTERVENTION SERVICES FOR INFANTS AND TODDLERS*

**ALL children birth through age two should be referred for a developmental assessment within one month of entering foster care.**

Children in foster care have extremely high rates of developmental delays and physical

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### ***Some medical conditions which entitle infants and toddlers to early intervention services:***

- Autism
  - Blindness/severe vision impairment
  - Deafness/hearing impairment
  - Chromosomal conditions (i.e., Downs Syndrome and Fragile X Syndrome)
  - Epilepsy
  - Failure to Thrive
  - Low birth weight
  - Fetal Alcohol Syndrome
  - Microcephaly
  - Cerebral Palsy
-

disabilities. Many young children in foster care need specialized interventions to address these conditions. Under federal and state law, eligible children with disabilities from birth through age 2 are entitled to Early Intervention services.<sup>41</sup> ***Young children who have developmental disabilities and delays, or physical or mental conditions likely to result in delays, can receive services through the Early Intervention Program of the federal Individuals with Disabilities Education Act (IDEA).*** See pages 268-269. Eligible infants and toddlers include those who experience a delay in their physical, communication, cognitive, social-emotional, self-help and/or motor development. Infants and toddlers whose diagnosed physical or mental conditions have a high probability of resulting in developmental delays also are eligible.

Early intervention services have been shown to improve children's functional abilities and outcomes, regardless of whether their delays are due to medical conditions or to the extreme deprivation associated with neglect. All children entering foster care should receive a developmental assessment, with re-evaluations conducted for eligible children and those in "at-risk tracking" (see below) every six months until the child is 3 and every two years thereafter until the child begins elementary school.

Children with mental retardation who are ages 3 and older should be registered with the mental retardation system.

Children who are registered in the mental retardation system are entitled to various supports and services, including supports coordination (case management). Once registered, a child in foster care also may be eligible for Family Driven Support Services (FDSS), which include such supports as respite, family aid and recreation. The following documents are needed to register the child:

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***Early Intervention services  
for infants and toddlers:***

- Assistive Technology Services
  - Audiology
  - Family Training, Counseling and Support
  - Health Services
  - Medical Services for Diagnosis and Evaluation
  - Nursing Services
  - Nutrition Services
  - Occupational Therapy
  - Physical Therapy
  - Psychological Services
  - Service Coordination
  - Special Instruction
  - Speech-Language Pathology
  - Transportation and Vision Services
- 

<sup>41</sup> 20 U.S.C. § 1431 et seq.; 34 C.F.R. Part 303; 11 P.S. § 875-101; 55 Pa. Code Chapters 4225 and 4226.

- A psychological evaluation that indicates an IQ below 70. For children under the age of 6, a physician's note or an evaluation indicating a 50% delay in the cognitive area is acceptable.
- A physical evaluation (conducted within the last year).
- A notice of MA eligibility.

**If the child does not have MA, the court should order the agency to register the child.**

### *BEHAVIORAL HEALTH*

Children placed in foster care have experienced real trauma and dramatic disruption in their lives and critical relationships. Research indicates that up to 80% of children in foster care have significant developmental or mental health problems, compared to 25% of children in the general population. Although placement in substitute care may be necessary to ensure their safety and well-being, it also may contribute to their emotional difficulties by disrupting their bonds with family members, friends and communities.<sup>42</sup> Additional placement changes can further disrupt the formation of important emotional attachments and intensify stress and anxiety for the child.

Youth in the foster care system are covered by Medicaid and can receive inpatient and outpatient mental health treatment depending on their needs. In addition, Behavioral Health Rehabilitation Services, which are commonly known as "wraparound services," are another entitlement available to MA-eligible children under the age of 21. These services are designed for children with emotional and behavioral disorders. Services are provided in such locations as the child's home and in school in order to prevent the child from being placed in a more restrictive environment, such as a long-term residential treatment facility or psychiatric hospital. A wraparound plan can include a variety of services, including but not limited to therapeutic staff support (TSS) to work one-on-one with the child in the child's environment, a behavioral specialist consultant to develop a behavior management plan for the child, and mobile therapy.

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<sup>42</sup> American Academy of Child & Adolescent Psychiatry (2001). *Psychiatric Care of Children in the Foster Care System. Policy Statement*. Washington, D.C.



***Indications for a Comprehensive Mental Health and Substance Abuse Assessment***

- History of mental health and/or substance abuse in child and/or family
- The appearance of extreme, or minor but prolonged, emotional or behavioral problems
- Staff or foster family concerns that there are mental health/behavioral problems
- Staff or foster family concerns that the child may be using alcohol, drugs, or inhaling toxic fumes to get high
- Results of an initial mental health/substance abuse screening indicate clinical levels of emotional/behavioral problems
- Children suffering from the trauma of sexual abuse and exploitation
- Children who “act out” by exhibiting inappropriate sexual behaviors
- Children struggling with emotional issues related to their sexual identity or sexual orientation
- Other indications that require a formal behavioral health assessment to rule out a significant problem, or to initiate intervention planning and treatment

**An initial mental health and substance abuse screening must be conducted within 24-hours of the child's placement.**

This screening should rely on published screening instruments and behavior checklists available to county children and youth workers and foster care agency case managers and staff. These screening tools *supplement* other indications to determine the need for a comprehensive mental health and substance abuse assessment. This screening also can be conducted as part of the child's health examination upon entry into care, since mental health screens are a mandatory component of EPSDT exams.

**Children should be referred for a comprehensive mental health and substance abuse evaluation within 60 days of placement, or sooner depending on the severity of the child's and family's needs.**

Children should be referred for a comprehensive evaluation when:

- their initial screening indicates problems *OR*
- they score in the clinical range on published measures or checklists *OR*
- they meet any of the criteria set forth above: Indications for a Comprehensive Mental Health and Substance Abuse Assessment.

All children entering foster care should receive this comprehensive evaluation. However, currently the Commonwealth does not have the resources for universal mental health evaluations of children in foster care. Children already in placement should be referred for a comprehensive mental health and substance abuse evaluation if they meet any of the criteria listed in the box on page 243 and have not received such an evaluation in the past six months.

Note that many children entering or already in the foster care system have had one or more behavioral health evaluations by the time the court is asked to intervene. Yet few of these children actually receive the recommended services. It is crucial for court personnel to determine first if the child has received an assessment within the past six months. If not, a comprehensive behavioral health and substance abuse assessment should be obtained. Informed consent, including the consent to share information regarding the evaluation with mental health and substance abuse treatment providers, should be obtained for this evaluation (see pages 244-250 regarding consent and confidentiality issues). If assessments *were* conducted within the past six months, the results should be obtained and recommended services implemented.

### *CONSENT AND INFORMATION SHARING ISSUES*

Delays in obtaining consent for evaluations and services, and for the release of medical records, pose a significant barrier to children in foster care who need medical treatment. This section briefly outlines the laws and regulations pertaining to consent to treatment and information-sharing as they affect children in foster care. For a comprehensive discussion of these laws, as well as legal citations to the information presented below, the reader is referred to *Consent to Treatment and Confidentiality Provisions Affecting Minors in Pennsylvania* (L. Rosado, 2002), which can be downloaded from Juvenile Law Center's website at [www.jlc.org](http://www.jlc.org). The website also provides updates.

## *AUTHORIZING EVALUATIONS AND TESTS*

### **The juvenile court may order evaluation and/or treatment.**

In an ongoing dependency case, the juvenile court may order a physical or mental examination of the minor, and may also order medical or surgical treatment of a minor who is suffering a serious physical condition or illness which, in the opinion of a physician, requires prompt treatment. The court may order the treatment even if the parent, guardian or custodian has not been given notice of the pending hearing, is not available, or without good cause informs the court that he or she does not consent to the treatment.

### **In *some* circumstances, the agency may authorize evaluation and treatment for children committed to its custody.**

When a child is in the agency's legal custody, the Commonwealth's Department of Public Welfare (DPW) regulations come into play. Regulations governing children and youth agencies, private foster care agencies, foster families, and child residential facilities distinguish between **routine versus non-routine** medical and dental examinations and treatment for purposes of consent. The regulations do not define routine and non-routine treatment but instead offer examples of each.

When the minor has been **involuntarily** removed from the home and is in the agency's legal custody, but parental rights have not been terminated, the agency caseworker can authorize **routine** examination and treatment for the minor; the consent of the parent/guardian is not needed. *However*, the minor's parent or legal guardian must still give prior written consent to *each instance* of **non-routine** examination or treatment for the minor. Again, if the parent/guardian does not consent or cannot be located, a court order must be obtained.

*The following are examples of routine matters for which consent is not required:*

- Well child visits and health exams

- Dental care
- Vision and hearing care
- Immunizations
- Treatment for injuries and illnesses

*The following are examples of non-routine matters for which consent is required:*

- Non-emergency (elective) surgery, including non-emergency surgeries for a medical condition
- Cosmetic surgery
- Experimental procedures or treatment

When the agency has custody of a minor for whom a decree of **termination of parental rights** has been entered, the agency can consent to all **major medical, psychiatric and surgical treatment for the minor**.

**The law permits minors to consent to various health care testing and treatment.**

The law permits minors – defined as persons under the age of 18 -- to consent to a wide variety of medical testing, treatment and health services without parental consent, if the minor is capable of giving his/her consent. For example, minors can consent to testing and treatment for a long list of what are known as “reportable diseases.” If a minor in foster care is not sufficiently mature to give consent, then the consent of the minor’s parent/guardian or a court order must be obtained. Set forth below are those health services for which the law permits minors, including minors in foster care, to consent. <sup>43</sup>

**Courts and child welfare professionals should familiarize themselves with the laws as to when minors can consent to their own health care as compared to when parental consent must be obtained.**

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<sup>43</sup> In addition, minors who have graduated from high school, been married and/or have been pregnant can consent to all medical, dental, and health services for themselves, with the exception of abortion.

## *MENTAL HEALTH EVALUATION AND TREATMENT*

**Minors 14 years and older.** A minor who is 14 years of age or older may consent to *both* voluntary inpatient and outpatient mental health evaluation and treatment.

***With respect to voluntary inpatient treatment, the consent of the minor's parent/guardian is not valid.*** If a parent/guardian or third-party (i.e., the agency) wants to obtain inpatient treatment for a non-consenting minor who is 14 years or older, they must pursue an involuntary commitment through the courts as per the Mental Health Procedures Act.

***With respect to voluntary outpatient treatment, a DPW bulletin advises that either the minor or the minor's parents can lawfully provide consent.*** When a parent/guardian consents to outpatient care on behalf of a non-consenting minor in this age group, and the parent is still able to "present" the youth for treatment, DPW advises that the mental health provider make efforts to engage the youth in treatment.

**Minors under the age of 14.** The parent/guardian of a minor under the age of 14 must give consent to both voluntary inpatient and outpatient evaluation and treatment. Absent parental consent, a court order must be sought.

## *SUBSTANCE ABUSE EVALUATION AND TREATMENT*

Minors can consent to medical care and counseling related to the diagnosis or treatment of a substance abuse problem. There is no age limit for giving consent to substance abuse treatment. A provider may treat a minor who has consented to treatment if the provider determines that the consent is "knowing and voluntary."

## REPRODUCTIVE HEALTH

### Pregnancy Testing, Prenatal Care and Contraception.

Any minor can consent to testing for pregnancy, as well as medical and health services to treat pregnancy, including all prenatal care. This does not include abortion. *See below*. The law also permits minors to obtain contraception (birth control) without parental consent.

### Abortions.

When a minor wants to obtain an abortion, the provider must obtain the informed written consent of the minor and one of her parents or legal guardians. If the pregnant minor's parents are divorced, the consent of the custodial parent is sufficient. If the pregnancy is the result of incest by the minor's father, the minor need only obtain consent from her mother. If neither the minor's parent nor legal guardian is available to the physician in a reasonable period of time, the consent of an adult person standing *in loco parentis* is sufficient. **Note that when the agency places a child with foster parents, the foster parents do not stand *in loco parentis* to the child. Nor does the agency stand *in loco parentis* if parental rights have not been terminated.** Without consent of a parent/guardian or an adult standing *in loco parentis*, there are two circumstances in which a minor can obtain a non-emergency abortion in Pennsylvania:

- The minor is emancipated *OR*
- The minor has received authorization from the Court of Common Pleas in the judicial district either where she resides or where she seeks to have the abortion performed.

### Sexually Transmitted Diseases, Including HIV/AIDS.

A minor can consent to testing and treatment for *any* venereal or Sexually Transmitted Disease (STD). These include but are not limited to HIV and AIDS, chlamydia, gonorrhea, and syphilis.

If a provider recommends HIV testing for a minor in foster care who is not capable of giving consent (i.e., an infant or toddler), written consent from the child's parent/guardian or a court order must be obtained.

### *INFORMATION SHARING*

#### **Children and youth agencies and private foster care agencies may share certain information in the child's case record with the child's health care providers.**

For children who are in the legal custody of a county agency, the caseworker may disclose information about the child from the child's family case record to health care providers without obtaining prior written consent. The caseworker may only disclose that information needed by the child's health care providers to carry out their responsibilities in serving the child. Similarly, the child's foster care placement agency caseworker may disclose otherwise confidential information about the child in the case records to the child's health care providers to the extent that the information is needed by the providers to carry out their responsibilities. Prior written consent is never needed to disclose information to health care providers in emergencies when the child is at risk of serious harm or death.

#### **The county agency may also share pertinent health information with the child's foster parents.**

According to state regulations, foster families are to be provided with information from a child's case record "which is necessary to protect the child's health and safety." Although there is no regulation that explicitly authorizes a foster parent to disclose health information to the child's current health care provider, the authority for such disclosure is implicit in the foster parent's responsibility to protect the child's health. Moreover, as a matter of practice, private agencies enter into agreements with their foster parents that require foster parents to escort children to routine medical examinations where disclosure of pertinent health information would occur.

**DPW guidelines govern the disclosure of information about children in foster care by the HealthChoices MCOs to child welfare professionals.**

The Department of Public Welfare has established guidelines for the release of patient information by the HealthChoices MCOs to agencies which and individuals who care for children in the child welfare system. MCOs may release limited information about a child, including the child's member number, assigned primary care physician, and assigned dentist, only to the following:

- County children and youth agency with legal custody of the child.
- Private agency providing placement for the child.
- Child's foster parents or kinship caregivers.
- Attorney representing the child and/or court appointed special advocate.

For a list of resources relating to health care and dependent children, see Appendix B.



## Part IV

### Section Two

#### *THE RIGHTS OF DEPENDENT CHILDREN TO EDUCATION*<sup>44</sup>

Dependent children, whether living at home or in placement, or children otherwise living away from their birth families, frequently encounter problems in obtaining appropriate public education and special education.

National data reveals that many youth aging out of foster care experience poor educational outcomes. See Blome, W.W., *What Happens to Foster Kids: Educational Experiences of a Random Sample of Foster Care Youth and a Matched Sample of Non-Foster Youth*, 14 CHILD AND ADOLESCENT SOCIAL WORK JOURNAL 41-53 (1997). The unique barriers that foster children face to prompt school enrollment and receipt of an appropriate education contribute to these poor results. For example, when children change placements and thus schools frequently, problems arise, including delays in enrollment and records transfer as well as loss of school days. Difficulty in obtaining parental consent delays access to services, particularly disability related services. This situation is complicated in Pennsylvania by the lack of uniform statewide protocols for enrollment and transfer of records.<sup>45</sup> Youth in foster care are often more likely to be placed in the most restrictive educational placements and also are often not appropriately identified for special education services.

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<sup>44</sup> This section of the Deskbook has been prepared, in the main, by the Education Law Center (ELC). ELC is a non-profit education advocacy organization dedicated to ensuring that all of Pennsylvania's children have access to a quality public education. ELC has lawyers and paralegals on staff. You can call them with questions on legal issues. (215) 238-6970 or (412) 391-5225. ELC offices are located in Philadelphia, Pittsburgh, and Harrisburg. ELC also operates the *Pennsylvania School Reform Network (PSRN)*, which provides timely information on and promotes important school reform that will help PA's most vulnerable and at risk students. ELC publishes manuals and "fact sheets" on education law that are available on the Internet at no charge – [www.elc-pa.org](http://www.elc-pa.org). The website contains the text of the laws, regulations, and policy directives referred to in this section. ELC also provides training opportunities for families and professionals, and represents parents and children in selected lawsuits that seek important education reforms.

<sup>45</sup> ELC and other advocacy groups have been lobbying for changes in state law that would set uniform, statewide requirements and timelines for enrollment. In 2004, the State Board of Education unanimously approved proposed regulations that would establish a uniform timetable for school districts to process their enrollment paperwork, including for nonresident children who live in institutions or foster homes. The proposed rules would require that schools enroll children no later than five business days after receipt of an application and documentation such as proof of age and immunization records. The proposed rules would also require the school that the child previously attended to forward the child's records to the new school within five business days of receiving a request for records. Before the new regulations can go into effect, they must undergo review by the state House and Senate education committees, the Attorney General's office and the Independent Regulatory Review Commission, a process that can take up to one year. To track the progress of these proposed regulations, you may consult ELC's website at [www.elc-pa.org](http://www.elc-pa.org).

The consequences to youth can be severe. As researchers have noted, given the current economy “a GED only is insufficient and may be a deterrent to stable employment, and by itself, a high school diploma no longer assures employment beyond a poverty level wage.” E.V. Mech, *Foster Youth in Transition: Research Perspectives on Preparation for Independent Living*, 73 CHILD WELFARE 614, 606-623 (1994). Thus, ensuring that youth in care receive appropriate educational services is crucial to promoting a successful transition.

The county children and youth agency is responsible for securing appropriate educational services for children committed to its custody.<sup>46</sup> Family service plans must include a record of the names and addresses of the child’s school/educational providers, the child’s grade level, his or her complete school record, the child’s physical, mental or emotional disabilities, if any, and any other relevant educational information. This information must be reviewed and updated each time a child changes placement, and provided to the child’s new foster care provider to ensure continuity of care. 42 U.S.C. §675(1)(B); 55 Pa. Code §3130.67.

Children who live apart from their families or in non-traditional settings encounter problems getting education for many different reasons. Some of the problems are structural – a child is a resident of the school district in which his or her parents reside, and a “non-resident” of any other school district. Although non-resident students, such as children in foster care whose parents live in another district, can usually attend school where they live, the rules can be complicated and confusing. And then there are logistical and practical impediments. For example, school districts sometimes expect a birth parent – who may or may not be readily available – to enroll the child and give needed information. Some school officials view children in substitute care as potential troublemakers and may resist their enrollment. Even when school authorities are cooperative and welcoming, when children move frequently, records can become hard to locate and transfer, and normal enrollment procedures can cause delays. By clearly explaining what rules apply, this manual will help eliminate or reduce these barriers.

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<sup>46</sup> When parental rights have not been terminated, parents retain the right to participate in making educational decisions and often still need to give their consent with respect to special education services. Please see the next section for more information on the rights of children in foster care who require special education services, and who is responsible for securing such services.

This section focuses on issues of particular concern for dependent children, and particularly those living apart from their families.<sup>47</sup> The specific topics discussed below are:

- The basic structure of public education.
- School enrollment requirements.
- Compulsory education and truancy laws.
- The rights of children in substitute care including residential or other group placements.
- Children living with relatives or family friends.
- Special education and early intervention for children with disabilities.
- Emancipated minors.

## **I. The Structure of the Public Education System**

Children and youth receive public education and related services in Pennsylvania through 501 local school districts and 29 Intermediate Units. School districts operate public elementary and secondary schools, from kindergarten or first grade through high school. Most school districts are governed by a local board of school directors, who are usually elected by the public; these school boards set local policy. Each local board employs someone to run the school district, usually a school superintendent. Principals are employed by the superintendent to operate each school in the district. A slightly different administrative system operates in Philadelphia, where the state and city share governing authority over local school operations through a School Reform Commission with appointed membership.

**Intermediate Units (IUs)** are regional entities that offer a wide variety of education and special education programs and services to children in the districts they serve. IUs also usually provide preschool early intervention services for children with disabilities from age three through kindergarten or first grade. Each IU is led by an executive director and is governed by a board of directors composed of school board members from school districts in the region.

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<sup>47</sup> ELC has numerous publications relating to education. Many are posted at [www.elc-pa.org](http://www.elc-pa.org).

**Children under the age of three** with developmental delays or physical or mental disabilities that are likely to result in developmental delays are eligible to receive services and supports through Pennsylvania's Infants and Toddlers Early Intervention Program. The Infants and Toddlers Program is administered at the state level by the Office of Mental Retardation in the PA Department of Public Welfare (DPW). At the local level, services are provided to eligible children by the Mental Health/Mental Retardation (MH/MR) Office in each county. Through the Infants and Toddlers Program, young children with disabilities receive developmental and other services, and their families receive services and supports needed to enhance their children's developmental and educational growth.

The State Board of Education, with most members appointed by the Governor, adopts regulations that interpret the state's education statutes. The Pennsylvania Department of Education (PDE) publishes Basic Education Circulars (BECs), advisory instructions to local school districts and intermediate units. Copies of all of PDE's current BECs can be downloaded from ELC's website, [www.elc-pa.org](http://www.elc-pa.org).

Judges should also be aware of these other components of the education system:

- **Kindergarten classes** are not required in every school district. However, once a district decides to operate kindergarten classes, it must follow all general and special education laws and regulations. Kindergarten classes may operate for as little as two and one-half hours per day.
- **Alternative schools** for students with significant discipline problems are operated by school districts. There are 624 alternative schools in the state. Some alternative schools offer quality programs of instruction and behavior support, but some are very poor and offer mostly "seatwork."
- **Area Vocational Technical Schools** (AVTs), also called Career and Technology Centers or Technical Schools, are operated either by a school district or a group of school districts to provide career and technical education services to local students. Eighty AVTs operate in the state, with 15 full-time programs and 65 part-time programs (where students attend their home high school for academic classes).

- **Charter schools** are independent public schools established and operated under a “charter” from the local school board. 96 charter schools currently operate in the state, including “cyber” charters that operate via the Internet.

## II. School Attendance

### **When are children entitled to attend public school where they live? 24 P.S. §§ 13-1301 and 13-1302**

In general, Pennsylvania children between the ages of 6 and 21 are entitled to attend school in the school district in which their parents live. 24 P.S. §§13-1301 and 13-1302. Although not mandatory, most school districts in PA operate at least part-time kindergarten program. Younger children with disabilities or developmental delays are entitled to “early intervention services” from appropriate early intervention agencies. PA regulations state that: “No student shall be denied access to a free and full public education on account of race, religion, sex, national origin, or handicaps.” 22 Pa. Code §12.4.

“Non-resident” children, such as children placed with foster parents or in group homes or other residential facilities outside their birth parents’ districts, also have the right to attend school where they live, and to receive necessary education and special education services there.

Children living with pre-adoptive parents are also entitled to attend school where they live. See, 22 Pa. Code §11.19.

### **What documents are required to enroll a student, including a dependent child, in school?**

The PA Department of Education (PDE) has new rules that will make it easier for all children to enroll in school. In a BEC entitled

“Enrollment of Students,” PDE set out the rules for enrolling students, including students in foster

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The children and youth agency is required to consider proximity to the youth’s current school when seeking a foster care placement. 55 Pa. Code ‘3130.67(b)(2)(iv). The court should inquire into whether the agency has explored placements that would allow school continuity.

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care. DPW issued a companion Bulletin to inform county and private children and youth agencies about the new enrollment procedures.<sup>48</sup> Within a few months, state regulations will be finalized that codify and expand on these requirements.<sup>49</sup> The BEC says that only the following documents can be required as a condition of enrollment:

- Proof of *residency* in the school district. Acceptable documentation includes a utility bill, rental lease, or bank account showing the residential address of the child's parent or guardian.
- Proof of the *child's age* (examples of acceptable documentation include a birth certificate, baptismal certificate or transcript of the record of baptism duly certified and showing the date of birth, notarized statement from the parents indicating the date of birth, duly attested transcript of the birth certificate, or duly certified transcript of birth).
- Official medical records of *immunization*, certificate of immunization, or assurance from the former school district or a medical office that the required immunizations have been done (or a required series begun) with a record to be sent as soon as possible. Immunization shall not be required for any child if a physician provides a written statement that immunization may be detrimental to the health of the child. 24 P.S. §1303a(c). Immunization is also not required if the parent or guardian objects in writing based on religious grounds or on the basis of a strong moral or ethical conviction similar to a religious belief. 24 P.S. §1303a(d). School officials may admit students who have received at least one dose of each of the immunization antigens required by state law and allow such students up to eight months to complete the remaining doses while they attend school. 28 Pa. Code §23.83 and §23.85(e); Enrollment of Students BEC.
- Completion of a written "Parent Registration Statement" about "whether the pupil was or is presently suspended or expelled from any public or private school of this Commonwealth or any other state for an act or offense involving weapons, alcohol or drugs or for the willful infliction of injury to another person or for any act of violence committed on school property." 24 P.S. §1304-A(a). The written statement must be completed by "the parent, guardian or other person having control or charge of a student." 24 P.S. §1304-A(a). The statement "shall include the name of the school from which the student was expelled or suspended for the above-listed reasons with the dates of expulsion or suspension and shall be maintained as part of the student's disciplinary record." 24 P.S. §1304-A(a). Caseworkers or caretakers may not

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<sup>48</sup> That Bulletin, entitled "Enrollment of Students," is posted at [www.elc-pa.org](http://www.elc-pa.org).

<sup>49</sup> It is expected that the proposed regulation, an amendment to 22 Pa. Code Chapter 11.11, will be in effect in a few months. A copy of the proposed Chapter 11, which was adopted in final form by the State Board of Education in January, 2004, is posted at [www.elc-pa.org](http://www.elc-pa.org).

be certain whether the child has a disciplinary record involving the specific acts listed in this statutory requirement. If you are unsure about this information, you may write in the required statement that you are giving information “to the best of my knowledge.”

In addition to the above, the school district registration form can request basic information such as :

1. The name, address, and telephone number of parents, guardians, or resident adults with whom the student is living;
2. The addresses and telephone numbers of other emergency contacts; and
3. Information about schools formerly attended by the child.

*The documents and information listed above are all that a school district can demand as a condition of enrolling a student. The BEC recommends that a student be enrolled and in attendance within ten (10) business days of the school district’s receipt of these documents.<sup>50</sup>*

**What are the rules on transfer of a student’s education records to the new school district? 24 P.S. §13-1305-A**

When a student enrolls in a new school district, that school district is required to request a certified copy of the student’s disciplinary record from the school the student previously attended. 24 P.S. §13-1305-A. “The sending school entity shall have ten (10) days from receipt of the request to supply a certified copy of the student’s disciplinary record.” 24 P.S. §13-1305-A. Again, *the school district cannot refuse to admit the student while it makes this request and waits for the records to arrive*; however, it can require as a condition of enrollment that a sworn “Parent Registration Statement” regarding the student’s discipline history be submitted. (See page 256.) School districts should also request copies of other student records from the school previously attended by the student, including academic records,

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*The school district **cannot** require foster children to produce:*

- the child’s Social Security number
- picture identification
- the child’s visa or immigration documents
- the Juvenile Court Order placing the child or other court records
- guardianship papers
- the reason why the child was removed from his or her birth family

A foster child can be enrolled in school by his or her foster parent or caseworker.

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<sup>50</sup> The proposed state regulation states that a student should normally be enrolled the next business day, but no later than 5 business days from the school district’s receipt of the records. Proposed 22 Pa Code §11.11(b).

attendance records, and any IEP and other special education records.<sup>51</sup> Again, the enrolling school district **cannot** keep the student out of school pending receipt of these records.<sup>52</sup>

### **What happens when a school district does not follow these enrollment rules?**

The Pennsylvania Department of Education (PDE) has established a “complaint” process to resolve student enrollment problems. This process is described in the “Enrollment of Students” BEC. Any person attempting to enroll the child, or the school district, may bring an enrollment dispute to PDE’s “School Services Unit” at the Office of Elementary and Secondary Education:

Pennsylvania Department of Education  
333 Market Street  
Harrisburg, PA 17126-0333  
Phone: (717) 783-3750

A complaint can be made by an initial phone call, and followed up by a letter explaining the situation. If the school district does not enroll the student, PDE will fax a letter to the district within five (5) business/school days after receiving the written complaint to request the school district’s official position; the school district will have five (5) business/school days to respond. If the school district refuses to enroll the student or does not respond, the complaint and response from the school district will be forwarded to the PDE Office of Chief Counsel. The Office of Chief Counsel and the Deputy Secretary for Elementary/Secondary Education will determine if the school district’s failure to enroll the student is valid. If not, the Deputy Secretary will determine what additional measures may be necessary to assure enrollment.

### **At what age can a child begin receiving education services, and how long can he or she continue to attend public school? 24 P.S. §13-1301, 22 Pa. Code §11.15**

In general, children have the right to attend school from ages 6 to 21, or until they graduate from high school. 24 P.S. §13-1301, 22 Pa. Code §11.15. A child who turns twenty-one (21) years

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<sup>51</sup> Under the proposed state regulations, the old school district will have ten (10) business days to forward the child’s education records to the new school district.

<sup>52</sup> Parents cannot prevent school districts from exchanging such information, and transfer of these records does not require parental consent. The new school district must request and the enrolling district must transfer the student records mentioned in this paragraph.



during the school term and who has not graduated from high school may continue to attend the public schools free of charge until the end of the school term. 24 P.S. §13-1301. Younger children with developmental delays or disabilities are eligible for early intervention services. Specific age eligibility rules are:

***Infants and Toddlers Early Intervention Program*** for children with disabilities through the County Mental Health/Mental Retardation (MH/MR) Office. Applicable age: Under age 3.

***Early Intervention Preschool Program*** for children with disabilities, usually through the regional intermediate unit, but sometimes provided by a school district or private agency. Applicable age: Age 3 to kindergarten, or, if the parent chooses, until the child is eligible for 1<sup>st</sup> grade.

***Kindergarten***, when offered through the local public school district. Applicable age: Limits set by school district, but cannot be less than 4 years before the first day of the school term, nor higher than school district's entry age for 1<sup>st</sup> grade.

***First grade***. Applicable age: Set by school district, but unless the school district has adopted a policy for early admission, the minimum age for admitting a child into the first grade (called the age for "beginners") cannot be less than five years and seven months before September 1. A child meeting the minimum age for beginners can attend first grade and cannot be required to attend kindergarten.

The county children and youth agency must ensure that children in its care are enrolled or have access to education in compliance with the Public School Code, 24 P.S. §§1-101-27-2702. See 55 Pa. Code §130.87(a). If the youth is beyond the age of compulsory school attendance, the agency must ensure that the youth has the opportunity to obtain career counseling or continuing education. 55 Pa. Code §3130.87(c).

**When is a child truant from school? 24 P.S. §13-1327**

Pennsylvania law mandates that children and youth of “compulsory school age” attend an education program that meets state standards. 24 P.S. §13-1327. Approved education programs may include public schools, private schools, or approved home education programs.<sup>53</sup> The compulsory attendance requirement runs from age 8 to age 17, unless the child begins 1<sup>st</sup> grade earlier. 24 P.S. §13-1326. The major exception is if the student has reached 16 *and* is “regularly engaged in any useful and lawful employment or service during the time the public schools are in session.” The student must hold “an employment certificate issued according to law.” 24 P.S. §13-1330(1). Usually school districts issue these “work papers.”

Both children of compulsory school age and the adults responsible for their care can be punished if the child does not attend school regularly. School officials must report as truant all children with unexcused absences for more than three days in a row. 24 P.S. §13-1354. Truant children and their caretakers can be subject to court proceedings, and children can in some situations be adjudicated “dependent” and custody transferred to a Children and Youth agency. For a detailed review of the procedures and penalties that can attach in a truancy situation you can download ELC’s fact sheet entitled “What are the Rules for School Attendance and Truancy” from [www.elc-pa.org](http://www.elc-pa.org). Children who are subject to dependency proceedings as a result of truancy allegations are entitled to all of the rights that attend such proceedings, including the right to counsel.

***NON-RESIDENT CHILDREN IN FOSTER FAMILY PLACEMENTS*****Can “non-resident” children and “emancipated minors” attend school where they live?**

Children who live with foster parents in districts other than where their birth parents live are considered to be “non-residents.” However, as a result of the decision in ***Nancy M. v. Scanlon***, 666 F. Supp. 723 (E.D. Pa. 1987), it is now clear that these children have the same right to attend

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<sup>53</sup> This section does not cover home schooling issues; if the child is attending an approved home program, the child is not truant. 24 P.S. §13-1333(d).

school where they live and to be treated as if they were residents of that school district for all purposes. 24 P.S. §13-1305(a). See also the BEC entitled “Enrollment of Students.”

Some local school officials may mistakenly believe that they have the authority to deny enrollment to foster children. Pennsylvania law used to contain a provision giving such authority to school districts. This outdated provision is still included in the reported statutes at 24 P.S. §13-1305(b), which adds to the confusion.

### *EMANCIPATED MINORS*

State education law defines an emancipated minor as “a person below the age of 21 who has chosen to establish a domicile apart from the continued control and support of parents or guardians.” A minor living with a spouse is emancipated. Emancipated minors are entitled to attend school in “the school district in which the child is then living” regardless of where his birth parents live. 22 Pa. Code §11.11.

### *IMMIGRANTS OR FOREIGN VISITORS*

It is unconstitutional to deny free public education to immigrant children who are not legally admitted into the United States. The United States Supreme Court decided this issue in the case of *Plyler v. Doe*, 457 U.S. 202 (1982). Pennsylvania law complies with this federal case, requiring school districts to “provide free education to children whose immigration status is not documented.” See BEC entitled “Foreign Students Eligibility for Enrollment.” Proposed revisions to 22 Pa. Code Chapter 11, which are expected to be issued in final form shortly, state:

A child's right to be admitted to school may not be conditioned on the child's immigration status. *A school may not inquire regarding the immigration status of a student as part of the admission process.* This provision does not relieve a student who has obtained an F-1 visa from the student's obligation to pay tuition under Federal law.

Proposed 22 Pa. Code §11.11(d) (emphasis added).

Schools are prohibited from requiring any student or parent to provide a Social Security number or immigration documents. Children must be enrolled and educated regardless of their immigration status, except for students with “F-1” visas, who have more limited entitlements.

#### *NON-RESIDENT CHILDREN LIVING GRATIS WITH RELATIVES OR FAMILY FRIENDS*

Sometimes a child is unable to live with his or her parents due to marital separation, economic, or other reasons. Pursuant to 24 P.S. §13-1302, when a child is living with a relative or family friend from another school district who is caring for the child “gratis,” the child can attend school in that district if the following conditions are met:

- The child is living with the resident continuously, and not just for the school term;
- The resident is willing to assume all personal obligations for the child relative to school requirements.
- The public school may require the resident of the district to file:
  - “[A]ppropriate legal documentation [court orders] to show dependency or guardianship;  
*or*
  - A sworn statement that he meets the requirements of §1302; *and*
  - “[O]ther reasonable information to substantiate the sworn statement” in accordance with PDE guidelines.

Other “reasonable information” may include utility bills, employment verification, state identity cards, tax forms, rental leases, insurance forms, and other information verifying the adult’s residence and responsibility for the child.

Foster families who receive foster care payments cannot meet the “gratis” requirement of §1302 (but note that children in foster care are entitled to be treated as residents and attend school under 24 P.S. §13-1305). Whether a child is living “gratis” with relatives or family friends will

usually depend on the facts of each case. However, children living with residents are “gratis” even if the resident is receiving pre-adoptive payments, or public benefits such as Supplemental Security Income or TANF on behalf of the child. 22 Pa. Code §11.19.

Children who meet the requirements of §1302 “shall be entitled to all free school privileges accorded to resident school children of the district.” The student will attend the school normally designated for the residence of the relative or family friend “in the same manner as though such child were in fact a resident school child of the district.” §1302. Students shall be enrolled and placement made “the next scheduled school day” after the school receives one of the two documents listed above, the information reasonably required to substantiate the sworn statement, and the other standard information required for newly enrolling students. BEC entitled “Education of Children Residing with Another Adult Other Than Natural Parent.”

#### *NON-RESIDENT CHILDREN LIVING IN FACILITIES OR RESIDENTIAL PLACEMENTS*

Children who are placed, either by court order or by their family in a residential facility located away from the child’s family are entitled to attend school in the district in which the facility is located. Examples of such facilities are:

- Juvenile shelters or residences for dependent children
- maternity residences
- drug and alcohol treatment centers
- children’s hospitals
- other agencies or “institutions for the care or training of children or adolescents

22 Pa Code §11.18(a), 24 P.S. §§13-1306 to 13-1310.

The school district in which the children’s facility or institution is located “shall permit any children who are inmates of such homes, but not legal residents in such district, to attend the public schools in said district.” 24 P.S. §13-1306(a). “Whenever non-resident children attend the public schools in such district, they shall be furnished proper transportation provided for resident children.” 24 P.S. §13-1306(b).

The “1306” or host district is responsible for developing special education programs for children with disabilities who live in the “children’s institution” in collaboration with the children’s resident school districts. The School Code also sets out the mechanism by which such children will be funded. See, *e.g.*, 24 P.S. §13-1306, 13-1309.

School attendance is more complicated for children in residential facilities when their parents do not live in Pennsylvania. These children may still attend school in their “1306” districts if the children can separately demonstrate that they are residents of Pennsylvania. To do this the child must show a presence in a Pennsylvania children’s facility or institution, and the parent’s and child’s intention for the child to remain in the facility or in the state for an indefinite amount of time. See BEC entitled “Determination of Residence of Children Living in PA Institutions.” See *also* **Steven M. v. Gilhool**, 700 F. Supp. 261 (E.D. Pa. 1988) (finding that children cannot be denied enrollment or charged out-of-state tuition without individual consideration of their case by the state and the right to appeal).

Sometimes a child is placed in a children’s institution while the parents reside in PA, and the whereabouts of the parents later cannot be determined. Children in this situation are entitled to the protections of §1306 and can attend school in the school district in which the institution is located; the Commonwealth provides funding. 24 P.S. §13-1308, 22 Pa. Code §11.18. The same rules apply if the child is placed by PA parents who leave the state and abandon the child. 22 Pa. Code §11.18.

For some children, the institution responsible for their care and the local school district may agree that the most appropriate education will be provided in a setting outside of the public schools. Some institutions obtain state approval to establish their own on-site public or private schools for the children in their care. In other situations, the local school system or intermediate unit provides appropriate education on the institution’s campus.

## ENROLLMENT AND TRANSFER DUE TO DISCIPLINARY ISSUES

### **Can a new school district refuse to enroll a youth who was expelled in the former school district?**

No, unless the youth was expelled for an Act 26 weapons offense, 24 P.S. §13-1301-A *et seq.* Act 26 requires that whenever a student registers in a new school district, the student's "parent, guardian, or other person having control or charge of a student" must give the new school a sworn statement saying whether the student has ever been suspended or expelled from any public or private school in any state for offenses involving weapons, drugs, alcohol, willful injury to another person, or violence on school grounds. This statement then becomes part of the student's record. Once this statement is provided, the student must be admitted and provided with an education on the same terms as other students in that district. However, if the student was expelled for an act or offense involving a weapon, he or she may be placed in an alternative assignment or provided alternative education services for the duration of the expulsion by the old district. 24 P.S. §13-1317.2(e.1).

### **When are transfers to disciplinary schools appropriate?**

Pursuant to Act 30, 24 P.S. §19-1901-C *et seq.*, school districts may remove *disruptive students* from regular school programs and place them in alternative education programs to provide them with a sound educational course of study and counseling designed to modify disruptive behavior and return them to the regular school curriculum. A disruptive student is a student who poses a clear threat to the safety and welfare of other students or the school staff, who creates an unsafe school environment, or whose behavior materially interferes with the learning of other students or disrupts the overall education process.<sup>54</sup> A disruptive student may be placed in an alternative program after notice and an informal hearing between the student's parents, the student, and the school principal.<sup>55</sup> School districts must adopt a policy for periodic

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<sup>54</sup> No student who is eligible for special education services pursuant to the IDEA may be deemed a disruptive student under Act 30, except that he or she may be disciplined consistent with federal and state law. Please see the next section for more information on disciplining students with disabilities.

<sup>55</sup> Where the student's presence in school poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process, the student may be immediately removed from the regular education curriculum with notice and a hearing to follow as soon as practicable.

review of students placed in an alternative program and the review must occur, at a minimum, at the end of every semester the student is in the program. The purpose of the review is to determine whether or not the student is ready to return to the regular school curriculum.

Alternative education programs for disruptive youth may operate outside the hours of the normal school day and on Saturdays. The program's structure must enable its students to make normal academic progress and meet requirements for graduation.

### III. Students with Disabilities and Gifted Students

The rules governing the special rights of children with disabilities and gifted students (both called "exceptional children" under PA law) are very complicated.

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 *et seq.*, 34 C.F.R. Part 300, and Pennsylvania's Chapter 14 regulations, 22 Pa. Code §14.101 *et seq.*, entitle eligible children with disabilities to a free, appropriate public education. Congressional amendments to the major federal law, the Individuals with Disabilities Education Act, are anticipated.<sup>56</sup>

#### What are some of the key "special education" terms, and what do they mean?

**Special education.** Special education is specialized instruction that is designed to meet the individualized needs of a child with a disability.

**Related services.** A child in special education is also eligible to receive "related services," which are developmental, corrective, and other supportive services that are needed to assist a child with a disability to benefit from the special education program. Examples of related services include transportation, psychological services, physical and occupational therapy, school nursing services, and medical services for diagnostic or evaluation purposes.

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<sup>56</sup> On its webpage, [www.elc-pa.org](http://www.elc-pa.org), ELC lists many publications, manuals, and fact sheets that summarize the legal rights of these children, and the reader is referred to those publications for a comprehensive review of this complex area. In this chapter, we provide only a brief overview, and highlight requirements that are particularly important for children in substitute care.



**Supplemental aids and services** A child in special education is also eligible to receive supplemental aids, services, and supports to enable the child to be educated with children without disabilities to the maximum extent appropriate to the child.

**Transition services.** A student over the age of 13 is eligible to receive “transition services” designed to promote his or her transition from school to higher education, employment, and independent living.

**Individualized education program (IEP).** An IEP is a written statement developed by a team, including the parent or surrogate parent, for a child with a disability. The agreed upon IEP is a “contract” between the family/child and the school district regarding the special education, related services, supplemental aids and services, and other accommodations that the school district must provide to the child. IEPs are reviewed annually, or more frequently if requested. The IEP also describes the child’s current educational performance and states measurable annual and short-term progress goals.

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Some services that are provided through an Individualized Education Program (IEP) are:

- special instruction
  - occupational therapy
  - physical therapy
  - speech-language therapy
  - emotional support
  - assistive technology
  - behavior intervention programs
  - transition to adulthood services
  - learning support
  - extended school year
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**Least restrictive environment (LRE).** Education of children with disabilities must take place in the “least restrictive environment,” that is, together with children who are not disabled, with supplemental aids and services, to the maximum extent appropriate to the child. LRE also means that students with disabilities who cannot be fully integrated in a regular class can be separated from non-disabled peers only to the extent needed to meet that child’s needs.

**Free appropriate public education (FAPE).** Children with disabilities are entitled to receive a free appropriate public education, including early intervention preschool, elementary school, and secondary school programs. Schools fail to provide a free appropriate public education when they

violate significant “procedural” aspects of the special education laws, such as not properly developing and implementing a child’s IEP.

**Surrogate parents.** Surrogate parents are adult volunteers appointed by the local school district, intermediate unit, or early intervention agency to serve as the student’s “parent” when the birth parent is unknown or unavailable. School districts and early intervention agencies can – but do not have to – appoint the child’s foster parent as the “surrogate parent.”

**Are children with disabilities, who are not yet old enough to attend school, entitled to any special help?**

Pennsylvania administers two “early intervention” (EI) programs, one for infants and toddlers from birth through age two, and a preschool EI program for children from age three to entry into kindergarten or first grade. At the state level, DPW is in charge of the Infants and Toddler program (which at the local level is operated by County Offices of Mental Health and Mental Retardation). The Preschool Program is operated by PDE and usually the Intermediate Unit. The policies and procedures of early intervention programs for young children are similar to the special education rules for older children and youth.

Children with disabilities in foster care face the same barriers to education as regular education students, but may suffer even greater harm when they are denied the educational services to which they are entitled. Sadly, children with disabilities will often regress to a lower level of functioning when their educational programming is interrupted. They require an appropriate educational program provided in a consistent and timely manner to make meaningful educational progress. This is especially true for older youth, who must develop and master skills that will help them to transition to their desired post-school outcomes.

**What can the court do to ensure that eligible pre-schoolers and school-aged children in the foster care system have access to special education and related services?**

Children in foster care have extremely high rates of academic problems. Although histories of maltreatment, separation from family, and placement disruptions contribute to their academic problems, a large number of foster children also have developmental delays and disorders, learning disabilities, attention deficit disorders, emotional/behavioral problems, mental retardation, or other conditions which can also interfere with academic achievement. **IDEA and Pennsylvania regulations entitle eligible children with disabilities ages 3 - 21 to appropriate special education services.**<sup>57</sup> Note that these disabilities may or may not be visible to the layperson.

Pre-schoolers who are experiencing delays in such areas as language development, socialization and self-help skills should be referred for a developmental screening. But it is important to note that as with infants and toddlers, it is recommended that ALL pre-schoolers ages 3-5 be referred for a developmental screening within one month of entering foster care. If a school-aged child has demonstrated significant academic or behavioral problems, the child welfare professional or court personnel should suggest to the child's parent, guardian, caregiver and/or the school district that the child be evaluated. A parent or guardian has the right to obtain an evaluation by making a *written* request to the child's principal or counselor. The court must ensure that these steps are taken for the child that is subject to its jurisdiction.

Once a child is evaluated and determined to be eligible, the district, or other entity under contract with the child welfare agency, must develop an Individualized Education Plan (IEP) to provide an appropriate education in the least restrictive environment. The law sets forth a timeline for this process, including time frames within which an evaluation must occur, an IEP developed, and services implemented. The law also requires that the child's parent/guardian be invited to participate in this process, and that their approval be obtained before the IEP is implemented. If the parent cannot be located or is otherwise not available, a surrogate parent must be appointed.

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<sup>57</sup> 20 U.S.C. § 1400 *et seq.* and § 1419 *et seq.*; 34 C.F.R. Parts 300 and 301; 11 P.S. 875-101; 22 Pa. Code Chapters 14 and 342.

**What are the most important “special education” laws and what are the rights that they create?**

Congress established the primary special education law and provided some of the funding for special education programs through the Individuals with Disabilities Education Act (IDEA). 20 U.S.C. §1400, 4 C.F.R. Part 300. The state is responsible for ensuring that local school districts comply with federal law, and to this end has promulgated state regulations. See 22 Pa. Code Chapter 14. In the late 1980's, the IDEA was amended to require early intervention programs for younger children. PA has promulgated a statute and adopted regulations to implement these programs. See 20 U.S.C. §1431, 34 C.F.R. Part 303, 55 Pa. Code Chapter 4426 (infants and toddler program); 22 Pa. Code §§14.151-.158 (preschool early intervention); PA Early Intervention Services Systems Act, 11 P.S. §§875-101, *et seq.*<sup>58</sup>

Some of the legal rights created by these laws are:

- School districts must provide parents or surrogate parents with timely written notice and must seek their consent before taking significant action or refusing to take a requested action.
- Parents and surrogate parents have the right to examine the child's education records and to participate in IEP and other school meetings about their child.
- When parents and surrogates disagree with the special education decisions of a school district, they have the right to file a written complaint and to request and receive administrative due process hearings, mediation procedures, and judicial review.
- While the administrative or judicial proceedings are pending, the school district cannot implement any change in the child's program or placement without the parents' consent.
- State and local school officials are required to identify, locate, evaluate, and serve all children with disabilities who are in need of special education. This responsibility is called “child find.”

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<sup>58</sup> Some disabled children do not qualify for special education, but are entitled to receive accommodations to allow their full participation in preschool, elementary school, and secondary school under Section 504 of the Rehabilitation Act. 29 U.S.C. §794. The Pennsylvania regulations implementing the federal law are found at 22 Pa. Code Chapter 15. Another important law is the Americans with Disabilities Act (ADA). 42 U.S.C. §12101. ADA requirements often overlap the legal safeguards of the IDEA and Section 504, mandating schools to accommodate students with disabilities so that they are not excluded from the benefits of education programs and services.

- School districts must evaluate each child being considered for special education and periodically reevaluate children found eligible using appropriate assessments. The results of these assessments must be shared with parents and surrogate parents.
- Parents or surrogate parents have the right to obtain independent educational evaluations of their child. School districts must consider the results of such evaluations and are even required to pay for them in certain cases.
- Children in special education have the right to receive a free appropriate public education (FAPE), from the ages of three through twenty-one (and younger children with developmental delays have the right to appropriate early intervention programs).
- Eligible children have the right to receive services and supports pursuant to a written individualized education program (IEP), or (for infants and toddlers) an individual family service plan (IFSP), drafted and regularly updated with participation from appropriate school personnel and parents or surrogate parents.
- Children in special education have the right to be educated in the least restrictive environment to the maximum extent possible and to receive the accommodations, supports, and services needed to accomplish this goal.
- Students with disabilities have special rights when confronting discipline exclusions or transfers.<sup>59</sup>

**Are teenagers with disabilities entitled to any specific transitional service planning with respect to their education?**

Yes, older youth with disabilities who have an IEP are entitled to “transition services” to help them make the transition from high school to adulthood. Transition services are designed to move youth into various post-high school activities, which can include:

- post-secondary education, including community colleges, four-year universities, trade schools and technical schools;

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<sup>59</sup> This topic is not discussed in this publication, but is described at length in several ELC publications that can be downloaded from ELC’s website, [www.elc-pa.org](http://www.elc-pa.org).

- vocational training, including programs funded through the state's Offices of Vocational Rehabilitation and Mental Health/Mental Retardation;
- employment, including supported employment;
- continuing and adult education programs, including GED courses;
- adult services provided by agencies including the Offices of Vocational Rehabilitation, Mental Health/Mental Retardation and the Social Security Administration)<sup>60</sup>; and
- independent living and community living programs.

Beginning at age 14, a child's IEP must state the child's transition service needs, focusing on the child's course of study, such as participation in advanced-placement courses or a vocational education program. At age 16, the IEP must state the child's needed transition services, including a description of interagency responsibilities or any needed linkages. Transition services must be based upon the individual student's needs, taking into account the student's preferences and interests. Transition services can and should be coordinated with independent living services so that they reinforce one another and are not duplicative.

Transition services include instruction, community experiences, the development of employment skills, and other services that help youth achieve post-school adult living objectives. When appropriate, transition services also should include activities to help the student acquire daily living skills, and can include functional vocational evaluation. For example, if a student with a disability will be living in a group home and participating in supportive employment, he or she may need instruction in daily living and job skills (i.e., how to use public transportation, handle money, or go to the store). If the student will be going on to a program of post-secondary or vocational

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<sup>60</sup> Individuals age 16 and older with certain physical and/or mental health disabilities can receive training, educational, and employment support services from the state's Office of Vocational Rehabilitation (OVR), which is organized in 15 District Offices in the state. *For a list of AVTS, go to [www.JLC.org/transitions/deskbooksupl.html](http://www.JLC.org/transitions/deskbooksupl.html).* Youth age 16 and over are eligible for services if they "have a disability that is, a physical, mental, or emotional impairment that results in a substantial impediment to employment, and [they] can benefit in terms of an employment outcome provided, and, Vocational Rehabilitation services are required for [them] to prepare for, enter, engage, and retain gainful employment." See OVR Individualized Services, Eligibility Requirements, at [www.dli.state.pa.us/landi/cwp/view.asp](http://www.dli.state.pa.us/landi/cwp/view.asp).

It is important to note that the OVR eligibility standard is not the same and is generally less restrictive than the standards for SSI disability payments or special education. Often youth who do not qualify for SSI or special education will qualify for OVR services. OVR can start planning with a youth while he or she is still in high school and then continue upon graduation. OVR recommends that youth be referred two years prior to graduation for optimal planning to occur.

After a youth is found eligible for services, OVR will develop an individualized service plan based on the youth's needs and interests. Services may include, for example, job training, job placement, job coaching or support, and partial funding for assistive technology. OVR also provides some residential training programs for eligible youth.

education, his/her transition services must include all of the courses that are prerequisites for entering that program.

Finally, transition services should also include teaching students “self-advocacy skills,” including the ability to speak clearly about preferences, aptitudes and abilities. Young adults with disabilities who are effective self-advocates understand their disabilities, the impact on their daily lives and the supports that they need to be successful in school, employment and in the community. Equipped with such self-advocacy skills, the youth himself or herself can fashion a desirable educational program.

### **How do youth get into vocational programs in the public school system?**

Throughout Pennsylvania there are Area Vocational-Technical Schools (AVTS). (See footnote 60). These schools are either run by a particular local school district or by several school districts in combination. AVTS provide vocational-technical training for half the day in some districts, while the remainder of the educational program is provided in the youth's school district. Several comprehensive AVTS provide the academic and vocational portions of the program at the same location.

While AVTS have entrance criteria, any youth can apply and can ask his or her local school for application materials and entrance criteria. Some AVTS have fewer slots than the existing demand. Special education students may have attendance at an AVTS as part of their transition plan in their IEP. While regular education students are not entitled to any particular vocational or skills assessment, such an assessment can be requested.

### **What accommodations will special education eligible youth receive in post-secondary schools?**

After students graduate from secondary school, they no longer have the protection of the IDEA. However, post-secondary schools, such as colleges and training schools, are prohibited from discriminating against individuals with disabilities under the Americans with Disabilities Act

and the Rehabilitation Act. The Office of Civil Rights in the United States Department of Education is responsible for enforcing these laws. Under these laws, post-secondary schools must make reasonable accommodations for individuals with disabilities. Young people with disabilities attending post-secondary programs are entitled to academic adjustments or aids to ensure that the program does not operate in a discriminatory manner. Accommodations may include changes in academic programming, extended time for testing, aids, or changes in residential facilities if housing is offered.

If youth would like academic adjustments to be made in their post-secondary program, they need to inform the school that they have a disability and request academic adjustment. Post-secondary schools do not have an obligation as do public secondary schools under the IDEA to identify youth with disabilities. Thus, the youth must take the initiative in making this request. Most schools have a disability services coordinator or procedures for setting up adjustments. More information about the responsibilities of post-secondary schools to students with disabilities can be found at [www.ed.gov/ocr/docs/auxaids.html](http://www.ed.gov/ocr/docs/auxaids.html).

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***What are the most important steps that the court can take to ensure that a teenager with disabilities receives an appropriate education, both while in care and after discharge?***

The court should:

- Take the time to understand the right to special education.
  - Recognize the right to special education as a resource for dependency intervention.
  - Ensure that a complete and updated copy of the child's school records is part of the case file.
  - Determine the child's disability status.
  - Ensure that the child has a current and appropriate IEP that is being implemented properly.
  - Ensure that the IEP contains a Behavior Intervention Plan, if appropriate.
  - Ensure that the child's placement is in the least restrictive environment.
  - Ensure that older students are receiving appropriate transition services and are involved in the transition planning process.
  - Ensure that older youth in post-secondary programs are receiving needed academic adjustments.
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**What are the rights of “gifted” children? 24 P.S. §1371(1)**

Pennsylvania law defines the term “children with exceptionalities” to mean “children of school age who have a disability *or who are gifted* and who, by reason thereof, need specially designed instruction.” 24 P.S. §1371(1) (emphasis added). State law requires public schools to follow similar rules and procedures for all “children with exceptionalities.” Because of the IDEA, children with disabilities have much broader rights than gifted students.

Public schools must identify and serve the educational needs of gifted students. A gifted student has “[o]utstanding intellectual and creative ability the development of which requires specially designed programs or support services, or both, not ordinarily provided in the regular education program.” 22 Pa. Code §16.1. Schools must identify and evaluate students who may be gifted based on multiple criteria and not solely on IQ scores. 22 Pa. Code §16.21. Each gifted student should receive a written education plan, appropriate services and supports, and procedural safeguards. A student can be eligible for both gifted education and special education, requiring the school to comply with both sets of legal requirements.

*School districts often overlook the exceptional needs of children in placement because of the transitional nature of their school enrollment (for example, the student may change foster families while waiting for a district to conduct an evaluation, and then have to start all over again with the new district).* The court should make sure that this does not happen by following up at each permanency review hearing to make sure the child’s educational needs are being met.

**IV. Surrogate Parents**

A school district cannot assign a surrogate parent solely because a child has been adjudicated dependent. ***O’Grady v. Centennial School District***, 401 A.2d 1388 (Pa. Cmmw. Court 1979). In such cases, the birth parents retain the right to make education decisions for their child. In addition, school districts cannot assign a surrogate parent merely because they find a parent to be difficult or uncooperative. If a school district truly believes that a parent’s conduct or lack of involvement is harming the child, then it must pursue the issue through either administrative or judicial hearing procedures.

Surrogate parents are selected by the student's school district (which sometimes assigns this function to the Intermediate Unit). Generally IUs perform this function for children in preschool early intervention programs, and the County Early Intervention agencies handle this for infants and toddlers in their program. Probation officers, social workers, or other employees of an agency responsible for the child's care are not eligible to serve as surrogate parents. Foster parents are eligible to serve if appointed by the appropriate education or early intervention agency.<sup>61</sup> The regulations governing the Infants and Toddlers program state that a foster parent may serve as the surrogate parent for a child in his/her custody with the approval of the custodial county children and youth agency. 55 Pa. Code §4225.96(e).

Surrogate parents have the same rights as birth parents to participate in the early intervention or special education process.

Surrogate parents receive education notices, review school records, attend meetings, make decisions about the child's early intervention or special education services and supports, and file complaints and appeals. However, the role of a surrogate parent is limited to the child's early intervention or special educational needs and does not extend to any other areas of the child's life.

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***What is a "Surrogate Parent" and when must one be appointed?***

Children in placement are, by definition, living apart from their birth parents. This can cause difficulties for children in early intervention or special education because federal law requires school districts to involve the parents of disabled children in all aspects of these programs. "Parents" are needed to give consent to evaluation and placement, to participate in the development of the IEP or the IFSP, and to trigger the dispute resolution mechanisms if the responsible education or early intervention agency does not meet its responsibilities.

For a child with an educational disability in foster care, a "surrogate parent" must be assigned to represent the interests of a child in all early intervention or special education matters if the school district cannot, with reasonable effort, discover the whereabouts of a birth or adoptive parent. This includes situations where the parents are deceased or parental rights have been terminated.

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<sup>61</sup> Under certain circumstances, a long term foster parent is considered to be a parent. However, that can happen only when parental rights have been terminated. See 34 C.F.R. §300.20(b).

## **V. Other Rules and Remedies**

**Are there any special rules that can help a child in substitute care when he or she moves and changes school districts or early intervention agencies or transitions into a new school program?**

More often than most students, children in placement experience transitions to a new residence or a new school. Children in early intervention or special education programs should continue receiving the services in the IEP or IFSP when they move to a new school district or early intervention agency. 22 Pa. Code §14.131(a)(3) (special education); 22 Pa. Code §14.154(g) (early intervention preschool). If the new school district or early intervention agency cannot implement every element of the existing IEP or IFSP, it may ask the parent or guardian to consider agreeing to an interim plan while additional evaluation and planning takes place. 22 Pa. Code §14.131(a)(3). The school district or early intervention agency is prohibited from ignoring the child's existing IEP or IFSP and must not require the child to "start all over again." This does not apply to moves from or to another state.

When a child reaches the age of three or the age of entry to kindergarten or first grade, the state must help the child transition between the different programs for children with disabilities. Exiting from the Infants and Toddlers Program into the Early Intervention Preschool Program is a particularly difficult transition. The Preschool Program has slightly different eligibility requirements and is administered by a different government agency. State regulations require the County to plan early for this transition, and to include extensive parent involvement during the child's second year. 55 Pa. Code §4226.77.

Children leaving the Early Intervention Preschool Program are also entitled to extensive transition services and meetings before entering kindergarten or first grade. See, 22 Pa. Code §14.154(e) and BEC entitled "Early Intervention Transition: Preschool Programs to School-Aged programs."

**What remedies are available if the school district or early intervention agency does not comply with the law?**

Obviously, less formal options should be tried first, the most important being to convene an IEP meeting. However, the law does set up a number of formal dispute resolution mechanisms.

**File a complaint with the appropriate state agency.** The state agency will investigate the complaint and recommend appropriate action. For complaints about early intervention preschool programs or school-aged special education programs contact:

Pennsylvania Department of Education  
Bureau of Special Education  
Division of Compliance Monitoring and Planning  
333 Market Street, 7th Floor  
Harrisburg, PA 17126-0333  
ConsultLine: 1-800-879-2301

For complaints about early intervention programs for infants and toddlers, contact the appropriate Regional Office of the Office of Mental Retardation.

For complaints about gifted programs contact:

Pennsylvania Department of Education  
Bureau of Curriculum and Academic Services  
333 Market Street, 8th Floor  
Harrisburg, PA 17126-0333  
Phone: 717-787-8913  
Fax: 717-772-3621

**Request mediation or a due process hearing.** The state provides a formal process for resolving problems through mediation or due process hearings. Once a parent or guardian requests mediation or a due process hearing, the state assigns an official mediator or a hearing officer to handle the case. Strict rules and procedures apply to the mediation and hearing processes, including deadlines for action, requirements for sharing information, and methods for

presenting evidence and questioning evidence presented by the other side in the case. If parents or guardians disagree with the outcome of the mediation, they can proceed with a due process hearing. If they disagree with the outcome of a due process hearing, they can file a lawsuit.<sup>62</sup>

For a list of resources relating to education and dependent children, see Appendix C.

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<sup>62</sup> For more information on special education or early intervention dispute resolution systems, access ELC's webpage at [www.elc-pa.org](http://www.elc-pa.org).

## Appendix A

### Resources: Rights of Older Youth

Dorothy Ansell et al., PROMISING PRACTICES: SUPPORTING TRANSITION OF YOUTH SERVED BY THE FOSTER CARE SYSTEM (Edmund S. Muskie School of Public Service and the University of Oklahoma National Resource Center for Youth Services).

Ansell-Casey Life Skills Assessment and Guidebook, at [www.caseylifeskills.org](http://www.caseylifeskills.org).

Lynda Arnold et al., TRANSITION FROM FOSTER CARE: A STATE-BY-STATE DATA BASE OVERVIEW (Casey Family Programs State Transition Data Base Project).

W.W. Blome, *What Happens to Foster Kids: Educational Experiences of a Random Sample of Foster Care Youth and a Matched Sample of Non-Foster Youth*, 14 CHILD AND ADOLESCENT SOCIAL WORK JOURNAL 41-53 (1997).

Chafee Foster Care Independence Program Questions and Answers,  
[www.acf.dhhs.gov/cb/laws/chafee.html](http://www.acf.dhhs.gov/cb/laws/chafee.html).

R. Cook, A NATIONAL EVALUATION OF TITLE IV-FOSTER CARE INDEPENDENT LIVING PROGRAMS FOR YOUTH: PHASE 2 (Westat, Inc., Contract No. OHDS 105-87-1608, U.S. Department of Health and Human Services, 1991).

Kristi Charles and Jennifer Nelson, PERMANENCY PLANNING: CREATING LIFE LONG CONNECTIONS, WHAT DOES IT MEAN FOR ADOLESCENTS? (University of Oklahoma, National Resource Center for Youth Development, April 2000).

M.E. Courtney et al., FOSTER YOUTH TRANSITIONS TO ADULTHOOD: OUTCOMES 12-18 MONTHS AFTER LEAVING OUT-OF-HOME CARE (University of Wisconsin-Madison, School of Social Work and Institute for Research on Poverty, 1998).

Lisa Eisenbud et al., BRIDGES TO INDEPENDENCE: IMPROVING TRANSITIONS TO ADULTHOOD FOR YOUTH SERVED BY THE NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES (Garden State Coalition for Youth and Family Concerns, Inc., 2001).

Cecelia Fiermonte & Jennifer Renne, MAKING IT PERMANENT: REASONABLE EFFORTS TO FINALIZE PERMANENCY PLANS FOR FOSTER CHILDREN (American Bar Association Center on Children and the Law, 2002).

Karen Aileen Howze, HEALTH CARE FOR TEENS IN CARE (American Bar Association Center for Children and The Law, 2002).

Independent Living Advisory Committee, INDEPENDENT LIVING FOR CHILDREN IN OUT-OF-HOME CARE (Wisconsin Department of Health and Family Services, Division of Children and Family Services).

E.V. Mech, *Foster Youth in Transition: Research Perspectives on Preparation for Independent Living*, 73 CHILD WELFARE 614, 606-623 (1994).

R. Nixon, IMPROVING ECONOMIC OPPORTUNITY FOR YOUTH FORMERLY SERVED BY THE FOSTER CARE SYSTEM: IDENTIFYING THE SUPPORT NETWORK'S STRENGTHS AND NEEDS: FINAL REPORT (Child Welfare League of America, 1998).

Nan Roman and Phyllis Wolfe, WEB OF FAILURE: THE RELATIONSHIP BETWEEN FOSTER CARE AND HOMELESSNESS (National Alliance to End Homelessness. 1995).

Nan Roman and Phyllis Wolfe, *The Relationship Between Foster Care and Homelessness*, 55 PUBLIC WELFARE 4-10 (1997).

Judith Silver, Ph.D., et al., YOUNG CHILDREN AND FOSTER CARE (Paul H. Brooks Publishing Co., 1999).

U.S. Department of Health and Human Services, Administration on Children, Youth and Families, Titles IV-E Independent Living Programs: A Decade in Review. (U.S. Government Printing Office, 1999).

N. Yohalem & K. Pittman, POWERFUL PATHWAYS: FRAMING OPTIONS AND OPPORTUNITIES FOR VULNERABLE YOUTH (The Forum for Youth Investment, International Youth Foundation, October 2001).

ALONE AFTER DARK: A SURVEY OF HOMELESS YOUTH IN CHICAGO (Chicago Coalition for the Homeless, 1992).

Challenges in Helping Youths Live Independently, Statement of Cynthia M. Fagnoni, Director, Education, Workforce, and Income Security Issues, Health, Education, and Human Services Division, Testimony Before the Subcommittee on Human Resources, Committee on Ways and Means, House of Representatives (May 13, 1999).

CHILD WELFARE LEAGUE OF AMERICA STANDARDS FOR INDEPENDENT LIVING SERVICES (Child Welfare League of America, 1989).

Frequently Asked Questions About the Foster Care Independence Act of 1999 and the John H. Chafee Foster Care Independence Program, I & II (National Foster Care Awareness Project, 2000), at [www.casey.org](http://www.casey.org).

IMPROVING ECONOMIC OPPORTUNITIES FOR YOUNG PEOPLE SERVED BY THE FOSTER CARE SYSTEM, PHASES 1-3 (Edmund S. Muskie School of Public Service and the University of Oklahoma National Resource Center for Youth Services, 1998).

INDEPENDENT LIVING FOR FOSTER YOUTH (The National Conference of State Legislatures, 2002).



PROMISING PRACTICES: SCHOOL TO CAREER AND POSTSECONDARY EDUCATION FOR FOSTER CARE YOUTH (Workforce Strategy Center, March 2000).

YOUTH IN THE STREETS AND ON THEIR OWN: YOUTH HOMELESSNESS IN ILLINOIS (Chicago Coalition for the Homeless, 2001).

## Appendix B

### Resources: Rights of Children in Placement to Healthcare

#### *Consent and Confidentiality:*

Rosado, Lourdes M. (2002). *Consent to Treatment and Confidentiality Provisions Affecting Minors in Pennsylvania*. Philadelphia: Juvenile Law Center. This book can be downloaded in a PDF file at no cost from the JLC website: <http://www.jlc.org>.

Stotland, J.F., Fieo, A., & Bush, E. (1998). *Children in Placement: Their Rights to Education and Health Care Services*. Philadelphia: Education Law Center. <http://www.elc-pa.org>.

Education Law Center - PA website: <http://www.elc-pa.org>.

Juvenile Law Center website: <http://www.jlc.org>.

#### ***Health and Development for Children in Foster Care:***

Dicker, S. & Gordon, E. (2001). Early Intervention and Early Childhood Programs: Essential Tools for Child Welfare Advocacy. *Journal of Poverty Law and Policy*, vol. 34, nos. 11-12, pp. 727-743.

Howze, K.A. (2002). *Health for Teens in Care: A Judge's Guide*. Washington, D.C.: The American Bar Association, Center for Children and the Law. For information on obtaining copies write to The American Bar Association, Center for Children and the Law 740 15<sup>th</sup> St. NW, 9<sup>th</sup> Floor, Washington, D.C. 20005-1022; phone 202-662-1720. <http://www.abanet.org/child>.

McCarthy, J. (2002). *Meeting the Health Care Needs of Children in the Foster Care System: Summary of State and Community Efforts*. Washington, D.C.: Georgetown University Child Development Center. Available by contacting Georgetown University Child Development Center,

3307 M Street, NW, Suite 401, Washington, DC 20007, (202) 687-5000 or on the web at <http://www.gucdc.georgetown.edu/foster.html>.

New York Permanent Judicial Commission on Justice for Children (1999). *Ensuring the Healthy Development of Foster Children: a Guide for Judges, Advocates and Child Welfare Professionals*. White Plains, New York: Author. This pamphlet can be obtained by contacting the NY Permanent Judicial Commission by phone: (914) 948-7568 or mail: 140 Grand Street, Suite 404, White Plains, NY 10601.

Silver, J., Amster, B., & Haecker, T. (1999). *Young Children and Foster Care: a Guide for Professionals*. Baltimore: Paul H. Brookes Publishing Company.  
<http://www.brookespublishing.com>.

Task Force on Health Care for Children in Foster Care, American Academy of Pediatrics, District II, New York State (2001). *Fostering Health: Health Care for Children in Foster Care*. Lake Success, NY: Author. To purchase this guide, contact the AAP, District II, NYS by phone at (516) 326-0310 or by mail at 420 Lakeville Road, room 244, Lake Success, NY 11042.

Woolverton, M. (2002). *Meeting the Health Care Needs of Children in the Foster Care System: Strategies for Implementation*. Washington, D.C.: Georgetown University Child Development Center. Available by contacting Georgetown University Child Development Center, 3307 M Street, NW, Suite 401, Washington, DC 20007, (202) 687-5000 or on the web at <http://www.gucdc.georgetown.edu/foster.html>.

### ***Behavioral Health and Children in Foster Care:***

American Academy of Pediatrics Committee on Early Childhood and Adoption and Dependent Care. (2000). Developmental issues for young children in foster care. *Pediatrics*, 106, 1145-1150.

Forkey, H.C. (2002) *Mental Health Services for Children in Substitute Care in Philadelphia: CATCH Report*. Philadelphia. For copies contact H. Forkey at [forkey@email.chop.edu](mailto:forkey@email.chop.edu).

Hepburn, K. & Mc Carthy, J. (2003). *Promising Approaches for Behavioral Health Services to Children and Adolescents and Their Families in Managed Care Systems: 3: Making Interagency Initiatives Work for Children and Families in the Child Welfare System*. Washington, D.C.: Georgetown University Center for Child and Human Development. Available by contacting Georgetown University Center for Child and Human Development 3307 M. Street, NW, Suite 401, Washington D.C 20007, 202-687-5000 or on the web at <http://www.gucdc.georgetown.edu>.

McCarthy, J. & McCullough, C. (2003). *Promising Approaches for Behavioral Health Services to Children and Adolescents and Their Families in Managed Care Systems: 2: A View From the Child Welfare System*. Washington, D.C.: Georgetown University Center for Child and Human Development. Available by contacting Georgetown University Center for Child and Human Development 3307 M. Street, NW, Suite 401, Washington D.C 20007, 202-687-5000 or on the web at <http://www.gucdc.georgetown.edu>.

Philadelphia Citizens for Children and Youth. (2003). *The Mental Health System for Low Income Children: The Philadelphia Story*. To obtain a copy contact PCCY: (215) 563-5848 or [info@pccy.org](mailto:info@pccy.org), or <http://www.pccy.org>.

## Appendix C

### Resources: Rights of Dependent Children to Education

Blome, W.W., *What Happens to Foster Kids: Educational Experiences of a Random Sample of Foster Care youth and a Matched Sample of Non- Foster Youth*, 14 CHILD AND ADOLESCENT SOCIAL WORK JOURNAL 41-53 (1997).

Duitch, Suri, *Promising Practices: School to Career and PostSecondary Education for Foster Care Youth: A Guide for Policy Makers and Practitioners*, WORKFORCE STRATEGY CENTER (2001).

Jax, Christine. *Limiting Mobility and Improving Student Achievement*, 23 HAMLINE L. REV. 1 (1999).

Rosado, Lourdes, ed. *Special Ed Kids in the Justice System: How to Recognize and treat Young People with Disabilities that Compromise their Ability to Comprehend, Learn, and Behave*, AMERICAN BAR ASSOCIATION JUVENILE JUSTICE CENTER (2000).

Vandivere, Sharon et al. *Children in Foster Homes: How are They Faring?* CHILD TRENDS RESEARCH BRIEF (Dec. 2003) (available at [www.childtrends.org](http://www.childtrends.org).)

## Appendix D

### Index of Case Summaries

#### Cases Involving Issues Pertaining to the Use of Masters ..... 21

*In re R.W.J.*, 826 A.2d 810 (Pa. Super. Ct. 2003).

*In the Interest of J.H.*, 788 A.2d 1006 (Pa. Super. Ct. 2001).

*In re A.S.*, 594 A.2d 714 (Pa. Super. Ct. 1991).

#### Adjudication Cases ..... 60 - 67

##### CASES WHERE DEPENDENCY ADJUDICATION REVERSED:

##### Evidence insufficient to sustain finding of abuse.

*In re D.A.*, 801 A.2d 614 (Pa. Super. Ct. 2002).

*In the Matter of C.R.S.*, 696 A.2d 840 (Pa. Super. Ct. 1997).

*In the Interest of J.M.*, 652 A.2d 877 (Pa. Super. Ct. 1995).

*In re A.S.*, 594 A.2d 714 (Pa. Super. Ct. 1991).

*In the Interest of Tanya Palmer*, 590 A.2d 798 (Pa. Super. Ct. 1991).

*In the Interest of Winnie Rodriguez*, 406 A.2d 553 (Pa. Super. Ct. 1979).

##### Parent's age and dependent status not a basis for determining child dependent.

*In the Interest of Kyle Austin Hall*, 703 A.2d 717 (Pa. Super. Ct. 1997).

##### A mere failure to comply with a juvenile court's order is

##### not prima facie evidence of dependency.

*In the Interest of T.M.*, 689 A.2d 954 (Pa. Super. Ct. 1997).

*In re T.D.*, 553 A.2d 979 (1988).

*In re M.L.*, 757 A.2d 849 (Pa. 2000).

*In the Interest of Anita H.*, 505 A.2d 1014 (Pa. Super. Ct. 1986).

*In the Matter of Mark T.*, 442 A.2d 1179 (Pa. Super. Ct. 1982).

##### Past instances of abuse or past difficulties that might affect ability to parent are not

##### sufficient to adjudicate a child dependent unless there is evidence that improper

##### parental care and control will continue to exist in the future.

*In re D.A.*, 801 A.2d 614 (Pa. Super. Ct. 2002).

*In re Christopher Swope*, 571 A.2d 470 (Pa. Super. Ct. 1990).

*In the Interest of H.B.*, 437 A.2d 1229 (Pa. Super. Ct. 1981).

The standard for finding dependency is not “in the child’s best interest,”

but rather whether there is immediately available proper parental care and control.

*In re Jackson*, 448 A.2d 1087 (Pa. Super. Ct. 1982).

*In re the Interest of Eugene Haynes*, 473 A.2d 1365 (Pa. Super. Ct. 1983).

#### CASES WHERE DEPENDENCY ADJUDICATIONS UPHELD:

Neglect – Parent unable or unwilling to meet needs of child.

*In re R.T., C.A. & K.A.*, 778 A.2d 670 (Pa. Super. Ct. 2001).

*In re K.A.D.*, 779 A.2d 540 (Pa. Super. Ct. 2001).

*In the Interest of B.B.*, 745 A.2d 620 (Pa. Super. Ct. 1999).

*In re R.R.*, 686 A.2d 1316 (Pa. Super. Ct. 1996).

*In re S.M.*, 614 A.2d 312 (Pa. Super. Ct. 1992).

*In re Yeager*, 455 A.2d 717 (Pa. Super. Ct. 1983).

*In Interest of Black*, 417 A.2d 1178 (Pa. Super. Ct. 1980).

*In re Kunkle*, 402 A.2d 1037 (Pa. Super. Ct. 1979).

Physical/sexual abuse – parents not only must not harm child,

but must also protect child from harm by others.

*In re R.W.J.*, 826 A.2d 10 (Pa. Super. Ct. 2003).

*In the Matter of A.H. & A.L.*, 763 A.2d 873 (Pa. Super. Ct. 2000).

*In the Matter of C.R.S.*, 696 A.2d 840 (Pa. Super. Ct. 1997).

*In the Interest of J.O.V. and J.A.V.*, 686 A.2d 421 (Pa. Super. Ct. 1996).

*In the Interest of C.L.*, 648 A.2d 799 (Pa. Super. Ct. 1994).

*In the Matter of B.R.*, 596 A.2d 1120 (Pa. Super. Ct. 1991).

*In re Frank W.D., Jr.*, 462 A.2d 708 (Pa. Super. Ct. 1983).

*In re Barclay*, 468 A.2d 778 (Pa. Super. Ct. 1983).

*In the Interest of K.B.*, 419 A.2d 508 (Pa. Super. Ct. 1980).

Sexual abuse of one child/finding of dependency as to siblings.

*In re M. W.*, 842 A.2d 425 (Pa. Super. Ct. 2004).

*In re S.B.*, 833 A.2d 1116 (Pa. Super. Ct. 2003).

**Disposition Cases** ..... 78 - 80

CLEAR NECESSITY FOUND:

Clear necessity is established when alternatives to separation from the parents are unfeasible.

*In the Interest of C.S.*, 580 A.2d 418 (Pa. Super. Ct. 1990).

*In re A.M. & P.M.*, 530 A.2d 430 (Pa. Super. Ct. 1987).

*In the Interest of Y.P. and T.H.*, 509 A.2d 397 (Pa. Super. Ct. 1986).

*In the Interest of S.M.S.*, 424 A.2d 1365 (Pa. Super. Ct. 1981).

If “proper care” is not available in the home for a child with particular needs,

clear necessity may require removal of the child until care can be provided.

*In re D.K.*, 58 Pa. D. & C.4th 353 (2002).

*In re Joseph Lee Breisch*, 434 A.2d 815 (Pa. Super. Ct. 1981).

*In the Matter of George*, 414 A.2d 1063 (Pa. Super. Ct. 1979).

*In Interest of Pernishek*, 408 A.2d 872 (Pa. Super. Ct. 1979).

#### CLEAR NECESSITY NOT FOUND OR INAPPROPRIATE STANDARD APPLIED:

Clear necessity standard applies whenever dependent child is subject to

removal from the home either at the initial disposition or after reunification.

*In the Interest of S.S.*, 651 A.2d 174 (Pa. Super. Ct. 1994).

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