CALIFORNIA JUDGES BENCHGUIDES

Benchguide 104

JUVENILE DEPENDENCY SELECTION AND IMPLEMENTATION HEARING

[REVISED 2013]

ADMINISTRATIVE OFFICE OF THE COURTS

JUDICIAL AND COURT OPERATIONS SERVICES DIVISION

CENTER FOR JUDICIARY EDUCATION AND RESEARCH

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I. [§104.1] SCOPE OF BENCHGUIDE

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

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

II. PROCEDURAL CHECKLISTS

A. [§104.2] General Conduct of Hearing

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

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

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

- *Exclude all persons from the court except parents (including alleged fathers), guardians, anyone granted status as a de facto parent, counsel, or anyone found by the court to have a direct and legitimate interest in the particular case or the work of the court including a court-appointed special advocate (CASA), and, in some cases, relatives.* Welf & I C §§345, 346.
- *Permit the child to attend if the child or his or her counsel requested the child's attendance and if the child's presence would be helpful to the court.* See Welf & I C §366.26(h)(2).
- *If the child is 10 years of age or older and is present, permit his or her participation if he or she desires it.* Welf & I C §349(a), (c); Cal Rules of Ct 5.534(p)(1). If the child is not present, determine whether the child was properly notified of the right to attend the hearing and inquire whether he or she was given an opportunity to

attend. See Welf & I C §§349(d), 366.26(h)(2); Cal Rules of Ct 5.534(p)(2). If the child was not properly notified or if he or she wished to be present and was not given an opportunity to be present, the court must continue the hearing but only for that period of time necessary to provide notice and secure the child's presence, unless the court finds that it is not in the best interest of the child to grant a continuance. Welf & I C §349(d); Cal Rules of Ct 5.534(p)(2).

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

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

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

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

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

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

(7) *If a parent is present for the first time, inquire whether the child has American Indian heritage and, if so, take steps to ensure that proper notice is given and provisions of the Indian Child Welfare Act are followed.* See Welf & I C §224.2(a); 25 USC §§1901–1963; Cal Rules of Ct 5.480–5.487. Determine whether this inquiry has already been made by the social worker.

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

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

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

(9) *If the child, minor, or nonminor dependent has not previously been represented by counsel, appoint counsel for the child, minor, or nonminor dependent unless he or she would not benefit from the appointment.* The court must state on the record the reasons for any finding that the child, minor, or nonminor dependent would not benefit from counsel. Welf & I C §317(c); Cal Rules of Ct 5.534(g)–(h). See discussion in §104.35. For a definition and general provisions governing a "nonminor dependent," see Welf & I C §11400(v) and Cal Rules of Ct 5.900. See also California Judges Benchguide 100: *Juvenile Dependency Initial or Detention Hearing* §100.18 (Cal CJER).

☛ JUDICIAL TIP: The court should consider appointing independent counsel for each sibling or group of siblings when the siblings or groups might have different interests, such as different adoptive placements or different permanent plans. See Cal Rules of Ct 5.660(c); *In re Cliffton B.* (2000) 81 CA4th 415, 428, 96 CR2d 778. But see *In re Frank L.* (2000) 81 CA4th 700, 702–704, 97 CR2d 88 (possible benefit of placing child near siblings is not sufficient to give mother the right to appeal the placement). The substantial interference with a sibling relationship exception to the termination of parental rights increases the potential for conflicts between siblings or groups of siblings at the .26 hearing. See Welf & I C §366.26(c)(1)(B)(v); Cal Rules of Ct 5.725(d)(2)(C)(v). Courts need to be sensitive to and alert for such conflicts. See *Carroll v Superior Court* (2002) 101 CA4th 1423, 1429–1430, 124 CR2d 891, holding that an

attorney may not continue to represent multiple children among whom there is an actual conflict of interest, and if one attorney is appointed and a conflict arises later, the court must relieve the attorney from representation of any of the children.

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

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

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

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

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

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

However, because the court must consider the child's wishes and best interests, testimony of the child may be valuable. See Welf & I C

§366.26(h)(1). Under certain circumstances, the child's testimony may be taken in chambers. See Welf & I C §366.26(h)(3)(A); discussion in §104.44.

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

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

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

- *The child is likely to be adopted (clear and convincing evidence).* Welf & I C §366.26(c)(1); Cal Rules of Ct 5.725(d)(2).

☛ JUDICIAL TIP: If there is an impediment to termination, but there is clear and convincing evidence that the child is likely to be adopted, it must make the adoptability finding even though it may not terminate parental rights. If the court finds the child is *not* likely to be adopted, it must not base its conclusion on the fact that the child has not yet been placed in a preadoptive home or with a relative or foster parent who is willing to adopt the child. Cal Rules of Ct 5.725(d)(2).

- *Adoption is the permanent placement goal because termination of parental rights is desirable and would not be detrimental under Welf & I C §366.26(c)(1) and there is a probability that the child is likely to be adopted, but the child is difficult to place and there is no identified or available prospective adoptive parent because of sibling considerations or other reasons*. Welf & I C §366.26(c)(3); Cal Rules of Ct 5.725(d)(6). The determination that the child is difficult to place for adoption must be based on one or more of the following (Welf & I C §366.26(c)(3); Cal Rules of Ct 5.725(d)(6)):
  - The child is a member of a sibling group that should stay together;
  - The child has a diagnosed medical, mental, or physical handicap; or
  - The child is seven years of age or older and no prospective adoptive parent is available.
- *Termination of parental rights would be detrimental to the child because of one of the following (preponderance of the evidence)*:
  - The parents have maintained regular visitation and contact with the child and the child would benefit from a continuation

of that contact. Welf & I C §366.26(c)(1)(B)(i); Cal Rules of Ct 5.725(d)(2)(C)(i).

— A child who is 12 years of age or older objects to the termination of parental rights. Welf & I C §366.26(c)(1)(B)(ii); Cal Rules of Ct 5.725(d)(2)(C)(ii).

— The child has been placed in a residential treatment facility, adoption is not likely or desirable, and continuation of parental rights will not prevent the child from finding a stable placement if the parents cannot resume custody when the child is released from residential care. Welf & I C §366.26(c)(1)(B)(iii); Cal Rules of Ct 5.725(d)(2)(C)(iii).

— The child is living with a foster parent or Indian custodian (see 25 USC §1903(2)) who is unwilling to adopt, but is willing to accept legal or financial responsibility for the child and to provide a stable home for the child, and removal from that placement would be emotionally detrimental to the child. Welf & I C §366.26(c)(1)(B)(iv); Cal Rules of Ct 5.725(d)(2)(C)(iv). This exception does not apply to a child under six years of age living with a nonrelative or to a child who is part of a sibling group which should stay together in which at least one child is under six years of age. Welf & I C §366.26(c)(1)(B)(iv); Cal Rules of Ct 5.725(d)(2)(C)(iv).

— There will be substantial interference with the relationship between the child and his or her siblings. Welf & I C §366.26(c)(1)(B)(v); Cal Rules of Ct 5.725(d)(2)(C)(v).

— The child is an Indian child and there is a compelling reason that termination of parental rights would not be in his or her best interest, including that (1) termination of parental rights would substantially interfere with the child's connection with the tribal community, or (2) the tribe has identified tribal customary adoption or some other planned permanent living arrangement for the child, such as guardianship. Welf & I C §366.26(c)(1)(B)(vi), (C); Cal Rules of Ct 5.725(d)(2)(C)(vi); see Welf & I C §366.24.

If the court finds that termination is detrimental as noted above, it must state its reasons in writing or on the record. Welf & I C §366.26(c)(1)(D); Cal Rules of Ct 5.725(d)(5).

- *The party claiming that termination would be detrimental to the child has the burden of proving the detriment*. Cal Rules of Ct 5.725(d)(4).

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

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

[*In the case of an Indian child*]

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

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

- *Visitation with the parents or guardians [would/would not] be detrimental to the physical or emotional well-being of the child (preponderance of the evidence)*. Welf & I C §366.26(c)(4)(C); Cal Rules of Ct 5.725(d)(7)(E).

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

[*Use if adoption is the permanent plan*]

- *The parental rights of* _____ [mother/ father/ alleged fathers] *shall be terminated and* [name of child] *shall be placed for adoption*. Welf & I C §366.26(b)(1); Cal Rules of Ct 5.725(d)(2).
- *Adoption or tribal customary adoption is identified as a permanent goal without permanently terminating parental rights. Efforts shall be made to locate an appropriate adoptive family within 180 days*. Welf & I C §366.26(b)(4); Cal Rules of Ct 5.725(d)(6).

• *Note:* Before considering adoption as a future goal, the court must order relative guardianship if appropriate under Welf & I C §366.21(b)(3).

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

- [Name], *who is a relative, is appointed as legal guardian for the child, and letters of guardianship shall issue*. Welf & I C §366.26(b)(3); Cal Rules of Ct 5.725(d)(6).

- [Name] *is appointed as nonrelative legal guardian for the child, and letters of guardianship shall issue*. Welf & I C §366.26(b)(5); Cal Rules of Ct 5.725(d)(7).

[*Or*]

- *The child shall be placed in foster care subject to juvenile court review*. Welf & I C §366.26(b)(6); Cal Rules of Ct 5.725(d)(7).

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

[*And/Or*]

- *If no adult is available to be a legal guardian and there is no suitable foster home, the court may order the child's custody transferred to a licensed foster family agency, subject to further orders*. Cal Rules of Ct 5.725(d)(10).

[*And/Or*]

- *Visitation with the parents shall be* _____. See Welf & I C §366.26(c)(4)(C); Cal Rules of Ct 5.725(d)(7)(E), 5.735(d)(2).

[*Use if legal guardianship is the permanent plan*]

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

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

(18) *Schedule future hearings as necessary*.

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

- *Schedule adoptive placement hearing if court has ordered that efforts be made to locate prospective adoptive family within 180 days*. Welf & I C §366.26(c)(3); Cal Rules of Ct 5.725(d)(6).

B. [§104.3] Setting Hearing at Disposition

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

(2) *Find that either reasonable efforts had been made or not been made.* Welf & I C §361(d); Cal Rules of Ct 5.695(e). See Welf & I C §366.26(c)(2)(A); Cal Rules of Ct 5.725(e)(1) (to terminate parental rights at a .26 hearing, the court need find only that at one hearing at which reasonable efforts or services were considered, there was a finding of reasonable efforts or services, which may have been at the detention hearing). See discussion in §104.11.

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

- *The child should be removed from parental custody (clear and convincing evidence).* Welf & I C §361(c); Cal Rules of Ct 5.695(d). Reasons should be stated on the record.
- *No reunification services should be provided because of clear and convincing evidence of one or more of the circumstances set out in Welf & I C §361.5(b) or Cal Rules of Ct 5.695(h)(6).* See §104.11.
- *The parent or guardian is incarcerated or institutionalized and the court determines by clear and convincing evidence that reunification services will be detrimental to the child.* Welf & I C §361.5(e)(1); Cal Rules of Ct 5.695(h)(13).

Note: A .26 hearing cannot be set to consider termination of parental rights of only one parent unless that parent is the sole surviving parent, the parental rights of the other parent have been terminated, or the other parent has relinquished custody. Cal Rules of Ct 5.705, 5.725(a)(2), (g).

(4) *If no reunification services have been ordered under Welf & I C §361.5, order a .26 hearing to be held within 120 days, unless there is a finding that services to the other parent or guardian are to be provided.* See Welf & I C §361.5(f); Cal Rules of Ct 5.695(h)(14). Although reunification services will not be ordered if the parents' whereabouts are unknown (see Welf & I C §361.5(b)(1); Cal Rules of Ct 5.695(h)(6)(A)), a .26 hearing may not be set if this is the only basis for denial of services. See Welf & I C §361.5(d); Cal Rules of Ct 5.695(h)(14).

☛ JUDICIAL TIP: Some courts set a hearing between 45 and 90 days before the scheduled .26 hearing to ascertain whether service

was sufficient. If service is found to be lacking, there will often be time to remedy this within the 120-day period.

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

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

(6) *Advise all parties of their right to seek review by extraordinary writ and that failure to do so will waive their right to raise issues in a subsequent appeal*. The judge should ensure that Judicial Council Notice of Intent to File Writ Petition and Request for Record form JV-820 and Petition for Extraordinary Writ (Juvenile Dependency) form JV-825 are presented to any parent or guardian who is present, and should order that the forms be mailed immediately to those not present. See Welf & I C §366.26(*l*)(3)(A); Cal Rules of Ct 5.590, 5.695(h)(15)–(19). The court must advise parties who are present that they must file this notice of intent within seven days. See Cal Rules of Ct 8.450(e)(4)(A). For parties who are notified by mail, the time for filing this notice will vary depending on whether they are within or outside the state or the country and whether the order was made by a referee not acting as a temporary judge. See Cal Rules of Ct 8.450(e)(4)(B)–(E). See discussion in §104.19. See also Cal Rules of Ct 8.452(h)(1), requiring the appellate court to resolve these writ petitions on their merits, and Rule 8.450(g)(1), requiring the juvenile court clerk to transmit the transcript of the juvenile court hearing to the appellate court within 12 calendar days.

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

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

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

- *Continued removal is necessary because return would create substantial risk of detriment to the child.* Welf & I C §366.21(e); Cal Rules of Ct 5.710(b)(1), 5.708(d). It is advisable to state on the record the factual basis for this conclusion. Cal Rules of Ct 5.708(d)(5).
- "*The child's placement is necessary and appropriate,*" *or* "*out of home placement is necessary and the child's placement is appropriate.*" See 42 USC §675(5)(B).
- *Reasonable efforts or services have or have not been offered or provided.* See Welf & I C §366.21(e); Cal Rules of Ct 5.708(e). See Welf & I C §366.26(c)(2)(A) (to terminate parental rights at a .26 hearing, the court need find only that at one hearing at which reasonable efforts or services were considered, there was a finding of reasonable efforts or services; a .26 hearing may not be ordered at the six-month review if the court finds that reasonable services have not been provided or offered). Evidence of any of the following does not necessarily imply a failure to offer or provide reasonable services: (1) the child has been placed with a foster family eligible to adopt or in a preadoptive home, (2) the case plan includes services to make and finalize a permanent plan should reunification efforts fail, or (3) services to make and finalize an alternative permanent plan have been provided concurrent with reunification services. Welf & I C §366.21(*l*); Cal Rules of Ct 5.708(e)(2)(B), (C). In the case of an Indian child, the court must find that active efforts have been made. Welf & I C §366.26(c)(2)(B). When the parent has been incarcerated or institutionalized, the court must consider barriers to accessing services or to maintaining contact with the child. Welf & I C §366.21(e).
- *One or more of the following applies by clear and convincing evidence:*
  - — Parents' whereabouts are still unknown and the basis for removal was Welf & I C §300(g) (child left without provision for care and parents' whereabouts unknown). Welf & I C §366.21(e); Cal Rules of Ct 5.710(c)(1)(A).

— Parent has not had contact with child for six months. Cal Rules of Ct 5.710(c)(1)(A).

— Parent has been convicted of a felony indicating parental unfitness. See Welf & I C §366.21(e); Cal Rules of Ct 5.710(c)(1)(B).

— Parent is deceased. Cal Rules of Ct 5.710(c)(1)(C).

— The child was under three years of age when removed or was a member of a sibling group in which one member was under three at the time of removal and the parent has failed to participate regularly and make substantive progress in a court-ordered treatment plan. Welf & I C §366.21(e); Cal Rules of Ct 5.710(c)(1)(D). The court must not set a .26 hearing in this situation if it finds that reasonable services were not offered or provided or that there is a substantial probability of return within six months or within 12 months of the date the child entered foster care, whichever is sooner. See Welf & I C §§361.49, 366.21(e), (g)(1); Cal Rules of Ct 5.710(c)(1)(D), 5.502(9). See Cal Rules of Ct 5.710(c)(1) for criteria relating to a substantial probability of return and Welf & I C §366.21(e) for factors to consider in setting a .26 hearing as to some or all members of a sibling group.

Note: A .26 hearing cannot be set to consider termination of parental rights of only one parent unless that parent is the sole surviving parent or the parental rights of the other parent have been terminated. Cal Rules of Ct 5.708(l), 5.725(a)(2), (g). No .26 hearing may be ordered if the child is a nonminor dependent. Welf & I C §366.21(g)(2).

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

☛ JUDICIAL TIPS:

- If the parents have had notice, the judge may set the .26 hearing early in the 120-day period, subject to the time requirements of Welf & I C §294(c)(1) (notice must be completed at least 45 days before the hearing) and the need for DSS to prepare a full report. If a contested hearing is expected, the scheduling should permit time for it.
- If the parents are present in court at the review hearing, they should be ordered back for the .26 hearing, with written notice to follow, sent by first-class mail to the mailing address that has been provided. See Welf & I C §294(f)(1). If a parent is absent and cannot be located, the judge may inquire whether DSS has used

due diligence in attempting to locate the parent. Once there is a finding of due diligence, DSS must submit an order for publication. See Welf & I C §294(a)(7), (f)(7), (g).

- Some judges set a hearing 30 or more days before the scheduled .26 hearing to ascertain whether service was sufficient. If service is found to be lacking, there may be time to remedy this within the 120-day period.

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

- *Current search efforts for absent parents or legal guardians*.
- *Review of amount and nature of contact between the child and the parents, legal guardians, and other members of the extended family since the time of placement*.
- *Evaluation of the child's medical, developmental, scholastic, mental, and emotional status*.
- *Preliminary assessment of the eligibility and commitment of any prospective adoptive parents (including prospective tribal customary adoptive parents in the case of an Indian child—see Welf & I C §366.24) or prospective legal guardians to include a criminal check, a check for prior child abuse or neglect, and the ability to meet the child's needs and to understand the obligations of adoption or guardianship*.
- *Description of efforts made to identify prospective adoptive parents or legal guardians*.
- *Relationship of the child to prospective adoptive parents or prospective legal guardians, the motivation for seeking adoption or guardianship, and the child's wishes concerning adoption or guardianship unless the child's age or condition precludes a meaningful statement*.
- *Analysis of likelihood of adoption if parental rights are terminated.*
- *In the case of an Indian child, whether tribal customary adoption would be detrimental and whether the Indian child cannot or should not be returned to the home of the Indian parent or custodian.*

(4) *Advise all parties of their right to seek review by extraordinary writ and advise that failure to do so will waive their right to raise issues in a subsequent appeal*. The judge should ensure that Judicial Council forms JV-820 and JV-825 are presented to any parent or guardian who is present, and should order that the forms be mailed immediately to those not

present. See Welf & I C §366.26(*l*)(3)(A); Cal Rules of Ct 8.450, 8.452, 5.590(b).

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

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

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

- *Continued removal is necessary because return would create substantial risk of detriment to the child*. Welf & I C §366.21(f); Cal Rules of Ct 5.715(b)(1), 5.708(d). It is advisable to state on the record the factual basis for this conclusion. Cal Rules of Ct 5.708(d)(5).
- "*The child's placement is necessary and appropriate*," or "*out of home placement is necessary and the child's placement is appropriate*." See 42 USC §675(5)(B).
- *Reasonable efforts or services have or have not been offered or provided*. Welf & I C §366.21(g)(1); Cal Rules of Ct 5.708(e). See Welf & I C §366.26(c)(2)(A) (to terminate parental rights at a .26 hearing, the court need find only that at one hearing at which reasonable efforts or services were considered, there was a finding of reasonable efforts or services; a .26 hearing may not be ordered at the 12-month review if the court finds that reasonable services have not been provided or offered). Evidence of any of the following does not necessarily imply a failure to offer or provide reasonable services: (1) the child has been placed with a foster family eligible to adopt or in a preadoptive home, (2) the case plan includes services to make and finalize a permanent plan should reunification efforts fail, or (3) services to make and finalize an alternative permanent plan have been provided concurrent with reunification services. Welf & I C §366.21(*l*); Cal Rules of Ct 5.708(e)(2). Under Welf & I C §366.21(g), a finding of a substantial probability that the child will be returned to the physical custody of the parent or guardian is a compelling reason not to set a .26 hearing.
- There is no substantial probability of return within 18 months from initial removal. Welf & I C §366.21(g)(1); See Cal Rules of Ct 5.715(b)(4)(A).

Note: A .26 hearing cannot be set to consider termination of parental rights of only one parent unless that parent is the sole surviving parent or the parental rights of the other parent have been terminated. See Cal Rules of Ct 5.708(l), 5.725(a)(2), (g). Moreover, if at this or any subsequent review hearing the court finds by clear and convincing evidence that the child is not likely to be adopted and that there is no one willing to assume legal guardianship, it must order that the child be placed in foster care and determine whether DSS has made reasonable efforts to maintain the child's relationships with people who are important to the child. See, e.g., Welf & I C §366.21(g)(3); Cal Rules of Ct 5.715(b)(4)(C). See also Welf & I C §366.3(d) (periodic hearings).

(2) *Order a .26 hearing to be held within 120 days if there is clear and convincing evidence that reasonable services have been offered or provided.* See Welf & I C §366.21(g)(2); Cal Rules of Ct 5.715(b)(4)(B), 5.708(*l*)–(o). The court may not order a .26 hearing if the child is a nonminor dependent. Welf & I C §366.21(g)(2).

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

- *Current search efforts for absent parents and legal guardians*.
- *Review of amount of and nature of contact between the child and the parents and other members of the extended family since the time of placement*.
- *Evaluation of the child's medical, developmental, scholastic, mental, and emotional status*.
- *Preliminary assessment of the eligibility and commitment of any prospective adoptive parent or prospective legal guardian to include a criminal check, a check for prior child abuse or neglect, and the ability to meet the child's needs and to understand the obligations of adoption or guardianship*.
- *Relationship of the child to prospective adoptive parents or prospective legal guardians, the motivation for seeking adoption or guardianship, and the child's wishes concerning adoption or guardianship unless the child's age or condition precludes a meaningful statement*.
- *Description of efforts made to identify prospective adoptive parents or legal guardians*.
- *Analysis of likelihood of adoption if parental rights are terminated*.
- *In the case of an Indian child, whether tribal customary adoption would be detrimental and whether the Indian child cannot or should not be returned to the home of the Indian parent or custodian*.

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

(5) *Continue to permit the parent to visit the child pending the hearing unless visitation would be detrimental to the child, and determine whether DSS has made reasonable efforts to maintain the child's relationships with people, other than siblings, who are important to the child*. See Welf & I C §366.21(h). Modify terms of visitation from previous levels as necessary to meet current needs.

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

(1) *Make the following findings:*

- *Continued removal is necessary because return would create substantial risk of detriment*. Welf & I C §366.22(a); Cal Rules of Ct 5.720(b)(1). The court must state on the record the factual basis for this conclusion. Cal Rules of Ct 5.720(b)(3). "The child's placement is necessary and appropriate," or "out of home placement is necessary and the child's placement is appropriate." See 42 USC §675(5)(B).
- *Reasonable services have been offered or provided*. Cal Rules of Ct 5.708(e). But see Welf & I C §366.26(c)(2)(A); Cal Rules of Ct 5.725(e)(1) (to terminate parental rights at a .26 hearing, the court need find only that at one hearing at which reasonable efforts were considered, there was a finding of reasonable efforts). Evidence of any of the following does not necessarily imply a failure to offer or provide reasonable services: (1) the child has been placed with a foster family eligible to adopt or in a preadoptive home, (2) the case plan includes services to make and finalize a permanent plan should reunification efforts fail, or (3) services to make and finalize an alternative permanent plan have actually been provided concurrent with reunification services. Welf & I C §366.22(a).

Note: A .26 hearing cannot be set to terminate the parental rights of only one parent unless that parent is the sole surviving parent, the parental rights of the other parent have been terminated, or the other parent has relinquished custody. Cal Rules of Ct 5.705, 5.708(l), 5.725(a)(2), (g). And no .26 hearing may be ordered if the child is a nonminor dependent. Welf & I C §366.22(a).

(2) *Terminate reunification services and order a .26 hearing to be held within 120 days*. See Welf & I C §366.22(a); Cal Rules of Ct 5.720(b)(3)(C).

Note: If reunification services are terminated and the court finds by clear and convincing evidence that the child is not a proper subject for adoption or, in the case of an Indian child, tribal customary adoption, and that there is no one willing to assume legal guardianship, it may order that the child be placed in foster care. Welf & I C §366.22(a); see Cal Rules of Ct 5.720(b)(3)(B).

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

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

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

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

(1) *Make the following findings:*

- *Continued removal is necessary because return would create a substantial risk of detriment*. Welf & I C §366.25(a); Cal Rules of Ct 5.722(b)(1). The court must state on the record that: "The child's placement is necessary and appropriate," or "out of home placement is necessary and the child's placement is appropriate." See 42 USC §675(5)(B).
- *Reasonable services have been offered or provided*. Welf & I C §366.25(a)(3); Cal Rules of Ct 5.708(e)(1). But see Cal Rules of Ct §5.725(e)(1) (to terminate parental rights at a .26 hearing, the court need find only that at one hearing at which reasonable efforts were considered, there was a finding of reasonable efforts). Evidence of any of the following does not necessarily imply a failure to offer or provide reasonable services: (1) the child has been placed with a foster family eligible to adopt or has been placed in a preadoptive home, (2) the case plan includes services to make and finalize a

permanent plan should reunification efforts fail, or (3) services to make and finalize an alternative permanent plan have actually been provided, concurrent with reunification services. Welf & I C §366.25(a)(3); Cal Rules of Ct 5.708(e)(2).

Note: A .26 hearing cannot be set to terminate the parental rights of only one parent unless that parent is the sole surviving parent, the parental rights of the other parent have been terminated, or the other parent has relinquished custody. Cal Rules of Ct 5.705, 5.708(l), 5.725(a)(2), (g). And no .26 hearing may be ordered if the child is a nonminor dependent. Welf & I C §366.25(a)(3).

(2) *Terminate reunification services and order a .26 hearing to be held within 120 days*. Welf & I C §366.25(a)(3); Cal Rules of Ct 5.722(b)(2)(B). 5.708(*l*)–(o).

Note: If reunification services are terminated and the court finds by clear and convincing evidence that the child is not a proper subject for adoption or, in the case of an Indian child, tribal customary adoption, and that there is no one willing to assume legal guardianship, it may order that the child be placed in foster care. Welf & I C §366.25(a)(3); Cal Rules of Ct 5.722(b)(2)(A).

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

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

(5) *Continue to permit the parent to visit the child pending the hearing unless visitation would be detrimental to the child.* Welf & I C §366.25(a)(3); Cal Rules of Ct 5.722(b)(2)(A)(iii). Modify terms of visitation from previous levels as necessary to meet current needs.

III. APPLICABLE LAW

A. [§104.8] General Background

Welfare and Institutions Code §366.26 provides the exclusive procedures for selecting and implementing a permanent plan, including the termination of parental rights, adoption, establishment of a legal guardianship, or placement with a foster family, or for a child who is

adjudged dependent, removed from the home of the parents, and for whom reunification efforts are deemed futile from the outset (Welf & I C §361.5(b)) or proved to be futile. Welf & I C §366.26(a)–(b); Fam C §7808(a).

The statutory scheme contemplates that before reaching the .26 hearing stage the juvenile court will have conducted several hearings and made a number of findings that returning the child to parental custody would be detrimental. *In re Vanessa W.* (1993) 17 CA4th 800, 806, 21 CR2d 633; *In re Brittany M.* (1993) 19 CA4th 1396, 1404, 24 CR2d 57 (no denial of equal protection to parents whose rights are terminated under Welf & I C §366.26). It is not a denial of due process that some of these findings are made by only a preponderance of the evidence; because the dependency process has so many safeguards built into it, by the time the .26 hearing stage is reached, the evidence in favor of termination is already clear and convincing. To require more at the .26 hearing stage would prejudice the interest of the adoptable child. *Cynthia D. v Superior Court* (1993) 5 C4th 242, 256, 19 CR2d 698; *In re Cristella C.* (1992) 6 CA4th 1363, 1372, 8 CR2d 342 (California statutes provide a variety of safeguards at every stage, including initial removal by clear and convincing evidence, presumption of return to parents at each judicial review, and provision of reunification services). Return of the child at the .26 hearing is not an issue before the court, and no evidence to support a request for return may be received. See *In re Marilyn H.* (1993) 5 C4th 295, 309–310, 19 CR2d 544.

The hearing held under Welf & I C §366.26 is called a "selection and implementation" hearing, rather than a "termination" hearing, because it is the hearing at which the court determines the future disposition of a child who cannot be returned to the parents' home even when parental rights are not terminated. *In re Amanda B.* (1992) 3 CA4th 935, 938, 4 CR2d 922. In other words, at the Welf & I C §366.26 hearing the court "selects" a permanent plan of adoption, legal guardianship, or foster care, and at the same time "implements" that plan by terminating parental rights, appointing legal guardians, or ordering foster care, as appropriate under the statutory provisions of that section. The main thrust of this hearing is no longer the success or failure of the parent's activities and efforts; it is the child's need for stability. See *In re Marilyn H.* (1993) 5 C4th 295, 309, 19 CR2d 544.

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

if that is not possible, identify the placement by name and specify the goal of the placement.

The court may not designate two long-term permanent plans for a child and therefore if a guardianship is not working, the court must terminate it before selecting foster care as the permanent plan. *In re Carrie W.* (2003) 110 CA4th 746, 760, 2 CR3d 38.

B. [§104.9] Purpose of .26 Hearing

The purpose of a .26 hearing has been characterized as follows:

(1) To select and implement a permanent plan of adoption, tribal customary adoption in the case of an Indian child, legal guardianship, or foster care. Welf & I C §§294(e)(6), 366.26(b); see *In re Marilyn H.* (1993) 5 C4th 295, 304, 19 CR2d 544.

(2) To determine a permanent placement for a child who cannot be returned home. *In re Heather B.* (1992) 9 CA4th 535, 546, 11 CR2d 891.

The court may not necessarily terminate parental rights at this hearing; although adoption is the favored option, there are certain circumstances in which termination may be precluded. Welf & I C §366.26(c)(1)(B); see, *e.g., In re Brandon C.* (1999) 71 CA4th 1530, 1537, 84 CR2d 505 (mother made great improvement in rehabilitating herself and securing a stable living situation; considerable bond developed with children that would benefit them should the relationship be allowed to continue).

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

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

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

The .26 hearing is not a periodic status review hearing. *In re Marilyn H.*, *supra*. At every review hearing, the focus is on the parents' progress at reunification. However, once the court orders a .26 hearing, attention shifts to whether the child is adoptable. *In re Edward R.* (1993) 12 CA4th 116, 126, 15 CR2d 308.

By the time the .26 hearing is held, it has already been determined that the parent will not have custody of the child. The remaining important issue is whether the child can and should be adopted. *In re Andrew S.* (1994) 27 CA4th 541, 548–549, 32 CR2d 670. Therefore, return of the child to the parents is not an option at this hearing. *In re Marilyn H.*, *supra*. Parents who seek to reinstate reunification services and make return home an option must seek modification under Welf & I C §388 of the order terminating reunification services before the .26 hearing. *In re Marilyn H.*, *supra*, 5 C4th at 309.

C. Setting the Hearing

1. [§104.10] In General

Once reunification services have been terminated, the focus shifts to the child's needs for stability and a permanent arrangement. *In re Marilyn H.* (1993) 5 C4th 295, 309, 19 CR2d 544. After services have been terminated at any stage, the child is entitled to the holding of a .26 hearing unless there are exceptional circumstances that justify the court's exercise of discretion to order foster care (*i.e.*, the court finds by clear and convincing evidence that the child is not a proper subject for adoption and no one is willing to assume legal guardianship—see, *e.g.*, Welf & I C §366.22(a)). *In re John F.* (1994) 27 CA4th 1365, 1374, 33 CR2d 225 (child had filed a petition for modification under Welf & I C §388 requesting the setting of a .26 hearing). When the court knows that more permanent options, such as adoption, are not foreclosed, it does not have discretion to maintain the child in the uncertainty of foster care and deny the .26 hearing. 27 CA4th at 1376–1377. See also *In re Johnny M.* (1991) 229 CA3d 181, 279 CR 693 (parents entitled to contested permanency planning hearing before permanent plan determined by court). Moreover, because the hearing at which the .26 hearing is set is so crucial, it may be an abuse of discretion to deny a parent a contested hearing at *that* hearing. See *Ingrid E. v Superior Court* (1999) 75 CA4th 751, 759, 89 CR2d 407 (parent had notified the court of new evidence that she had wanted to present at the 18-month permanency hearing).

In certain circumstances, a parent must make an offer of proof as a prerequisite to a contested hearing. For example, a presumed father, whose children have been in long-term foster care and who are now being considered for adoption, must make an offer of proof before being entitled to a contested .26 hearing. *M.T. v Superior Court* (2009) 178 CA4th 1170, 1189–1190, 101 CR3d 183.

Although the .26 hearing can be scheduled at the disposition hearing (see §104.11) or any of the review hearings (see §§104.13–104.15), a court may also set a .26 hearing when it grants a petition under Welf & I C §387, removing a child from parental custody, if the parent has received at least 12 months of reasonable services (presumably six months for a child under three). See *Carolyn R. v Superior Court* (1995) 41 CA4th 159, 164, 48 CR2d 669. However, a substantial portion of those services must have been "time limited" in nature, and if the child has been a dependent but never removed from parental custody, the disposition orders after a sustained Welf & I C §387 petition may not include the setting of a .26 hearing. See *In re Joel T.* (1999) 70 CA4th 263, 268, 82 CR2d 538.

In ruling on a supplemental Welf & I C §387 petition, the court may not rely on Welf & I C §360(a) and appoint a relative to be the children's legal guardian, but must instead hold a .26 hearing as required by Cal Rules of Ct 5.565(f). *In re G.W.* (2009) 173 CA4th 1428, 1439, 94 CR3d 53.

A .26 hearing may also be scheduled when the court grants a petition under Welf & I C §388, changing a disposition order for services to an order for no services. *Sheila S. v Superior Court* (2000) 84 CA4th 872, 877, 881, 101 CR2d 187; see Welf & I C §388(c). Services are not reasonable if a formerly incarcerated parent is deported before being able to use them. See *In re Maria S.* (2000) 82 CA4th 1032, 1040, 98 CR2d 655.

Once a guardianship has been established, no statute or court rule requires the court to make a judicial finding of changed circumstances at a separate Welf & I C §388 hearing before holding a .26 hearing. *In re Andrea R.* (1999) 75 CA4th 1093, 1105–1106, 89 CR2d 664.

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

original (dispositional in this case) order. *In re Athena P.* (2002) 103 CA4th 617, 625, 127 CR2d 46.

The court may not hold a .26 hearing for a child who is a nonminor dependent. See Welf & I C §§366.3(i), 366.21(g)(2), 366.22(a), 366.25(a)(3). For the definition of a "nonminor dependent," see California Judges Benchguide 100: *Juvenile Dependency Initial or Detention Hearing* §100.18 (Cal CJER).

Orders, such as visitation orders, that are made contemporaneously with orders setting a .26 hearing are also only reviewable by writ. *In re Tabitha W.* (2006) 143 CA4th 811, 817, 49 CR3d 565.

a. At Disposition Hearing

(1) [§104.11] Denial of Reunification Services

Subject to the exceptions noted below, the court must set a .26 hearing at the disposition hearing if both parents and any guardian are denied reunification services and the court makes the following findings (see Welf & I C §361.5(f); Cal Rules of Ct 5.695(h)(14)):

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

(2) Reasonable efforts were made or not made to prevent or eliminate the need for removing the child from the home. Welf & I C §361(d); Cal Rules of Ct 5.695(e).

☛ JUDICIAL TIPS:

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

(3) No reunification services are to be ordered under Welf & I C §361.5(b)(2)–(16) or (e)(1) and Cal Rules of Ct 5.695(h)(6) because one of the following has been found by clear and convincing evidence:

- The parent has a mental disability described by Fam C §§7826 and 7827 that renders the parent incapable of using reunification services. Welf & I C §361.5(b)(2); Cal Rules of Ct 5.695(h)(6)(B).

- The child had previously been removed because of physical or sexual abuse under Welf & I C §361 and had been returned home without termination of jurisdiction, and is again being removed for abuse under Welf & I C §361. Welf & I C §361.5(b)(3); Cal Rules of Ct 5.695(h)(6)(C).
- The child's parent or guardian has caused the death of another child through abuse or neglect. Welf & I C §361.5(b)(4); Cal Rules of Ct 5.695(h)(6)(D). A judge may properly find that a parent's nolo contendere plea to felony child endangerment (Pen C §273a), which was part of a plea bargain to an original charge of murder, is equivalent to a conviction for causing the death of another child through abuse or neglect. *In re Jessica F.* (1991) 229 CA3d 769, 776–778, 282 CR 303 (decided under a former version of Welf & I C §361.5(b)(4)).
- The court has jurisdiction because of Welf & I C §300(e) (severe physical abuse under the age of five) based on parent's or guardian's conduct. Welf & I C §361.5(b)(5); Cal Rules of Ct 5.695(h)(6)(E).
- The child has been adjudged a dependent because of severe physical or sexual harm suffered by the child or a sibling or half sibling, and the court makes a factual finding that it would not benefit the child to pursue reunification with the offending parent. Welf & I C §361.5(b)(6); Cal Rules of Ct 5.695(h)(6)(F). The court must consider the factors set forth in Welf & I C § 361.5(i) in determining whether reunification will benefit the child. See discussion in California Judges Benchguide 102: *Juvenile Dependency Disposition Hearing* §102.80 (Cal CJER).
- The parent is not receiving services for a sibling or half sibling because of acts specified by Welf & I C §361.5(b)(3), (5), or (6). Welf & I C §361.5(b)(7); Cal Rules of Ct 5.695(h)(6)(G). The court must consider the factors set forth in Welf & I C §361.5(i) in determining whether reunification would benefit the child who would otherwise be denied services under Welf & I C §361.5(b)(7). See discussion in California Judges Benchguide 102: *Juvenile Dependency Disposition Hearing* §102.80 (Cal CJER).
- The child was conceived as a result of the parent's committing an act of child sexual abuse as described by Pen C §288 or §288.5 or equivalent acts in another state. Welf & I C §361.5(b)(8); Cal Rules of Ct 5.695(h)(6)(H).
- The parent or guardian is incarcerated or institutionalized, and the court determines by clear and convincing evidence that

reunification services will be detrimental to the child. Welf & I C §361.5(e)(1); Cal Rules of Ct 5.695(h)(13).

- The child has been found to be described by Welf & I C §300(g) (voluntarily surrendered or otherwise left without provision for support), and the abandonment was willful, constituting serious danger for the child. Welf & I C §361.5(b)(9); Cal Rules of Ct 5.695(h)(6)(I).
- The court had ordered termination of reunification services for siblings or half siblings who had been removed under Welf & I C §361 because reunification services had failed and court finds that the parent or guardian has not made reasonable efforts to treat the problem that caused the removal. Welf & I C §361.5(b)(10); Cal Rules of Ct 5.695(h)(6)(J); *In re Gabriel K.* (2012) 203 CA4th 188, 194–197, 136 CR3d 813.
- Parental rights had been terminated with respect to siblings or half siblings, and the parent or guardian has subsequently not made reasonable efforts to treat the problem. Welf & I C §361.5(b)(11); Cal Rules of Ct 5.695(h)(6)(K).
- The parent or guardian was convicted of a violent felony (see Pen C §667.5(c)). Welf & I C §361.5(b)(12); Cal Rules of Ct 5.695(h)(6)(L).
- The parent or guardian has severe drug or alcohol problems and has either resisted treatment during the previous three years, or has failed or refused to comply with a court ordered substance abuse treatment program as part of a dependency reunification plan on at least two prior occasions. Welf & I C §361.5(b)(13); Cal Rules of Ct 5.695(h)(6)(M).
- The parent or guardian has advised the court that he or she is not interested in receiving reunification or family maintenance services or having the child returned, has completed the Judicial Council's form for waiver of services, and has been found by the court to have knowingly and intelligently waived the right to services. Welf & I C §361.5(b)(14); Cal Rules of Ct 5.695(h)(6)(N).
- The parent or guardian has on one or more occasions willfully abducted the child or a sibling or half sibling from a placement and refused to disclose the child's whereabouts or return the child. Welf & I C §361.5(b)(15); Cal Rules of Ct 5.695(h)(6)(O).
- The parent or guardian has been required by the court to be registered on a sex offender registry under the federal Adam Walsh Child Protection and Safety Act (42 USC §16913(a)). Welf & I C §361.5(b)(16); see 42 USC §5106a(2)(B)(xvi)(VI).

- The parent or guardian is incarcerated, institutionalized, or detained by the United States Department of Homeland Security, or has been deported to his or her country of origin, and the provision of reunification services would be detrimental to the child. Welf & I C §361.5(e)(1).

Under Welf & I C §361.5(b)(10) and (11), prior termination of parental rights of a man who was an alleged or biological father of a sibling of the child who is the subject of the newest petition may serve as the basis for denying reunification services even if the man is the *presumed* father of that child. *Francisco G. v Superior Court* (2001) 91 CA4th 586, 599, 110 CR2d 679.

See discussion in California Judges Benchguide 102: *Juvenile Dependency Disposition Hearing* §§102.77–102.86 (Cal CJER).

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

If findings are made based on Welf & I C §361.5(b)(5), the court may order reunification services (and therefore not schedule a .26 hearing) if it makes one of the following findings by a preponderance of the evidence (Welf & I C §361.5(c); Cal Rules of Ct 5.695(h)(12)):

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

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

If findings are made based on Welf & I C §361.5(b)(3), (4), and (6)–(15), the court may order reunification services (and therefore not schedule a .26 hearing) if it finds by clear and convincing evidence that reunification would be in the child's best interest. Welf & I C §361.5(c); Cal Rules of Ct 5.695(f)(11).

If the parent has a mental illness described by Fam C §§7826 and 7827, the court must still order reunification services unless competent evidence from at least two mental health professionals establishes, by clear and convincing evidence, that the parent would be unable to care for the child within the next 12 months. See Welf & I C §361.5(c); Cal Rules of Ct 5.695(h)(10). In assessing the effect of a mental disability on entitlement to reunification services, the court should first determine whether the parent suffers a mental disability as described in Fam C §§7820–7827. If so, and the disability renders the parent incapable of using reunification services, reunification may be denied under Welf & I C §361.5(b)(2). If not, but the parent is unlikely to be capable of using services so as to be able to care for the child within 12 months, reunification may be denied under Welf & I C §361.5(c). *In re Rebecca H.* (1991) 227 CA3d 825, 843, 278 CR 185.

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

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

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

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

(2) That reasonable services were offered or provided. See Welf & I C §366.21(e), (*l*); Cal Rules of Ct 5.707(c)(1)(F). But see Welf & I C §366.26(c)(2)(A); Cal Rules of Ct 5.725(e)(1) (to terminate parental rights at a .26 hearing, the court need find only that at one hearing at which reasonable efforts were considered, there was a finding of reasonable efforts). At the six-month review, if the court finds that reasonable efforts were not provided or offered, however, it may not set a .26 hearing for a child who was under three at removal. Welf & I C §366.21(e).

☛ JUDICIAL TIPS:

- Although both these findings need only be made by a preponderance of evidence, many judges recommend using a clear and convincing standard (when the evidence warrants) when setting a .26 hearing. It is advisable to state on the record the factual basis for these conclusions.
- In the case of an Indian child, the court must find that active efforts were made. Welf & I C §366.26(c)(2)(B). The "active efforts" standard of ICWA must be met by clear and convincing evidence, not evidence beyond a reasonable doubt. *In re Adoption of Hannah S.* (2006) 142 CA4th 988, 998, 8 CR3d 605.

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

- The child was removed initially under Welf & I C §300(g), and the whereabouts of the parent are still unknown.
- The parent has failed for six months to contact and visit the child.
- The parent has been convicted of a felony indicating parental unfitness. In this regard, a judge may properly find that a parent's nolo contendere plea to felony child endangerment (Pen C §273),

which was part of a plea bargain to an original charge of murder, is equivalent to a conviction for causing the death of another child through abuse or neglect. *In re Jessica F.* (1991) 229 CA3d 769, 776–778, 282 CR 303.

☛ JUDICIAL TIP: A .26 hearing may be set at the six-month review or at any other time only if it is set to consider termination of parental rights of both parents and any guardian. See Cal Rules of Ct 5.705, 5.708(*l*), 5.725(a)(2). If either parent or a guardian is still receiving services, the court may not proceed to a .26 hearing. Nor may a .26 hearing be set at a six-month review if the child is a nonminor dependent. Welf & I C §366.21(g)(2).

- The parent is deceased.
- The child was under three years of age when removed, or is a member of a sibling group one of whom was under three at removal, and the parent has failed to participate regularly and make substantial progress in the treatment plan, unless the court finds that there is a substantial probability that the child will be returned within six months or within 12 months of the date the child entered foster care, whichever is sooner. Welf & I C §§361.49, 366.21(e); Cal Rules of Ct 5.710(c)(1)(D), 5.502(9). To find such a probability the court may consider whether (1) the parent or guardian has regularly visited and contacted the child (taking into account barriers to maintaining contact with the child), (2) the parent or guardian has made significant progress in curing the conditions that led to removal, and (3) the parent or guardian has demonstrated ability to complete the plan and to provide for the child's protection and needs. See Cal Rules of Ct 5.710(c)(1)(D).

A court may set a selection and implementation hearing at the six-month review when the parent has failed to contact and visit the child; there is nothing to be gained in continuing to offer services because the parent has made no effort to reunify with the child for six months, and there are no extenuating circumstances. *In re Monique S.* (1993) 21 CA4th 677, 682, 25 CR2d 863. A brief casual or chance meeting with the child will not be sufficient to count as contact in determining whether to continue reunification services. *In re Tameka M.* (1995) 33 CA4th 1747, 1754, 40 CR2d 64.

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

of reunification services was upheld on appeal in *Armando D. v Superior Court* (1999) 71 CA4th 1011, 1018, 1022–1023, 84 CR2d 189.

In determining whether to deny visitation to the parents when setting a .26 hearing at any review hearing (see Welf & I C §§366(a)(1), 366.21(h), 366.22(a)), the court must use a "preponderance of the evidence" standard of proof in finding that visitation would be detrimental to the child. *In re Manolito L.* (2001) 90 CA4th 753, 761–762, 109 CR2d 282.

☛ JUDICIAL TIPS:

- In setting a .26 hearing based on the fact that there has been no contact for six months, it is generally believed that it is the last six months that counts; however, initiation of some token contact as the hearing date approaches will not, by itself, defeat the setting of the .26 hearing.
- Many judges would be reluctant to set a .26 hearing at this stage if the parents have attempted to contact the child by leaving messages, speaking with the foster parents, or in some other manner without actually reaching the child. If possible, judicial officers should assess the sincerity and quality of these attempts.

See discussion in California Judges Benchguide 103: *Juvenile Dependency Review Hearings* §103.35 (Cal CJER).

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

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

(1) Continued removal is required because return would create a substantial risk of detriment by a preponderance of the evidence. Welf & I C §366.21(f), (*l*); Cal Rules of Ct 5.715(b)(1). It is advisable to state the factual basis for this conclusion on the record.

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

(2) There is no substantial probability of return to the parents within 18 months from detention/removal. Welf & I C §366.21(g)(1); Cal Rules of Ct 5.715(b)(4).

(3) Reasonable services were offered or provided, taking into account any barriers to accessing services faced by incarcerated or institutionalized parents. Welf & I C §366.21(f); Cal Rules of Ct 5.708(e). This finding must be made by clear and convincing evidence. Welf & I C

§366.21(g)(2). But see Cal Rules of Ct 5.725(e)(1) (to terminate parental rights at a .26 hearing, the court need only find that at one hearing at which reasonable efforts were considered, there was a finding of reasonable efforts). In the case of an Indian child, the court must find that active efforts were made by clear and convincing evidence. Welf & I C §366.26(c)(2)(B); *In re Adoption of Hannah S.* (2006) 142 CA4th 988, 998, 8 CR3d 605.

The court may not order a .26 hearing at a 12-month review hearing if the child is a nonminor dependent. Welf & I C §366.21(g)(2).

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

If the child is not returned home at the 18-month review, services must be terminated and a .26 hearing set unless the court makes one of two findings by clear and convincing evidence: (1) that the child is not a proper subject for adoption or, in the case of an Indian child, tribal customary adoption (see Welf & I C §366.24), and has no one willing to accept legal guardianship, in which case, it may order foster care as the permanent plan (Welf & I C §366.22(a); Cal Rules of Ct 5.720(b)(3)(C)), or (2) the best interests of the child would be met by providing additional services to a parent or guardian who had been recently discharged from incarceration or institutionalization and had been making significant and consistent progress in establishing a safe home for the child or to one who had been making significant and consistent progress in a drug treatment program (Welf & I C §366.22(b)). Therefore, at the 18-month hearing, there are only four alternatives: (1) the child is returned home, (2) services are terminated and a .26 hearing is set, (3) the case is continued for up to six months more of services for a parent who had been incarcerated or institutionalized or in a drug treatment program (see §104.16), or (4) services are terminated and the court orders foster care after finding by clear and convincing evidence that the child is not a proper subject for adoption. See Welf & I C §366.22(a); Cal Rules of Ct 5.720(b)(6). The court may not order a .26 hearing, however, if the child is a nonminor dependent. Welf & I C §366.22(a).

Even when the court learns at the 18-month hearing that the parents have made substantial efforts toward compliance with the reunification plan, it may set a .26 hearing when the parents have not alleviated the conditions that caused the court to remove the child from the home in the first place. See *In re Dustin R.* (1997) 54 CA4th 1131, 1142, 63 CR2d 269.

☛ JUDICIAL TIP: To comply with the specificity required by federal law (and to aid in later reviewing the placement—see §104.7), the court should enter a placement order, identify the

placement by name, and provide the goal of the placement, without calling it "long-term foster care."

An exception to this four-part scheme is when the court finds that adequate services have not been offered or provided. In this situation, the judge must exercise discretion whether to terminate services and select one of the three alternatives specified above or to continue reunification services beyond 18 months. See *In re Dino E.* (1992) 6 CA4th 1768, 1779, 8 CR2d 416 (no reunification plan had been developed). See also *In re Daniel G.* (1994) 25 CA4th 1205, 1209, 31 CR2d 75 (some reunification services had been provided but court still should have exercised discretion in deciding whether or not to extend services when it found previous services to be inadequate) and *In re Elizabeth R.* (1995) 35 CA4th 1774, 1792–1799, 42 CR2d 200 (parent was hospitalized for mental illness during most of the reunification period, did not miss any visits, and made many attempts to augment visitation; court should have used Welf & I C §352 to continue the 18-month hearing). Distinguishing factors in these cases are either that services were inadequate or that some "external factor" prevented the parent from participating in the services. See *Andrea L. v Superior Court* (1998) 64 CA4th 1377, 1389, 75 CR2d 851. The extension must be supported by substantial evidence that is reasonable in nature, credible, and of solid value. *In re Brequia Y.* (1997) 57 CA4th 1060, 1068–1069, 67 CR2d 389. See discussion in California Judges Benchguide 103: *Juvenile Dependency Review Hearings* §103.48 (Cal CJER).

☛ JUDICIAL TIP: As with the other review hearings, federal audit mandates require the court to make the findings described in §104.13.

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

If the child is not returned home at the 24-month hearing, the court must order a .26 hearing to be held within 120 days to determine whether adoption, guardianship, foster care, or in the case of an Indian child, tribal customary adoption is the most appropriate plan. Welf & I C §366.25(a)(3). An exception to this requirement is if the court finds by clear and convincing evidence that a .26 hearing would not be in the best interests of the child because the child is not a proper subject for adoption or tribal customary adoption and has no one willing to accept legal guardianship. Welf & I C §366.25(a)(3). Moreover, the court may not order a .26 hearing if the child is a nonminor dependent. Welf & I C §366.25(a)(3).

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

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

2. [§104.17] Ordering an Assessment

Whenever the court terminates or denies reunification services and orders a .26 hearing, it must concurrently order the preparation of an assessment. See, *e.g.*, Welf & I C §366.21(i); Cal Rules of Ct 5.710(c), 5.708(n)(4). When the .26 hearing is set at disposition, the court must direct DSS (and the licensed county adoption agency, if separate from DSS) to prepare an assessment that includes (Welf & I C §361.5(g)(1)):

- Current search efforts for absent parents and notification of the noncustodial parent.
- Review of amount of and nature of contact between the child and the parents since the time of placement.
- Evaluation of the child's medical, developmental, scholastic, mental, and emotional status.
- Preliminary assessment of the eligibility and commitment of any prospective adoptive parent or prospective guardian to include a criminal check, a check for prior child abuse or neglect, and the ability to meet the child's needs and to understand the obligations of adoption or guardianship.
- Relationship of the child to prospective adoptive parents or prospective guardians, the motivation for seeking adoption or guardianship, and the child's wishes concerning adoption or guardianship unless the child's age or condition precludes a meaningful statement.
- Description of efforts made to identify prospective adoptive parents or legal guardians.
- Analysis of likelihood of adoption if parental rights are terminated.
- In the case of an Indian child, whether tribal customary adoption would be detrimental and whether the Indian child cannot or should not be returned to the home of the Indian parent or custodian.

Similarly, at a 6-, 12-, or 18-month or subsequent hearing, when the court terminates or denies reunification services and orders that a .26

hearing be held, it must direct DSS to prepare an assessment. Welf & I C §§366.21(i), 366.22(c)(1), 366.25(b)(1); Cal Rules of Ct 5.708(n)(4). The assessment must contain the same factors specified above.

3. [§104.18] Other Orders /Advisements

At the time that the court sets the .26 hearing, it must advise the parent or guardian of the right to seek review by extraordinary writ and that failure to seek writ review will waive the right to raise issues in a subsequent appeal. Welf & I C §366.26(*l*)(3)(A); Cal Rules of Ct 5.590. See discussion in §104.19. The court must also advise the parents either in statutory language (see Welf & I C §294(e)(6)) or in a functional equivalent that at the *next* hearing it is required to select and implement a permanent plan, which may be a plan of adoption, guardianship, or foster care. *In re Anna M.* (1997) 54 CA4th 463, 468, 62 CR2d 831 (termination of parental rights was reversed because the court had emphasized guardianship as the likely plan).

In addition, the court must continue to permit the parent to visit the child pending the hearing unless it finds that visitation would be detrimental to the child (see, *e.g.*, Welf & I C §366.21(h)), but terms of the visitation may be modified from previous levels to meet current needs. The court must also make orders to enable the child to maintain relationships with those people, other than siblings, who are important in the child's life, consistent with the child's best interests. Welf & I C §366.21(h). If denying visitation when setting a .26 hearing, the court must use a "preponderance of the evidence" standard of proof when finding that visitation would be detrimental to the child. *In re Manolito L.* (2001) 90 CA4th 753, 761–762, 109 CR2d 282.

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

The order setting a .26 hearing is not appealable at the time it is made. See Welf & I C §366.26(*l*); Cal Rules of Ct 5.590(b); *In re Charmice G.* (1998) 66 CA4th 659, 668, 78 CR2d 212. Nor is any order, regardless of its nature, that has been made at the hearing at which a .26 hearing is set. *In re Anthony B.* (1999) 72 CA4th 1017, 1024, 85 CR2d 594 (order denying reinstatement of supervised visitation.

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

(a) A petition for an extraordinary writ (JV-825) was filed in a timely manner,

(b) The writ petition substantively addressed the issues to be challenged on appeal and supported that challenge with an adequate record, and

(c) The writ petition was summarily denied or otherwise not decided on the merits.

Failure to file a petition for extraordinary writ review under Welf & I C §366.26(*l*) and Cal Rules of Ct 8.450 and 8.452 precludes appellate review only of issues included in the order setting the .26 hearing; it does not affect appellate review of any matters arising out of the .26 hearing itself. *Sue E. v Superior Court* (1997) 54 CA4th 399, 405, 62 CR2d 726.

When the court has ordered a .26 hearing it must orally advise all parties present, and notify absent parties by first-class mail, that any party who desires to preserve the right to appeal must file a petition for extraordinary writ. See Welf & I C §366.26(*l*)(3); Cal Rules of Ct 5.590(b). The notice of intent to file the writ petition (form JV-820) must be filed within seven days when the parties are present at the hearing; when the parties are notified by mail or when the order was made by a referee not acting as a temporary judge, the time for filing this notice will be longer, depending on where the parties are located. See Cal Rules of Ct 8.450(e)(4) . Copies of the Judicial Council form petitions (form JV-825) must be available in the courtroom and must accompany all mailed notices of the advice. Cal Rules of Ct 5.590(b)(4). The court must ensure that the clerk sends notice of the requirement for writ review to all absent parties within 24 hours. See Welf & I C §366.26(*l*)(3)(A); Cal Rules of Ct 5.590(b)(2); *In re Cathina W.* (1998) 68 CA4th 716, 721–724, 80 CR2d 480. Once the notice of intent to file a writ petition has been filed, the clerk must serve the people listed in Welf & I C §294. Cal Rules of Ct 8.450(g).

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

The deadline for filing a writ petition is mandatory. *Roxanne H. v Superior Court* (1995) 35 CA4th 1008, 1012, 41 CR2d 760. See also *Karl S. v Superior Court* (1995) 34 CA4th 1397, 1401, 41 CR2d 84 (petition for writ must be denied when the notice of intent to file the writ is not timely filed under Welf & I C §366.26(*l*) and Cal Rules of Ct 8.450).

A petition for a writ requires a client's consent. *Guillermo G. v Superior Court* (1995) 33 CA4th 1168, 1173, 39 CR2d 748. A parent's stated desire to appeal any future unfavorable decision is not sufficient to infer consent when that parent did not appear at the hearing in which the .26 hearing was set and did not sign the writ petition, despite the attorney's warnings. *Suzanne J. v Superior Court* (1996) 46 CA4th 785, 788, 54 CR2d 25. An attorney who represents a parent who has not communicated with the attorney or appeared at the hearings is under no

professional duty to file a writ petition without the client's authorization. *Janice J. v Superior Court* (1997) 55 CA4th 690, 692, 64 CR2d 227.

With the client's authorization, however, if a parent is incarcerated or otherwise not present at the hearing at which the .26 hearing is set, counsel may complete the notice of intent to file a writ and file it on behalf of the client. *Jonathan M. v Superior Court* (1995) 39 CA4th 1826, 1830, 46 CR2d 688 (appellate court consent based on good cause is needed under Cal Rules of Ct 8.450(e)(3) if parent's signature is not obtained).

One remedy for the failure of the juvenile court to advise a parent of writ procedures when setting a .26 hearing is for the appellate court to treat the invalid appeal as if it were a writ petition. *Jennifer T. v Superior Court* (2007) 159 CA4th 254, 260, 71 CR3d 293.

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

D. Notice Requirements

1. [§104.20] Who Is Entitled to Notice

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

- The mother.
- Any presumed and alleged fathers.
- Child (if 10 years of age or older). Notice to children's attorney of .26 hearing may be sufficient to notify the children. *In re Desiree M.* (2010) 181 CA4th 329, 335, 104 CR3d 523.
- Any known sibling if 10 years of age or older, the sibling's caregiver, and the attorney if the sibling is the subject of a dependency proceeding or has been adjudged a dependent child unless that child's case is scheduled for the same court on the same day; if the sibling is under 10 years of age, then only the caregiver and attorney must be notified.
- All counsel of record.
- The child's current caregiver, including foster parents, relative caregivers, preadoptive parents, and nonrelative extended family members.
- Indian custodian and tribe if the court has reason to know that an Indian child is involved; if the custodian or tribe cannot be identified or located, notice must be given to the Bureau of Indian Affairs (see also Welf & I C §§224.1(a), 224.2; 25 USC §1912(a); Cal Rules of Ct 5.481).
- Notice must not be given to (Welf & I C §294(b)):

- A parent whose rights have been terminated.
- A parent who has relinquished his or her child for adoption to a licensed adoption agency or state DSS, and the relinquishment has been accepted.
- Any unknown parent by publication if DSS recommends adoption, and the court determines that publication would be likely to lead to actual notice (see Welf & I C §294(g)(2)).
- An alleged father who has denied paternity and waived notice of further hearings on Judicial Council form JV-505.

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

It is essential for all those claiming to be fathers to be notified because a court may not terminate the parental rights of only one parent unless that parent is the sole surviving parent or the other parent had his or her rights terminated or had relinquished custody to DSS. Cal Rules of Ct 5.725(a)(2), (g). See also Cal Rules of Ct 5.705, 5.708(*l*) (.26 hearing may not be set to consider termination of parental rights of only one parent).

Failure to provide a parent with statutorily required notice of a .26 hearing is a defect requiring automatic reversal. *In re Jasmine G.* (2005) 127 CA4th 1109, 1116, 26 CR3d 394.

2. [§104.21] Time Limitations

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

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

A court may not sanction DSS for failing to provide timely notice by publication (see Welf & I C §294(f)(7)(A)) by refusing to consider adoption as recommended by DSS. *In re Christiano S.* (1997) 58 CA4th 1424, 1433, 68 CR2d 631.

When an Indian child is involved, notice to the Indian custodian and tribe must be completed at least 10 days before the hearing. Welf & I C §224.2(d). Under ICWA, even when the child's status as an Indian child is not conclusive, a .26 hearing may not be held until at least 10 days after receipt of notice. *In re Jonathan D.* (2001) 92 CA4th 105, 110–111, 111 CR2d 628. These notice requirements apply even with a previous determination that the siblings were not Indian children; determination of tribal membership is made on an individual basis. 92 CA4th at 111. Once the court has complied with ICWA notice requirements at the outset of the juvenile proceedings, however, a parent's assertion of membership in a particular tribe will not retrigger the ICWA notice requirements at the .26 hearing. *In re Joseph P.* (2006) 140 CA4th 1524, 1531, 45 CR3d 591 (BIA had denied applicability of ICWA). The court's exhortations at each hearing for the parents to disclose membership in an Indian tribe, particularly when the parents never objected to the social worker's reports that ICWA did not apply, satisfies the court's initial and continuing duty of inquiry. *In re E.H.* (2006) 141 CA4th 1330, 1335, 46 CR3d 787; see Cal Rules of Ct 5.481.

Procedures for giving notice are found in Cal Rules of Ct 5.481 and Welf & I C §224.2. For discussion of ICWA notice requirements, see THE INDIAN CHILD WELFARE ACT BENCH HANDBOOK, chap 2 (CJER).

3. [§104.22] Contents of Notice

The notice must inform those receiving it of the time and place of the hearing and must advise them of their right to appear. Welf & I C §294(e)(1), (2). The notice must also advise the child and parents of the right to counsel, the nature of the proceedings, the recommendation of DSS, and of the fact that at the hearing the court will be selecting and implementing a permanent plan of adoption, legal guardianship, or foster care for the child. Welf & I C §294(e)(3)–(6). If an Indian child is involved, the notice must contain a statement that the parent or Indian custodian and the tribe may intervene at any point and that they may have up to an additional 20 days for preparation. Welf & I C §224.2(a)(5)(G).

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

4. [§104.23] Type of Notification

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

Whatever the required method of notification, once the court has found initially that notice was properly given to the parents and others entitled to notice, notice for any continuation of the hearing may be by first-class mail to the last known address, by an order given in court under Welf & I C §296 to a child, parent or guardian, or Indian custodian, or by any other means calculated to provide notice, unless the recommendation for the permanent plan has changed. Welf & I C §294(d). If the recommendation has changed, notice must be provided according to §§104.24–104.26 below. In a case decided before this statute went into effect, the court held that a parent who received notice and does not appear at a hearing that is then continued is entitled to notice of the rescheduled hearing. *In re Angela C.* (2002) 99 CA4th 389, 393, 120 CR2d 922.

Notice can be a problem when the parent is homeless. The court should ask the parent to give a *permanent* mailing address at the earliest opportunity to the court, as well as to the attorney and social worker, in order to be in compliance with Welf & I C §316.1 and Cal Rules of Ct 5.534(m). See *In re Rashad B.* (1999) 76 CA4th 442, 449–450, 90 CR2d 462 (failure to file writ petition was excused because of lack of notice to homeless parent). A permanent mailing address does not have to be the same as a residence address. 76 CA4th at 450.

When an Indian child is involved, notice to the tribe must be by registered mail, return receipt requested. Welf & I C §§224.2(a), 294(i).

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

If the parents were present at the hearing at which the .26 hearing was scheduled, the court must advise them at that time of the time and place of the hearing, order them to appear, and direct that they receive notice of this hearing by first-class mail. Welf & I C §294(f)(1). If the *attorney* was present at the time the .26 hearing was scheduled, no further notice is required. If the attorney of record is present when the court schedules a .26 hearing, and the parents' whereabouts are unknown, service must be to the attorney by certified mail, return receipt requested (see Welf & I C §294(f)(7)(A)). Welf & I C §294(j).

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

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

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

c. [§104.26] When Parents Cannot Be Found

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

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

If the court determines that DSS used due diligence in attempting to locate the parent and legal guardianship or foster care is recommended, no further notice to the parent is required, but the court must order that notice be given by first-class mail to the grandparents if their identities and addresses are known. Welf & I C §294(f)(7)(B). When the parent's residence becomes known, notice must be immediately served as provided in Welf & I C §294(f)(2)–(6). Welf & I C §294(f)(7)(C).

If the names or identities of one or both parents or alleged parents is unknown or uncertain, the court must issue an order (consistent with Fam C §§7665 and 7666) dispensing with notice if, after inquiry and a determination that there has been due diligence in attempting to identify any possible natural parents, the court is unable to identify any such

parent, and no person has appeared who claims to be a parent. Welf & I C §294(g)(1). After determining that DSS has used due diligence in attempting to identify an unknown parent under Welf & I C §294(g)(1), if DSS recommends adoption, the court must determine whether notice by publication might be likely to lead to actual notice to the unknown parent. Welf & I C §294(g)(2). If so, the court may order notice by publication to be directed to either or both parents and to all who claim to be parents; the notice must name and otherwise describe the child. Welf & I C §294(g)(2). The notice must require the unknown parent to appear as stated in the citation, and the publication must be made once a week for four consecutive weeks. Welf & I C §294(g)(2).

d. [§104.27] Locating Parents

In locating a parent for purposes of notification, DSS should make use of the information it has available. When it ignores the most likely means of finding a parent, reasonable diligence in locating the parent cannot be shown, and substituted service will not be sufficient. *David B. v Superior Court* (1994) 21 CA4th 1010, 1016, 26 CR2d 586 (DSS failed to inquire about father's whereabouts in the armed services although his name and the fact that he was in the Marines was on the birth certificate). DSS must not ignore the most likely means of finding the parent*; In re Arlyne A.* (2000) 85 CA4th 591, 599, 102 CR2d 109 (due diligence declaration appeared valid on its face, but DSS had failed to check directory assistance for town of father's family residence when informed that the father lived there).

Termination of parental rights may be reversed when DSS demonstrates great ineptitude in locating the father, together with a failure to make a thorough, systematic investigation and a failure to conduct an inquiry in good faith. *In re Megan P.* (2002) 102 CA4th 480, 482, 489, 125 CR2d 425 (father had been in same location for years and wanted to find the children, but because of careless misspelling, DSS looked in the wrong state for a person of the wrong name, and failed to check such obvious sources as the "Parent Locator Clerk" in Child Support Services).

A father is not entitled to a stay under the Soldiers' and Sailors' Civil Relief Act even though he was in the Navy and away at sea at the time the .26 hearing was set, because he did not demonstrate that he was actually unavailable to participate in the hearing, and because he had never shown an interest in parenting the child. *Christine M. v Superior Court* (1999) 69 CA4th 1233, 1244, 82 CR2d 220.

5. [§104.28] Notification of Incarcerated Parent

The court has a mandatory duty under Pen C §2625 to notify an incarcerated parent of a hearing at which termination of parental rights are

sought; however, when some other outcome such as guardianship is recommended, the court has discretion over whether to require notice and may deny the parent's request to attend the hearing. *In re Barry W.* (1993) 21 CA4th 358, 364, 369–371, 26 CR2d 161. Once an incarcerated parent appears and participates, the parent may not complain on appeal that he or she was denied the right to have been transported to an earlier hearing under Pen C §2625. *In re Gilberto M.* (1992) 6 CA4th 1194, 1200 n7, 8 CR2d 285.

E. [§104.29] Scheduling the Hearing

The hearing must be scheduled within 120 days of the date that reunification services are denied or ordered to be terminated, whether at disposition (see Welf & I C §361.5(b)) or at a review hearing (see Welf & I C §§366.21(e), (g)(2), 366.22(a)).

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

In general, there may be tension between the timely resolution of dependency cases and the thoughtful exercise of judicial discretion. *In re Sean E.* (1992) 3 CA4th 1594, 1599, 5 CR2d 193. Delay or a change in course may become necessary, although this would be a rare occurrence. For example, if a court grants a Welf & I C §388 petition showing changed circumstances, including a possibility that the parent would be able to care for the child, it must not then proceed to a .26 hearing and terminate parental rights. *In re Sean E., supra.* When a parent makes a showing of being able to reunify with the child, it may be a denial of due process for a court to deny a petition for modification, even when the 12-month hearing has been held and services terminated. *In re Jeremy W.* (1992) 3 CA4th 1407, 1416, 5 CR2d 148.

The judge has a dilemma when the parent is able to show a change of circumstances but still no ability to reunify. In that case, there would have to be a delay, during which time the parent has a hearing on the Welf & I C §388 petition, but no change in course from the original plan to proceed to a .26 hearing if the change in circumstances is insufficient to permit reunification. When the person seeking modification makes a prima facie case that there has been a change in circumstances, it is a denial of due process to proceed with the .26 hearing without hearing evidence on the petition for modification. *In re Lesly G.* (2008) 162 CA4th 904, 914–915, 76 CR3d 361.

The .26 hearing may begin during the pendency of a writ proceeding (see discussion in §104.17) because it is not a foregone conclusion that a

stay will be granted. *In re Brandy R.* (2007) 150 CA4th 607, 610, 58 CR3d 456; Cal Rules of Ct 8.452(f).

1. [§104.30] Continuances

The court may continue the proceeding for up to 30 days to appoint counsel and permit counsel to become acquainted with the case. Welf & I C §366.26(g). In addition, a continuance may be granted on request of counsel for the parent, child, or petitioning agency if it would not be contrary to the child's best interests. Welf & I C §352. See discussion in California Judges Benchguide 103: *Juvenile Dependency Review Hearings* §103.58 (Cal CJER). In any event, a continuance should last only for the period of time shown necessary by the evidence. Welf & I C §352(a). See also *In re Emily L.* (1989) 212 CA3d 734, 742–743, 260 CR 810 (pauses in the proceedings prolong the uncertainty for the child and make it more difficult for prospective adoptive parents to make a commitment to the child).

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

If the child was not properly notified of the right to be present at the .26 hearing or was not given an opportunity to attend the hearing, the court may be required to continue the hearing to allow for the child's presence. Welf & I C §349(d). Parents who fail to appear at a regularly scheduled .26 hearing must be renotified of any continued hearing. *In re Phillip F.* (2000) 78 CA4th 250, 258, 92 CR2d 693. If they have been properly noticed under former Welf & I C §366.23 (now Welf & I C §294), however, the renotification does not need to comply with all the requirements of that section; instead, notice by counsel, the clerk of the court, or some other means will suffice. *In re Phillip F., supra,* 78 CA4th at 258–259.

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

One reason to grant a continuance might be if the reunification services could not be completed during the time allotted. See *In re Michael R.* (1992) 5 CA4th 687, 695, 7 CR2d 139 (.26 hearing was set at 12 months and mother filed a motion for continuance under Welf & I C §352). The court may not summarily deny the motion for the continuance without exercising its discretion in the process. *In re Michael R., supra.*

☛ JUDICIAL TIP: Although it is tempting to be skeptical of a parent's claim that there was inadequate time in which to complete reunification plans, it is important to take the time to provide (on the record) the reasons why reunification could have

been completed during the allotted time and any further justification for denial of a continuance.

A court may deny a request for a continuance if the request was made in order to permit the parents time to review an assessment that was provided just before the hearing. *In re Gerald J.* (1991) 1 CA4th 1180, 1187, 2 CR2d 569 (service of the notice of hearing was otherwise in order). A court may also deny a request for a continuance for paternity testing when an alleged father had neither attempted contact with the child during the reunification period nor sought earlier testing. *In re Ninfa S.* (1998) 62 CA4th 808, 810–811, 73 CR2d 209. Because the issue of genetic testing of an alleged father is irrelevant at the .26 hearing to the likelihood of adoption or to any of the exceptions set out in Welf & I C §366.26(c)(1)(B), the continuance would not be helpful and would interfere with prompt resolution of the child's status and right to a permanent placement. *Ninfa S., supra,* 62 CA4th at 811.

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

In any case, chronic court congestion in the juvenile court is not good cause for continuing the hearing; dependency cases demand priority. See, *e.g., Jeff M. v Superior Court* (1997) 56 CA4th 1238, 1242–1243, 66 CR2d 343; see also *In re Axsana S.* (2000) 78 CA4th 262, 272, 92 CR2d 701 (pending criminal case also not good cause for continuance).

F. [§104.32] Conduct of Hearing

As with any juvenile court hearing, a .26 hearing must be conducted in a nonadversarial manner, unless there is a contested issue of law or fact (see Welf & I C §350(a)(1); Cal Rules of Ct 5.534(b)), and the court must control the proceedings with a view to expeditious determination of the facts and of all information related to the present circumstances and welfare of the child (Welf & I C §350(a)(1); Cal Rules of Ct 5.534(a)). The .26 hearing must be closed to the public and heard at a special or separate session of court. See Welf & I C §§345–346.

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

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

- Present evidence to the court.

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

Hearings held under Welf & I C §366.26 may be conducted by referees or by superior court commissioners assigned as referees. See Cal Rules of Ct 5.536. A referee may obtain a stipulation to act as a temporary judge. Cal Rules of Ct 2.816, 5.536(b). A stipulation to a commissioner acting as a temporary judge need not be in writing or express; a "tantamount stipulation" may be implied from the conduct of the parties and attorneys. *In re Horton* (1991) 54 C3d 82, 98, 284 CR 305; *In re Courtney H.* (1995) 38 CA4th 1221, 1227–1228, 45 CR2d 560. If the referee's decision is one that requires approval by a juvenile court judge, the order becomes final ten calendar days after service of a written copy of the order or 20 judicial days after the hearing, whichever is later. *In re Clifford C.* (1997) 15 C4th 1085, 1093, 64 CR2d 873.

When the parties refuse to enter into a stipulation, the referee may nonetheless conduct juvenile proceedings; a stipulation is necessary to give the court's acts finality (unless there is a rehearing), but the absence of a stipulation does not deprive the court of jurisdiction. *In re Roderick U.* (1993) 14 CA4th 1543, 1551, 18 CR2d 555. Despite Welf & I C §366.26(i)(1) (court has no power to change or set aside a termination order), if the order had been made by a referee without a stipulation, the parties may seek a rehearing within ten days under Welf & I C §252. *In re Roderick U., supra,* 14 CA4th at 1553. If no rehearing is sought, a termination order will become final when issued by a referee in the absence of a stipulation ten days after service of the order. *In re Roderick U., supra.*

For more in-depth discussion of the conduct of dependency proceedings generally, see California Judges Benchguide 103: *Juvenile Dependency Review Hearings* §§103.18 (judicial officers), 103.24–103.32 (conduct of proceeding including duty of advisement of rights and receipt of evidence), and 103.63 (rehearings when original hearing was before referee) (Cal CJER).

1. [§104.33] Who May Be Present

Often, a child who is under 10 years of age will not attend a .26 hearing unless the child or the child's counsel has requested his or her

attendance or the court requires the child to attend. Welf & I C §366.26(h)(2). If the child is 10 years of age or older and is present, the court should permit his or her participation if he or she desires it. Welf & I C §349(a), (c); Cal Rules of Ct 5.534(p)(1). If the child is not present, the court must determine whether the child was properly notified of the right to attend the hearing and inquire whether he or she was given an opportunity to attend. Welf & I C §§349(d), 366.26(h)(2); Cal Rules of Ct 5.534(p)(2). If the child was not properly notified or if he or she wished to be present and was not given an opportunity to be present, the court must continue the hearing only for that period of time necessary to provide notice and secure the child's presence, unless the court finds that it is in the best interest of the child not to grant a continuance. The court may issue any and all orders reasonably necessary to ensure that the child has an opportunity to attend. Welf & I C §349(d); Cal Rules of Ct 5.534(p)(2).

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

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

(1) Parents, de facto parents, Indian custodian, or guardians, or if none can be found or none reside within the state, any adult relatives residing within the county, or if none, any adult relatives residing nearest the court;

(2) Counsel for parent or guardian, de facto parent, adult relative, and Indian custodian or tribe;

(3) Attorney for the petitioning agency (see Cal Rules of Ct 5.530(d));

(4) Social worker;

(5) Court clerk;

(6) Any court-appointed special advocate;

(7) A representative of the child's Indian tribe;

(8) The official court reporter;

(9) Bailiff, at the court's discretion; and

(10) Anyone else entitled to notice of the hearing under Welf & I C §§290.1 and 290.2.

A sibling may attend if he or she is 10 years of age or older, as well as the sibling's caregiver and attorney if the sibling is the subject of a dependency proceeding or has been adjudged a dependent child. See Welf & I C §294(a)(4). See discussion in §104.20. The court may also permit any of the child's relatives to be present at the .26 hearing on a sufficient showing and may receive information from relatives on Judicial Council form JV-285. See Cal Rules of Ct 5.534(f). See also Welf & I C §§100–110, 356.5 (setting forth requirements governing the appointment and

duties of a person appointed as a CASA volunteer); Cal Rules of Ct 5.655 (program guidelines for CASAs).

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

A parent's waiver of appearance for one hearing does not extend to other hearings unless the parent was present at the hearing at which the later hearings are scheduled (see *In re Malcolm D.* (1996) 42 CA4th 904, 913, 50 CR2d 148). *In re Julian L.* (1998) 67 CA4th 204, 208, 79 CR2d 839.

2. [§104.34] Appointment of Counsel

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

a. [§104.35] For the Child

The court must appoint counsel unless it finds explicitly that the child must not benefit from counsel; if finding no benefit, the court must state on the record the reasons for this finding. Welf & I C §366.26(f)(1); Cal Rules of Ct 5.534(h), 5.660(b). The requirements for finding that the child would not benefit from counsel are set forth in Cal Rules of Ct 5.660(b)(1)(A)–(C).

The court should appoint independent counsel for each sibling or group of siblings when there is an actual conflict of interest (*In re Cliffton B.* (2000) 81 CA4th 415, 428, 96 CR2d 778) or when one might arise (*Carroll v Superior Court* (2002) 101 CA4th 1423, 1429–1430, 124 CR2d 891). In *In re Cliffton B, supra,* the siblings were very close, one sibling was clearly adoptable, and the other expressed a desire not to have the adoptable sibling's parental rights terminated because of the danger that termination would curtail the sibling contact. *In re Cliffton B., supra*. See also *In re Frank L.* (2000) 81 CA4th 700, 702–704, 97 CR2d 88 (parent may not appeal on basis that child should not be separated from siblings);

In re Gerald J. (1991) 1 CA4th 1180, 1188, 2 CR2d 569 (the court need not consider the objection of one child to the termination of parental rights for that child's sibling). Even when the conflict between siblings or groups of siblings is only a potential conflict of interest, the court should consider whether the appointment of counsel for each sibling or group of siblings is appropriate because the enactment of the exception to the termination of parental rights for substantial interference with a sibling makes conflicts of interest for children's counsel more likely to occur. See Welf & I C §366.26(c)(1)(B)(v); Cal Rules of Ct 5.725(d)(2)(C)(v). The courts should be sensitive to and alert for such conflicts. See Cal Rules of Ct 5.660(c) for guidelines to follow in appointing attorneys for siblings.

When the permanent plan was the same for both siblings who were raised together and who were mutually devoted, the fact that one might have been entitled to tribal benefits while the other was not is not the kind of conflict of interest that would require separate counsel. *In re Barbara R.* (2006) 137 CA4th 941, 953–954, 40 CR3d 687.

b. [§104.36] For Parents

If the parents are present at the hearing at which the .26 hearing is set, the court must advise them of the right to counsel at that time. Welf & I C §294(f)(1). Welfare and Institutions Code §366.26(f)(2) requires that if a parent appears at the .26 hearing without counsel and is unable to afford one, the court must appoint counsel for that parent unless representation is knowingly and intelligently waived. The same attorney may not be appointed to represent the child and the parent at a .26 hearing. Welf & I C §366.26(f)(2). The court must determine the payment to be received by private counsel and how much of the payment is to be from the parties' funds and how much, if any, from the county's general fund. Welf & I C §366.26(f)(3). Generally, courts have held that the parent's right to counsel is statutory, rather than constitutional, despite the fact that at the hearing the court will decide whether or not the child will be adopted. See *In re Andrew S.* (1994) 27 CA4th 541, 549, 32 CR2d 670. But see *In re Arturo A.* (1992) 8 CA4th 229, 239, 10 CR2d 131 (there may be a due process right to effective assistance of counsel at any hearing which may lead to termination of parental rights).

If the parent elects self-representation, the court *must* take a waiver before precluding a disruptive but mentally competent parent from self-representation, whether on the grounds of protecting a person unskilled in the law or protecting the process from disruption. *In re Angel W.* (2001) 93 CA4th 1074, 1084–1085, 113 CR2d 659 (.26 hearing). However, the court need not engage in a full *Faretta*-type inquiry with the parent. *In re Angel W., supra,* 93 CA4th at 1084.

If the parent elects self-representation, the court *must* take a waiver of the parent's right to counsel under Welf & I C §317, but need not engage in a full *Faretta*-type inquiry. *In re Angel W., supra,* 93 CA4th at 1084, (.26 hearing). Before precluding a disruptive but mentally competent parent from self-representation on the grounds of protecting the process from disruption, the court must find the parent is and will remain so disruptive as to significantly delay the proceedings or cause the proceedings to negatively impact the child's right to a fair and prompt hearing. *In re Angel W., supra,* 93 CA4th at 1085.

If the case involves a nonminor dependent, representation by counsel is not provided for a parent, unless the parent is receiving family reunification services. Welf & I C §317(d).

c. [§104.37] Relieving Counsel

Once counsel has been appointed, that attorney must represent the client in all proceedings (see Welf & I C §317(d)) including writ proceedings in the appellate court (*Rayna R. v Superior Court* (1993) 20 CA4th 1398, 1404–1405, 25 CR2d 259). A juvenile court policy memorandum providing that attorneys appointed to represent indigent parents are to be relieved once a permanent plan is implemented unless good cause is shown is inconsistent with Welf & I C §317(d) (appointed counsel must represent the parent at all proceedings). *In re Tanya H.* (1993) 17 CA4th 825, 833, 21 CR2d 503.

In general, a court should not relieve a parent's attorney without a showing of good cause and substitution of another attorney. *In re Julian L.* (1998) 67 CA4th 204, 207–208, 79 CR2d 839. When counsel seeks to withdraw, the court must require an explanation for the record why he or she cannot proceed; if the attorney has been unable to contact the parent, counsel must inform the court how this lack of contact has an adverse impact on the client's representation. *In re Malcolm D.* (1996) 42 CA4th 904, 915, 50 CR2d 148. Before counsel may be relieved, the court must conduct a hearing with notice to the concerned parents. *Janet O. v Superior Court* (1996) 42 CA4th 1058, 1066, 50 CR2d 57.

The court must investigate circumstances fairly and impartially before it relieves parent's counsel and goes on to terminate parental rights. See *Katheryn S. v Superior Court* (2000) 82 CA4th 958, 972–975, 98 CR2d 741 (court erroneously relieved public defender when mother had removed the child from the jurisdiction). Once there has been such an investigation, however, it may be proper to relieve a child's counsel if the court determines the child can no longer benefit from the appointment of counsel such as at the postpermanency planning stage when adoption is imminent and there are no longer legal issues to be resolved. See *In re Jesse C.* (1999) 71 CA4th 1481, 1490–1491, 84 CR2d 609.

In dependency cases, the *Marsden* procedure for discharging counsel and appointing new counsel is not applicable when original counsel was retained. *In re V.V.* (2010) 188 CA4th 392, 398–399, 114 CR3d 638. The court need not grant a lengthy continuance to permit an attorney with no dependency experience to prepare for a .26 hearing. 188 CA4th at 399.

d. [§104.38] Competency

All parties who are entitled to counsel, including the child who is the subject of the proceedings, are entitled to competent counsel. Welf & I C §317.5. To raise the level of competency of counsel appearing in juvenile court, the juvenile court judge has an obligation to encourage local attorneys to practice in juvenile court over a substantial period of time, to raise the status of public attorneys who practice in juvenile court, and to establish minimum standards of practice for court-appointed attorneys who practice in juvenile court. Cal Rules of Ct, Standards of J Admin 5.40(c). The judge should also institute and encourage training programs for lawyers who serve as court-appointed attorneys in juvenile court, as well as set minimum training and continuing legal education standards. Cal Rules of Ct, Standards of J Admin 5.40(d). See Cal Rules of Ct 5.660(d) for rules governing competency.

e. [§104.39] Attorneys' Fees

A court cannot arbitrarily cut the fees submitted by an attorney for representing a child. *Trask v Superior Court* (1994) 22 CA4th 346, 353, 27 CR2d 425 (delinquency case). To encourage high quality of legal representation of children as required by Cal Rules of Ct, Standards of J Admin 5.40, a court should not reduce the fees submitted by appointed counsel without a statement of reasons for the reduction. *Trask v Superior Court, supra.* However, when the court is responsible for setting fees for panel attorneys, it may change the method of compensation from hourly to flat fee to be applied prospectively to services rendered after the effective date of the new policy. *Amarawansa v Superior Court* (1996) 49 CA4th 1251, 1257–1251, 57 CR2d 249.

3. Receipt of Evidence

a. [§104.40] Generally

At the hearing, the court must review and consider the social worker's report containing an assessment of the child and of prospective adoptive parents, if any, as well as the report of any CASA volunteer, the case plan submitted for the hearing, and the report submitted by the caregiver under Welf & I C §366.21(d). Welf & I C §§366.23, 366.26(b); Cal Rules of Ct 5.725(d). See also Welf & I C §§361.5(g), 366.21(i), 366.22(b)(1), 366.25(b)(1) (specifying contents of report). This report

must be provided to the parties and all counsel at least ten days before the hearing and must provide a summary of recommendations to the child's present custodians, any CASA, and an Indian child's tribe. Cal Rules of Ct 5.725(c). In addition, any person notified, such as the current caregiver, may submit information to the court in writing. Welf & I C §294(a)(8).

If an assessment is incomplete, significantly failing to comply with the requirements of Welf & I C §366.21(i), the court may not use it as the basis of its findings. See *In re Valerie A.* (2008) 162 CA4th 1, 13–15, 75 CR3d 86.

The child must have been asked for a statement regarding his or her permanent placement plan, and the case plan must contain the social worker's assessment of this statement. Cal Rules of Ct 5.725(d)(8)(A). At the hearing, the court must consider the case plan and permanent placement plan and must find that the child was or was not actively involved in developing these plans. Cal Rules of Ct 5.725(d)(8). If it finds that the child was not actively involved, it must order DSS to involve him or her unless the court finds that the child is unable, unwilling, or unavailable to participate. Cal Rules of Ct 5.725(d)(8)(B).

In the case of an Indian child, the court must review the case plan and find (Cal Rules of Ct 5.725(d)(8)(C)–(D)):

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

If the child is 12 years of age or older and in a permanent placement, the court must consider the case plan and find either that the child was given the opportunity to review, sign, and receive a copy or was not given the opportunity; if the court found that the child did not have this opportunity, it must order DSS to provide the child with such an opportunity. Cal Rules of Ct 5.725(d)(9).

Social workers' reports containing hearsay are admissible at .26 hearings. See Welf & I C §366.26(b); *In re Keyonie R.* (1996) 42 CA4th 1569, 1572–1573, 50 CR2d 221. The admissibility of the social worker's report at the .26 hearing is not expressly conditioned on the social worker being available for cross-examination. *In re Jeanette V.* (1998) 68 CA4th 811, 816, 80 CR2d 534; see Welf & I C §366.26(b); Cal Rules of Ct 5.725(c), (d). If termination of parental rights is the recommendation, it must be clearly stated in the report that there is sufficient evidence that the child is likely to be adopted. A "fragmentary and ambiguous" assessment

is not acceptable and will not meet the agency's burden to prove adoptability. *In re Brian P.* (2002) 99 CA4th 616, 625, 121 CR2d 326.

The parents are entitled to present evidence at a .26 hearing as at any dependency proceeding. See *In re Jennifer J.* (1992) 8 CA4th 1080, 1085, 10 CR2d 813. They have a due process right to question DSS on the issue of adoptability. *In re Thomas R.* (2006) 145 CA4th 726, 734, 51 CR3d 864. But once the court determines that the child is likely to be adopted, the burden shifts to the parent to show that termination of parental rights would be detrimental under one of the four (now six) exceptions listed in Welf & I C §366.26(c)(1)(B). *In re Zachary G.* (1999) 77 CA4th 799, 809, 92 CR2d 20.

b. [§104.41] Relevance

A .26 hearing does not provide a forum for the parents to contest the suitability of prospective adoptive parents. *In re Scott M.* (1993) 13 CA4th 839, 844, 16 CR2d 766. Therefore, deficiencies in the assessment report prepared for the hearing, such as failure to check on prospective adoptive parents' criminal history, do not ordinarily deprive the parents of procedural due process. *In re Crystal J.* (1993) 12 CA4th 407, 413, 15 CR2d 513. See discussion in §§104.56–104.59 on determining adoptability.

Also not relevant is whether the DSS decision on adoptive placement is the best one because the state DSS or a licensed adoption agency has the exclusive care and control of the child and the court may not substitute its judgment for the agency's unless the DSS decision was clearly absurd. *Department of Social Servs. v Superior Court* (1997) 58 CA4th 721, 734, 68 CR2d 239. The court's review is limited to whether DSS has abused its discretion. *Los Angeles County Dep't of Children & Family Servs. v Superior Court* (1998) 62 CA4th 1, 10, 72 CR2d 369.

Evidence of the racial or ethnic match between the child and prospective adoptive parents is not relevant at a .26 hearing. See *In re Tracy X.* (1993) 18 CA4th 1460, 1464–1465, 23 CR2d 43. Because courts are required to engage in concurrent planning (see Welf & I C §§358.1(b), 16501.1(f)(10)), however, it may be a good idea to actively address ethnic considerations in placement at the earliest possible stages. See Fam C §§8708 and 8709 (although discrimination based on race, etc., in adoptive placement is not permissible, consideration can be given to racial and other factors); see also discussion in Seiser & Kumli, California Juvenile Courts: Practice and Procedure §2.12[6] (LexisNexis 2013) and in §104.57.

The parents' current circumstances are not relevant to the issue of adoptability which is the focus of the hearing. *In re Edward R.* (1993) 12 CA4th 116, 126, 15 CR2d 308. Current parental circumstances, however, may be relevant in resolving whether the parents have maintained regular

contact with the child and whether the child would benefit from continuing this relationship under Welf & I C §366.26(c)(1)(B)(i). 12 CA4th at 127.

The court need not let a parent present evidence on detriment (see Welf & I C §366.26(c)(1)(B)) when the court had previously found "no detriment" at an earlier .26 hearing (which had been continued to give DSS time to locate prospective adoptive homes). *In re A.G.* (2008) 161 CA4th 664, 671, 74 CR3d 378. Finally, before the enactment of Welf & I C §366.26(c)(1)(B)(v), a court did not need to consider the objection of one child to the termination of parental rights for that child's sibling (*In re Gerald J.* (1991) 1 CA4th 1180, 1188, 2 CR2d 569), although, the adoptive parents may wish to facilitate postadoptive sibling contact (Welf & I C §366.29). Under Welf & I C §366.26(c)(1)(B)(v), however, it appears that siblings' wishes must be considered in determining whether or not termination of parental rights would be detrimental to the child when it would sever a sibling relationship.

4. Testimony of Child

a. Consideration of Child's Wishes

(1) [§104.42] Generally

Welfare and Institutions Code §366.26(h)(1) imposes a mandatory duty on the court to consider the child's wishes to the extent that those wishes are ascertainable. If the child is present at the hearing, the court must allow the child, if he or she so desires, to address the court and participate in the hearing. Welf & I C §349(c); Cal Rules of Ct 5.534(p)(1). If a child who is 10 years of age or older is not present, the court must determine whether the child was properly notified of the hearing and given an opportunity to attend; if the child was not properly notified and he or she wishes to attend, the court must continue the hearing to secure the child's presence, unless a continuance would not be in the best interest of the child. Welf & I C §349(d); see Cal Rules of Ct 5.534(p)(2).

If the child does not address the court, the social worker's report should address the child's wishes, and the judge may augment this report by questioning the child's counsel and the CASA, if any. Unsworn statements of counsel, the CASA, or anyone else, however, is not evidence. See *In re Heather H.* (1988) 200 CA3d 91, 95–96, 246 CR 38. See also Cal Rules of Prof Cond 5–200(e) (attorney "shall not assert personal knowledge of the facts at issue, except when testifying as a witness").

A court need not consider the child's express wishes, however, when the child is not capable of adequately expressing those wishes by virtue of being too young or frail to communicate or to understand the nature of the

proceedings. *In re Juan H.* (1992) 11 CA4th 169, 173, 13 CR2d 716 (child was under four years of age; court could properly rely on the determination of his wishes from reports of his behavior in mother's presence).

The court may terminate parental rights even when the child has expressed views to the contrary when the court finds that the child would derive no benefit through continued regular contact with the parents. See *In re Jennifer J.* (1992) 8 CA4th 1080, 1087–1088, 10 CR2d 813.

(2) [§104.43] How To Determine Child's Wishes

A court may reasonably infer a young child's preference from his or her conduct. *In re Leo M.* (1993) 19 CA4th 1583, 1594, 24 CR2d 253. Most courts that have considered the issue have held that a court need not receive direct evidence of the child's wishes, either at the hearing or through out-of-court statements reflecting the fact that the child is aware of the nature of the hearing. See, *e.g.*, *In re Leo M.*, *supra*, 19 CA4th at 1592; *In re Amanda D.* (1997) 55 CA4th 813, 820, 64 CR2d 108 (holding that in considering the child's wishes under Welf & I C §366.26(h), the court need not hear direct testimony but may rely on evidence of the child's wishes found in the DSS report). See also *In re Jesse B.* (1992) 8 CA4th 845, 853, 10 CR2d 516 (holding that substantial compliance with Welf & I C §366.26(h) may be achieved when the child has independent counsel who has interviewed the child to determine his or her wishes as required by Welf & I C §317(e)).

Consideration of the child's wishes under Welf & I C §366.26(h) may require the court to explore the child's feelings regarding possible custodians so that it can infer his or her wishes concerning the permanent plan. *In re Julian L.* (1998) 67 CA4th 204, 208–209, 79 CR2d 839. A child's statements that the child liked living with foster parents, referred to their house as "my home," and was apathetic about visits with the biological father was held to be sufficient evidence for the court to assess the child's wishes. *In re Amanda D.*, *supra*, 55 CA4th at 820–821.

Despite the holding in *Leo M.* that the court need not determine that the child specifically understand that the proceeding is one for termination of parental rights (19 CA4th at 1593), one case has held that if the court does not receive direct evidence of the child's wishes at the .26 hearing, it must receive an out-of-court statement reflecting the fact that the child is aware that termination of parental rights is at issue. *In re Diana G.* (1992) 10 CA4th 1468, 1480, 13 CR2d 645.

b. [§104.44] Taking Testimony in Chambers

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

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

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

The presence of parents' counsel is essential; it may be prejudicial error for the court to question the child in chambers with only a reporter present. See *In re Laura H.* (1992) 8 CA4th 1689, 1697, 11 CR2d 285. Although *In re Laura H., supra,* held that acquiescence by the parent to such a procedure might not constitute a waiver, the court in *In re Jamie R.* (2001) 90 CA4th 766, 771, 109 CR2d 123, held that a parent who keeps silent and otherwise acquiesces in the child's being questioned in chambers outside the presence of counsel waives the statutory right to have counsel at the in-chambers proceeding (.26 hearing).

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

c. [§104.45] Other Alternatives

In addition to in-chambers testimony, the court may make other arrangements to accommodate the child witness. See, *e.g., In re Amber S.* (1993) 15 CA4th 1260, 1266–1267, 19 CR2d 404, which held that the court had inherent power to use both in-chambers testimony and closed circuit television to ensure truthfulness (jurisdiction hearing).

Moreover, the court may elect not to have the child testify at all in an appropriate case. *In re Jennifer J.* (1992) 8 CA4th 1080, 1087–1088, 10 CR2d 813 (although testimony would have been relevant and child was competent and available). Although the court must consider the child's wishes, it may exclude the child's testimony to prevent psychological damage even when the case does not fall under Evid C §765(b) (child under 14 who was victim of crimes). *In re Jennifer J., supra,* 8 CA4th at 1089. The court may refuse to issue process requiring the attendance and testimony of the child after weighing all the interests if the child's wishes

can be presented without live testimony and psychological damage would have resulted from such testimony. *In re Jennifer J., supra.*

Statements by a child who is not competent to testify (or one for whom testimony might cause psychological damage as in the *Jennifer J.* case) may be admissible under a "child dependency hearsay exception" when there are indicia of reliability. See *In re Cindy L.* (1997) 17 C4th 15, 23–25, 28, 69 CR2d 803. Also in the context of a jurisdiction hearing, the Supreme Court decided *In re Lucero L.* (2000) 22 C4th 1227, 1242–1243, 96 CR2d 56, which held that a child's out-of-court statements may be admissible even if they do not meet the requirements of the child dependency hearsay exception and even if the child is incompetent to testify.

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

G. [§104.46] Findings and Orders

At a .26 hearing, the court may choose to: (1) terminate parental rights and order the child placed for adoption, (2) identify adoption as the goal without terminating parental rights and begin to locate appropriate adoptive parents, (3) appoint a relative or nonrelative guardian for the child, (4) order a plan of tribal customary adoption without termination of parental rights, or (5) place the child in foster care. Welf & I C §366.26(b); see *In re Barry W.* (1993) 21 CA4th 358, 364, 26 CR2d 161. Returning the child to the parents is not an option at the .26 hearing, but due process is satisfied because the parent may have brought a petition under Welf & I C §388 for modification or termination of jurisdiction based on changed circumstances. *In re Marilyn H.* (1993) 5 C4th 295, 310, 19 CR2d 544.

The court need not specify the grounds for its decision at the .26 hearing; the finding or its equivalent will have been made when the court scheduled the .26 hearing. *In re Janee J.* (1999) 74 CA4th 198, 213, 87 CR2d 634. The only decision required at the .26 hearing is that the child is adoptable and that there had been a prior decision to deny or terminate reunification services. *In re Janee J., supra,* 74 CA4th at 214.

Adoption, as the permanent plan when a child cannot be returned to the parent's custody (see *In re Heraclio A.* (1996) 42 CA4th 569, 578, 49 CR2d 713), is preferred over guardianship. *In re Keyonie R.* (1996) 42 CA4th 1569, 1573, 50 CR2d 221. Adoption is preferable because it places children in the most permanent and secure alternative. *In re Lukas B.* (2000) 79 CA4th 1145, 1156, 94 CR2d 693. An order for adoption will be

fairly automatic if the child is a proper subject for adoption and none of the circumstances listed in Welf & I C §366.26(c)(1)(B) is present. *In re Jose V.* (1996) 50 CA4th 1792, 1798, 58 CR2d 684 (both parents' counsel and child's counsel had argued for guardianship). If the relative caretaker is willing to adopt, his or her preference for guardianship would not preclude adoption under Welf & I C §366.26(c)(1)(B). *In re Xavier G.* (2007) 157 CA4th 208, 213–214, 68 CR3d 478. Nevertheless, under Welf & I C §366.26(b)(3), relative guardianship is preferable to choosing adoption as a *future* goal under Welf & I C §366.26(b)(4).

Because adoption is preferred over guardianship, the strength and quality of a child's relationship with a parent must outweigh the benefits of a permanent home to justify a guardianship order when the child is otherwise a proper subject of adoption. *In re Teneka W.* (1995) 37 CA4th 721, 728–729, 43 CR2d 666 (father had killed the mother but the children would suffer some detriment from the loss of a long-term relationship with father). But when the child is living with a relative who is willing to accept legal guardianship but unable or unwilling to adopt (but not because of unwillingness to accept legal or financial responsibility), the court must select guardianship if removing that child from the relative's home would be detrimental. Welf & I C §366.26(c)(1)(A); Cal Rules of Ct 5.725(d)(2)(B). See discussion in §§104.48–104.53 of circumstances in which termination of parental rights is precluded.

☛ JUDICIAL TIP: It is recommended that Title IV-E findings required for postpermanency hearings under Welf & I C §366.3(e) (see California Judges Benchguide 103: *Juvenile Dependency Review Hearings* §103.52 (Cal CJER)) be made at the .26 hearing insofar as they are relevant at this stage. These may include:

- DSS has complied with the case plan by making reasonable efforts to finalize the permanent plan.
- The permanent plan of adoption is appropriate and is ordered as the permanent plan.
- The permanent plan of legal guardianship with a specific goal of (dismissal of dependency or adoption) is appropriate and is ordered as the permanent plan.
- The permanent plan of permanent placement with [*name*], a fit and willing relative with a specific goal of _____ [*kinship adoption, guardianship, transition to independent living, tribal customary adoption, etc.*] is appropriate and is adopted as the permanent plan.
- The permanent plan of placement with *[name]*, with a specific goal of _____ [*return home, adoption, guardianship, relative*

placement, less restrictive foster care setting, etc.] is appropriate and is adopted as the permanent plan.

- The likely date by which child may be returned home or placed for adoption, legal guardianship, or another planned permanent living arrangement, such as tribal customary adoption in the case of an Indian child.
- Services needed for transition to independent living for a child 16 years of age or older.

1. Termination of Parental Rights

a. [§104.47] In General

To terminate parental rights, the court must find by clear and convincing evidence that it is likely that the child will be adopted. Welf & I C §366.26(c)(1). The purpose of termination of parental rights is to free the dependent child for adoption. Cal Rules of Ct 5.725(g). Indeed, the likelihood of adoption is the pivotal question. *In re Heather B.* (1992) 9 CA4th 535, 547, 11 CR2d 891. See discussion in §104.56. If the court makes that finding, one of the following findings (made at an earlier hearing) generally will provide a sufficient basis for termination (Welf & I C §366.26(c)(1)):

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

Because the purpose of termination is adoption, the rights of the mother and any alleged, presumed, and known and unknown fathers must be terminated in order for the child to be adopted. Cal Rules of Ct 5.725(g). The court may not terminate the rights of only one parent unless that parent is the only surviving parent, the rights of the other parent have been terminated, or the other parent has relinquished custody of the child to the county welfare department. Cal Rules of Ct 5.725(a)(2), (g). Despite the requirement that the court may not terminate parental rights of one parent only, when one parent appeals and the parental rights of that parent are reinstated for failure to provide proper notice of the .26 hearing, the

other parent's rights cannot also be restored without the filing of a timely appeal under Welf & I C §366.26(i)(1). *Los Angeles County Dep't of Children & Family Servs. v Superior Court* (2000) 83 CA4th 947, 949, 100 CR2d 172. If both parents appeal, however, and the termination of parental rights is reversed as to one parent, it may be in the child's best interests to restore the other parent's rights also, even in the absence of error as to the second parent. *In re DeJohn B.* (2000) 84 CA4th 100, 110, 100 CR2d 649 (both parents appealed; judgment as to mother reversed due to lack of notice, so no reason to deprive the child of whatever benefits might be gained through the father's family); *In re Mary G.* (2007) 151 CA4th 184, 205–208, 59 CR3d 703 (both parents appealed, and father's parental rights reinstated; mother's rights also reinstated despite mother's failure to make prima facie showing of changed circumstances to justify her petition for modification).

A court cannot terminate the parental rights of a presumed father without a finding that he is unfit, resulting in detriment to the child. *In re G.S.R.* (2008) 159 CA4th 1202, 1211–1212, 72 CR3d 398. And detriment may not be based solely on having insufficient funds to obtain adequate housing. *In re G.S.R., supra,* 159 CA4th at 1214. Nor may it be based on having inadequate housing. *In re P.C.* (2008) 165 CA4th 98, 105, 80 CR3d 595.

The question of whether to accord presumed father status to a man who has not been involved early in the dependency process is a troubling one. Thus one court has held that when an unwed father comes forward as soon as he learns of the baby's existence (eight months into the dependency process) and demonstrates a full commitment to financial, emotional, and other kinds of support, he is entitled to presumed father status, and DSS must prove he is an unfit parent before his parental rights may be terminated. *In re Baby Boy V.* (2006) 140 CA4th 1108, 1117–1118, 45 CR3d 198. Disagreeing with *In re Baby Boy V.*, another court has held that a biological father who waited until eight months after the dependency process had begun before even inquiring whether his sexual encounters with the mother ended in pregnancy must not automatically be accorded presumed father status. *In re Vincent M.* (2008) 161 CA4th 943, 959–960, 74 CR3d 755.

The finding that a child is adoptable, however, will not of itself support an order terminating parental rights; the court must also have made any one of the findings listed in Welf & I C §366.26(c)(1) at a prior hearing. *In re DeLonnie S.* (1992) 9 CA4th 1109, 1113, 12 CR2d 43. For example, all that may be required for termination of parental rights is a finding at the .26 hearing that the child is adoptable, together with the previous finding at the jurisdictional and dispositional hearings that the parents' whereabouts were unknown and therefore reunification services were not required. *In re Baby Boy L.* (1994) 24 CA4th 596, 605–606, 29

CR2d 654. Once these findings have been made, in the absence of evidence that termination would be detrimental to the child under one of the six exceptions (Welf & I C §366.26(c)(1)(B)), the court *must* terminate parental rights. *In re Andrea R.* (1999) 75 CA4th 1093, 1108, 89 CR2d 664.

After parental rights have been terminated, the parents are no longer entitled to notice of any subsequent hearings (Welf & I C §366.3(a)), nor are they entitled to visitation with the child. *In re Diana G.* (1992) 10 CA4th 1468, 1481–1483, 13 CR2d 645. Moreover, once parental rights have been terminated, a former parent may not be ordered to pay child support. *County of Ventura v Gonzales* (2001) 88 CA4th 1120, 1122, 106 CR2d 461.

b. When Precluded

(1) [§104.48] General Requirements

Parental rights may not be terminated if, at each hearing at which the court was required to make findings concerning reasonable efforts or services, the court found that reasonable efforts were not made or that reasonable services were not offered or provided. Welf & I C §366.26(c)(2); Cal Rules of Ct 5.725(d)(2)(A). When the child is an Indian child, the court must find that active efforts have been made by clear and convincing evidence. Welf & I C §366.26(c)(2)(B); *In re Adoption of Hannah S.* (2006) 142 CA4th 988, 998, 8 CR3d 605.

When there has been a failure to provide reunification services, termination of parental rights is improper and the court must order an additional six months of services at the review hearing at which a hearing under Welf & I C §366.26 is contemplated. *In re David D.* (1994) 28 CA4th 941, 954–956, 33 CR2d 861. See also *In re Precious J.* (1996) 42 CA4th 1463, 1479–1480, 50 CR2d 385, holding that services are not reasonable for an incarcerated parent when DSS failed to arrange any visits or establish a visitation schedule despite court orders directing it to do so. It was also error to terminate parental rights without ever having either offered reunification services or having determined that services should be declined even though the mother's whereabouts were originally unknown and she lived in a locked psychiatric facility. *In re T.M.* (2009) 175 CA4th 1166, 1171–1173, 96 CR3d 774; Welf & I C §366.26(c)(2)(A).

In addition, the court may not terminate the parental rights of only one parent unless that parent is the sole parent because the other parent has died, has had his or her rights terminated, or has relinquished custody to DSS. Cal Rules of Ct 5.725(a)(2), (g). Under Cal Rules of Ct 5.725(a), it is error for a court to terminate parental rights at two separate hearings, one for each parent. *In re Vincent S.* (2001) 92 CA4th 1090, 1093, 112 CR2d 476.

Termination of parental rights is also improper when parents have voluntarily relinquished their parental rights under Welf & I C §361(b); in this situation, the juvenile court may not then terminate parental rights under Welf & I C §366.26 nor may it place the children for adoption under this section. *In re R.S.* (2009) 179 CA4th 1137, 1152–1153, 101 CR3d 910. Adoption after a voluntary relinquishment is overseen by the State Adoptions Department or county adoption agency under Fam C §8704(a).

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

(1) The child is living with a relative who is willing to accept legal guardianship but unable or unwilling to adopt (although not because of unwillingness to accept legal or financial responsibility), and it would be detrimental to the emotional well-being of the child to be removed from that relative's custody. Welf & I C §366.26(c)(1)(A); Cal Rules of Ct 5.725(d)(2)(B). In the case of an Indian child, "relative" includes "extended family member." Welf & I C §366.26(c)(1)(A); Cal Rules of Ct 5.725(d)(2)(B); 25 USC §1903(2).

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

(3) A child who is 12 years of age or older objects to the termination of parental rights. Welf & I C §366.26(c)(1)(B)(ii). A statement of preference is not necessarily an objection, precluding termination of parental rights. See *In re Christopher L.* (2006) 143 CA4th 1326, 1335, 50 CR3d 57. In this case, an adolescent child's statement to the court that he wanted to be adopted by his aunt and uncle, but wanted to continue visiting with his mother, did not act as a barrier to termination of parental rights under Welf & I C §366.26(c)(1)(B)(ii) (child-objection exception), but rather as a statement of preference.

(4) The child has been placed in a residential treatment facility, adoption is not likely or desirable, and continuation of parental rights will not prevent the child from finding a stable placement if the parents cannot resume custody when the child no longer needs residential care. Welf & I C §366.26(c)(1)(B)(iii). A child whose prospective adoptive parents operate a special needs (residential treatment) home in which the child's developmentally delayed brother lives, however, is not thereby precluded from adoption because of Welf & I C §366.26(c)(1)(B)(iii). *In re Jeremy S.* (2001) 89 CA4th 514, 527–528, 107 CR2d 280.

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

(6) There will be substantial interference with the relationship between the child and his or her siblings. Welf & I C §366.26(c)(1)(B)(v); Cal Rules of Ct 5.725(d)(2)(C)(v). This exception may not be applied retroactively. *In re Raymond E.* (2002) 97 CA4th 613, 618, 118 CR2d 376. A parent has standing to raise this exception (*In re L. Y. L.* (2002) 101 CA4th 942, 951, 124 CR2d 688) but not for the first time on appeal (*In re Erik P.* (2002) 104 CA4th 395, 403, 127 CR2d 922). See discussion of procedure in §104.52.

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

(7) The child is an Indian child and there is a compelling reason that termination of parental rights would not be in his or her best interest, including that (1) termination of parental rights would substantially interfere with his or her tribal connection, or (2) the tribe has identified tribal customary adoption or another planned permanent living arrangement for the child, such as guardianship. Welf & I C §366.26(c)(1)(B)(vi), (C); Cal Rules of Ct 5.725(d)(2)(C)(vi).

These criteria are the *only* bases for concluding that adoption or termination of parental rights is not in the child's best interest when the situation would otherwise warrant termination and subsequent adoption. Welf & I C §366.26(c)(1)(B), (4); Cal Rules of Ct 5.725(d)(2). There is no "best interests of the child" exception to adoption in addition to the six enumerated exceptions contained in Welf & I C §366.26(c)(1)(B). *In re Jessie G.* (1997) 58 CA4th 1, 8, 67 CR2d 811; *In re Josue G.* (2003) 106 CA4th 725, 734, 131 CR2d 92 (no best-interest exception to the preference for termination of parental rights and adoption).

The party claiming that termination would be detrimental to the child has the burden of proving the detriment. Cal Rules of Ct 5.725(d)(4). The court need not make an express finding of "no detriment" in order to have found an exception to termination of parental rights under Welf & I C §366.26(c)(1)(B) (in this case, relating to the Indian child exception under Welf & I C §366.26(c)(1)(B)(vi)). *In re A.A.* (2008) 167 CA4th 1292, 1321, 84 CR3d 841.

Termination of parental rights of a gravely disabled parent, however, is *not* precluded by the ADA. *In re Anthony P.* (2000) 84 CA4th 1112, 1116, 101 CR2d 423. See also *In re Diamond H.* (2000) 82 CA4th 1127, 1139, 98 CR2d 715 (the ADA does not directly apply to juvenile dependency proceedings and cannot be used as a defense).

(2) [§104.49] Benefit From Continuing Contact

Termination of parental rights under Welf & I C §366.26(c)(1)(B)(i) is precluded when the benefit from continuing the parent/child relationship

outweighs the security and sense of belonging that a new family would confer. *In re Lukas B.* (2000) 79 CA4th 1145, 1155, 94 CR2d 693. In deciding whether termination is precluded because of the potential benefit of this continuing contact, the court should balance whether the strength and quality of the parent/child relationship outweighs the well-being that the child would gain from having a permanent adoptive home, together with the security and sense of belonging that a new adoptive family would confer. *In re Autumn H.* (1994) 27 CA4th 567, 574, 32 CR2d 535.

Termination is not automatically precluded either because the parent is not ready to resume custody at the time of the .26 hearing or because there is not a suitable adoptive parent. *In re Amber M.* (2002) 103 CA4th 681, 690, 127 CR2d 19 (in this case, the children had a strong bond with mother who visited as often as possible during reunification period and acted in a loving, parental way, and mother did everything that was asked of her to regain custody). Similarly, a court must not automatically reject the "benefit from continuing contact" exception even when (1) the biological parent does not have day-to-day contact with the child, (2) there is a prospective adoptive parent with whom the child has a primary attachment and who has promised to permit visits with the biological parent, and (3) time might eventually ameliorate the child's loss of that parent. *In re S.B.* (2008) 164 CA4th 289, 299–300, 79 CR3d 449.

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

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

See *In re Brittany C.* (1999) 76 CA4th 847, 853–854, 90 CR2d 737; Welf & I C §366.26(c)(1)(B)(i). See, *e.g.*, *In re C.F.* (2011) 193 CA4th 549, 555–557, 121 CR3d 881 (no bonding study or other evidence that showed the mother occupied a parental role, that the children would suffer any actual detriment on the termination of parental rights, or that the benefits of continuing the parental relationship outweighed the benefits of permanent placement with family members who were ready to give them a permanent home).

Moreover, a biological father who failed to reunify during the course of the dependency process may not derail adoption proceedings merely

because the child might gain some benefit from friendly visits. *In re Jason J.* (2009) 175 CA4th 922, 937, 96 CR3d 625. Such friendly visits by a biological father may not be the basis for an exception to termination of parental rights when the child had never lived with the father and the father never went beyond supervised visitation. 175 CA4th at 938. And a grandfather cannot assert the "beneficial relationship" exception to termination of parental rights based on status as presumed father because he would not have been entitled to obtain that status. *In re Jose C.* (2010) 188 CA4th 147, 161–163, 114 CR3d 903.

Courts should consider these general areas in determining whether Welf & I C §366.26(c)(1)(B)(i) applies (*In re Angel B.* (2002) 97 CA4th 454, 467, 118 CR2d 482):

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

But even with a number of years of loving parenting, the beneficial relationship exception of Welf & I C §366.26(c)(1)(B)(i) will not overcome an autistic child's long-term needs for the stability, predictability, and highly competent care that a special needs adoptive home would provide. *In re Dakota H.* (2005) 132 CA4th 212, 229–230, 33 CR3d 337.

(a) [§104.50] Termination of Parental Rights Proper—No Parental Role

To preclude termination of parental rights under Welf & I C §366.26(c)(1)(B)(i), the parent must have occupied a parental role in the child's life. *In re Andrea R.* (1999) 75 CA4th 1093, 1108, 89 CR2d 664. Examples in which parents were not found to have performed such a role include:

- *In re Beatrice M.* (1994) 29 CA4th 1411, 1420, 35 CR2d 162 (although the child might have benefited from continuing contact with the natural parents and the adoptive parent maintained and encouraged continuing contact with the natural parents, the natural parents did not have a parental relationship with the children);
- *In re Elizabeth M.* (1997) 52 CA4th 318, 324, 60 CR2d 557 (when visits with a parent were not always consistent and when the parent did not occupy a parental role during those visits, the parent-child relationship, no matter how positive, was not sufficient to overcome the statutory preference for adoption of Welf & I C §366.26(c)(1)(B)(i);

- *In re Brittany C.* (1999) 76 CA4th 847, 853–854, 90 CR2d 737 (the parent must show that the relationship with the child is a parent-child relationship, rather than a friendship; the relationship must be more than pleasant and emotionally significant—it must have some resemblance to the consistent, daily nurturing that marks a parental relationship);
- *In re Derek W.* (1999) 73 CA4th 823, 827, 86 CR2d 739 (child had lived with prospective adoptive parents, who were the only people who provided the child with food, shelter, protection, and guidance on a daily basis, from the time he was nine days old);
- *In re Zachary G.* (1999) 77 CA4th 799, 811–812, 92 CR2d 20 (strong bond with mother did not rise to the level of the exception listed in Welf & I C §366.26(c)(1)(B)(i) when the child turned to the prospective adoptive parents, rather than the mother, at times when he was hungry, tired, or in need of affection or attention);
- *In re Jasmine D.* (2000) 78 CA4th 1339, 1344, 93 CR2d 644 (parent was loving and never missed a visit (which were always supervised), but failed to obtain housing or participate in drug treatment); and
- *In re Casey D.* (1999) 70 CA4th 38, 52, 82 CR2d 426 (mother's relationship to child was that of friendly visitor, but child turned to foster parent when she was tired or hurt or needed reassurance).
- *In re Angel B.* (2002) 97 CA4th 454, 468, 118 CR2d 482 (although the evidence indicated that mother acted lovingly and appropriately with the child during visits, there was no evidence that the mother-child relationship was so significant that its termination would cause her any detriment).
- *In re Bailey J.* (2010) 189 CA4th 1308, 1316, 117 CR3d 568 (even with regular and upbeat supervised visits with a mother from whose custody the child was removed at two days old, these visits could be seen as little more than play dates with a loving adult).

In an unusual case, however, the court terminated parental rights despite the fact that the father occupied a parental role and the child loved him. *In re Cliffton B.* (2000) 81 CA4th 415, 423–425, 96 CR2d 778. The court balanced the strength and quality of the natural parent-child relationship in a tenuous home situation against the security and sense of belonging the new family would confer. The court considered the facts that the father had once again relapsed from a drug treatment program after a lengthy period of sobriety and that the foster family was willing to adopt the child and provide a stable home. *In re Cliffton B., supra* (case characterized as a close case).

(b) [§104.51] No Termination of Parental Rights—Parental Role Found

The nature of the relationship must be examined in determining whether it would be detrimental to terminate parental rights under the "beneficial contact" exception. In a case in which a nine-year-old child had lived with the mother for six and one-half years and wished to live with her again, the juvenile court's order to terminate parental rights was reversed based on evidence that there was positive interaction between the child and the mother and on the court's own observation that their relationship was "parental." *In re Jerome D.* (2000) 84 CA4th 1200, 1207–1208, 101 CR2d 449. A decision not to terminate parental rights under this beneficial contact exception was also proper when the mother visited regularly, made great progress toward rehabilitation and a stable living situation, and when a significant and close bond developed between her and the children which would benefit the children if the relationship continued. *In re Brandon C.* (1999) 71 CA4th 1530, 1537, 84 CR2d 505.

Moreover, termination of parental rights should be precluded based on the parent-child exception of Welf & I C §366.26(c)(1)(B)(i) in the following circumstances: (1) the child had lived with his mother until nearly nine years of age, (2) there were weekly visits with the mother after removal that were very important to the child, and (3) the child's emotional security was dependent on continuing to have a relationship with the mother. *In re Scott B.* (2010) 188 CA4th 452, 470, 470–472, 115 CR3d 321.

Once the court finds that the parent and child had a beneficial relationship, it may not terminate parental rights and order adoption based on the unenforceable promise of prospective adoptive parents that they would allow visitation with the biological parents. *In re C.B.* (2010) 190 CA4th 102, 128–129, 117 CR3d 846.

(c) [§104.52] Procedure

The court may require an offer of proof before setting a contested hearing on an exception sought by a parent to termination of parental rights *In re Tamika T.* (2002) 97 CA4th 1114, 1121, 118 CR2d 873. An offer of proof may be necessary to clearly identify the contested issues. *In re Earl L.* (2004) 121 CA4th 1050, 1053, 18 CR3d 74.

The court does not have a sua sponte duty to ascertain whether an exception to adoption applies; the burden is on the party seeking an exception by preponderance of the evidence (*In re Rachel M.* (2003) 113 CA4th 1289, 1295, 7 CR3d 153; see Cal Rules of Ct 5.725(d)(4)), including the sibling exception. *In re Daisy D.* (2006) 144 CA4th 287, 292, 50 CR3d 242.

To preclude termination of parental rights under Welf & I C §366.26(c)(1)(B)(i), the parent has the burden of showing that (1) continuation of the relationship will outweigh the benefits to the child of living with an adoptive family, or (2) termination of parental rights would be detrimental to the child. *In re Angel B.* (2002) 97 CA4th 454, 466, 118 CR2d 482. The court must weigh the benefit of continuing the relationship against the benefit to the child that adoption would provide. *In re L. Y. L.* (2002) 101 CA4th 942, 952–953, 124 CR2d 688.

If the court finds that termination is detrimental, it must state its reasons in writing or on the record. Welf & I C §366.26(c)(1)(D); Cal Rules of Ct 5.725(d)(5). Thus, after DSS reports on the nature of the contact between the child and biological relatives, the burden falls on the parent to produce evidence that the child would benefit from continuing the relationship so much that termination of parental rights would be inappropriate. *In re Urayna L.* (1999) 75 CA4th 883, 887, 89 CR2d 437.

The court may admit a bonding study commissioned by a parent to show that the exception of Welf & I C §366.26(c)(1)(B)(i) applies without violating the psychotherapist-patient privilege because the parent was not acting as a patient in that instance. *In re Tabatha G.* (1996) 45 CA4th 1159, 1168, 53 CR2d 93. However, the court need not order a bonding study to show the benefit of continuing contact under Welf & I C §366.26(c)(1)(B)(i) as a condition for ordering termination of parental rights because the kind of parent-child bond that may preclude termination of parental rights does not arise in the short period between the termination of services and the .26 hearing. *In re Richard C.* (1998) 68 CA4th 1191, 1196, 80 CR2d 887 (the nature and extent of the relationship should become clear during the 12 months that services are provided).

(3) [§104.53] Interference With Sibling Relationship

In considering the exception to adoption and termination of parental rights because of interference with a sibling relationship under Welf & I C §366.26(c)(1)(B)(v), the court's concern must be the best interests of the child being considered for adoption, not the interests of that child's siblings. *In re Hector A.* (2005) 125 CA4th 783, 791, 23 CR3d 104. The court may reject adoption only if it finds that adoption would be detrimental to the child, not to a sibling. *In re Celine R.* (2003) 31 C4th 45, 49, 1 CR3d 432. The testimony of siblings, however, may be indirectly relevant to the issue of the effect that adoption would have on the child in question. *In re Naomi P*. (2005) 132 CA4th 808, 823, 34 CR3d 236.

The sibling-relationship exception to termination of parental rights was not designed to apply to those who were removed from home as newborns, but rather to preserve long-standing relationships among siblings that serve as anchors for children whose lives are in turmoil. *In re*

Erik P. (2002) 104 CA4th 395, 404, 127 CR2d 922. But the exception may well apply when a child had lived in the grandmother's home with his siblings his entire life and was completely bonded to his siblings. *In re Fernando M.* (2006) 138 CA4th 529, 536–537, 41 CR3d 511. A half sibling may be considered to be a sibling under this exception to termination of parental rights. *In re Valerie A.* (2006) 139 CA4th 1519, 1524, 43 CR3d 734.

Even substantial sibling bonds and the corresponding detriment should they be broken may be outweighed by the benefits of adoption, particularly when it is possible that the sibling connections will continue after termination of parental rights. *In re Jacob S.* (2002) 104 CA4th 1011, 1018–1019, 128 CR2d 654, disapproved on other grounds in 46 C4th 529, 537. For example, when interaction between siblings or half siblings occurred when the children were infants or toddlers, separate adoption may better serve the children's long-term emotional needs than would continued sibling contact. *In re Valerie A.* (2007) 152 CA4th 987, 1013, 512 CR3d 403. And because opponents of termination of parental rights must show that termination would substantially interfere with the sibling relationship, evidence that sibling contact would continue after adoption would render the exception inapplicable. *In re Megan S.* (2002) 104 CA4th 247, 254, 127 CR2d 876.

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

c. [§104.54] Findings

To terminate parental rights, the court must have previously made any one of the findings listed in Welf & I C §366.26(c)(1)(B) in addition to the finding by clear and convincing evidence that the child is likely to be adopted. The court cannot substitute an additional ground. *In re DeLonnie S.* (1992) 9 CA4th 1109, 1113–1114, 12 CR2d 43. It is not a condition precedent to the termination of parental rights at a .26 hearing that the court find the following on the record:

(1) It would be detrimental to the child to continue in the parental relationship. *In re Jesse B.* (1992) 8 CA4th 845, 851, 10 CR2d 516.

(2) Termination is in best interest of child. *In re Jennifer J.* (1992) 8 CA4th 1080, 1089, 10 CR2d 813.

(3) Parent was unfit. *In re Cody W.* (1994) 31 CA4th 221, 225, 36 CR2d 848; *In re A.S.* (2009) 180 CA4th 351, 360–361, 102 CR3d 642.

(4) Reunification efforts were sufficient. See *In re Michelle M.* (1992) 4 CA4th 1024, 1034, 6 CR2d 172.

(5) Termination is the least detrimental alternative. *In re Cody W., supra*, 31 CA4th at 230–231.

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

☛ CAUTION: A court may not terminate a nonoffending, noncustodial mother's or presumed father's parental rights without finding, by clear and convincing evidence, that awarding custody to the parent would be detrimental to the child's best interests. *In re T.G.* (2013) 215 CA4th 1, 20, 155 CR3d 1; see *Santosky v Kramer* (1982) 455 US 745, 747–748, 753, 71 L Ed2d 599.

d. [§104.55] Parents' Conduct and Current Circumstances

The natural parents' current conduct and circumstances do not provide the focus of the .26 hearing. The purpose of .26 hearings is not to punish parents, although parental conduct may be a factor in the outcome. *In re Heather B.* (1992) 9 CA4th 535, 556, 11 CR2d 891.

There is no burden on DSS at this hearing to show that the parents are at fault. *Cynthia D. v Superior Court* (1993) 5 C4th 242, 254, 19 CR2d 698. Nor is termination precluded because the parents have improved their lives and are ready to provide a stable home for the child. In a case involving a pre-1989 dependency, the Supreme Court has held that a court may find that the child's interest in stability outweighs the parent's interest in the care and custody of the child after 18 months of out-of-home placement. *In re Jasmon O.* (1994) 8 C4th 398, 421, 33 CR2d 85 (DSS failed to disclose to the parents or the court that the mother's social worker's sister was the foster mother, but there appeared to be no connection between that conflict of interest and the failure of attempted reunification).

However, the parents' circumstances are relevant at the time of the .26 hearing, for example, to show that they have maintained regular contact with the child, that the child benefits from maintaining that contact, and that therefore parental rights should not be terminated. Welf & I C §366.26(c)(1)(B)(i); *In re Edward R.* (1993) 12 CA4th 116, 127, 15 CR2d 308. If parents can show that the lack of relationship has resulted from a failure of reunification services (*i.e.,* the court had earlier terminated visitation without making a finding under Welf & I C §366.21(h) that visitation would be detrimental to the children),

termination of parental rights may be improper. *In re David D.* (1994) 28 CA4th 941, 954–956, 33 CR2d 861.

It is error for a court to terminate parental rights of a father under Fam C §7825 because of felony convictions when the convictions were for burglary and possession. *In re Baby Girl M.* (2006) 135 CA4th 1528, 1542–1544, 38 CR3d 484.

e. [§104.56] Likelihood of Adoption

The court has no sua sponte duty to evaluate whether there are impediments to adoption by prospective adoptive parents. *In re G.M.* (2010) 181 CA4th 552, 564, 105 CR3d 32.

A child who has none of the characteristics listed in Welf & I C §366.26(c)(3) and has been determined by DSS to be adoptable is generally considered likely to be adopted. See *In re Baby Boy L.* (1994) 24 CA4th 596, 610–611, 29 CR2d 654 (only impediment was statement by prospective adoptive parents that it might be risky to become attached to the child because he had not yet been freed for adoption). The issue of adoptability focuses on the child, including the child's age, physical condition, and emotional state, and other factors that would make it difficult for the child to be adopted. *In re Sarah M.* (1994) 22 CA4th 1642, 1649, 28 CR2d 82.

Although the fact that a prospective adoptive parent has not been identified is not a basis to conclude that the child is not a probable subject for adoption, when a child might be difficult to place because of membership in a sibling group, because of diagnosis of a medical, physical, or mental disability, or because the child is seven years of age or older, a finding of adoptability may need to include the identification of a prospective adoptive parent. See Welf & I C §366.26(c)(3); Cal Rules of Ct 5.725(d)(6). Siblings may be considered difficult to place under Welf & I C §366.26(c)(3) when they are considered a "sibling group," because of being full siblings and having lived together, even when they constantly fight with each other. *In re Gabriel G.* (2005) 134 CA4th 1428, 1438, 36 CR3d 847.

The determination of adoptability does not focus on any prospective adoptive parents, but rather on the child; it is not necessary that the child already be in a potential adoptive home or that there is an adoptive parent "waiting in the wings." *In re Josue G.* (2003) 106 CA4th 725, 733, 131 CR2d 92. Nevertheless, the issue of whether a prospective adoptive family exists may be relevant because it provides evidence that the child is adoptable and therefore likely to be adopted within a reasonable time by this family or some other. *In re Sarah M., supra,* 22 CA4th at 1650. If prospective adoptive parents exist, the child may be considered a proper subject for adoption, even if there are some problems with the proposed

adoption. See *In re Roderick U.* (1993) 14 CA4th 1543, 18 CR2d 555. A child may be found adoptable based solely on a caretaker's willingness to adopt if there is no legal impediment and the caretaker is able to meet the child's needs. *In re Helen W.* (2007) 150 CA4th 71, 80, 57 CR3d 914.

Nevertheless, it may be an abuse of discretion for a court to find that a medically fragile child is adoptable, particularly when the child has special needs, engages in such difficult behaviors that even a foster parent experienced in dealing with special needs children needs respite care, and there is a lack of solid evidence indicating probability of adoption by family members. *In re Ramone R.* (2005) 132 CA4th 1339, 1351–1352, 34 CR3d 344.

A court should not use an assessment report that is incomplete and fails to comply with the requirements of Welf & I C §366.21(i) in supporting a finding of adoptability. *In re Valerie A.* (2008) 162 CA4th 1, 13–15, 75 CR3d 86.

(1) [§104.57] Suitability of Prospective Adoptive Parents

If the child is considered generally adoptable, the suitability of prospective adoptive parents is generally irrelevant to the issue of whether the child is likely to be adopted. *In re Carl R.* (2005) 128 CA4th 1051, 1061, 27 CR3d 612. When a child is generally adoptable, the court need not determine whether there are any impediments to adoption by current caretakers. *In re R.C.* (2008) 169 CA4th 486, 494, 86 CR3d 776.

A .26 hearing does not provide a forum for the parents to contest the suitability of prospective adoptive parents. *In re Scott M.* (1993) 13 CA4th 839, 844, 16 CR2d 766. Generally, the suitability of a potential adoptive parent is an issue for the adoption hearing and not for the .26 hearing. *In re T.S.* (2003) 113 CA4th 1323, 1329, 7 CR2d 173.

Nevertheless, the court may permit questioning of a social worker concerning impediments to adoption by prospective adoptive parents if the child's age, physical condition, or mental stability otherwise renders adoption questionable (*In re Sarah M.* (1994) 22 CA4th 1642, 1649, 28 CR2d 82) and may also require, as part of an adoptability assessment for a disabled child who requires total care for life, an evaluation of whether the prospective adoptive parents can meet that child's needs (*In re Carl R.*, *supra*, 128 CA4th at 1062). Moreover, if the only person willing to adopt is unsuitable because that person has a history of abuse or for some other reason, the .26 hearing may be the correct forum to hear evidence on the appropriateness of the prospective adoptive parent. See *In re Jerome D.* (2000) 84 CA4th 1200, 1205–1206, 101 CR2d 449 (finding of adoptability by clear and convincing evidence may be precluded in this situation).

Prospective adoptive parents are not unsuitable by virtue of the fact that they intend to home school a severely disabled child; this intent

should not be an impediment to termination of parental rights and adoption. *In re Carl R., supra,* 128 CA4th at 1065–1067.

A child need not be likely to be adopted by the public at large but only by a particular family, and when assessment of that family is delayed because it is time-consuming, the goal of the dependency system (prompt resolution of custody status and a stable home environment) is thwarted. *In re John F.* (1994) 27 CA4th 1365, 1377, 33 CR2d 225 (case based on failure to set .26 hearing at review hearing).

(2) [§104.58] When Adoption Likely

At least one court has held that there is clear and convincing evidence that a child is likely to be adopted when the child communicated the wish to be adopted by the foster parents and the foster parents were clear that they wanted to adopt the child. *In re Michelle M.* (1992) 4 CA4th 1024, 1035, 6 CR2d 172. Even when a child is at risk for hereditary neurological and developmental problems, the child may nevertheless be likely to be adopted when the problems do not appear to interfere with the child's acquisition of developmental skills and when there were a number of prospective adoptive parents who had expressed interest. *In re Jennilee T.* (1992) 3 CA4th 212, 234–235, 4 CR2d 101. And if a child is happy, healthy, and thriving, he or she may be adoptable even with in-utero drug exposure, speech delays, and no identified father. *In re R.C.* (2008) 169 CA4th 486, 492, 86 CR3d 776.

In *In re L. Y. L.* (2002) 101 CA4th 942, 952, 956, 124 CR2d 688, the court of appeal approved the juvenile court's determination that the child was adoptable based on evidence that the child was in good health, was developing normally, and had a sociable personality, coupled with the fact that the foster parents were willing to adopt and that there were six other families willing to adopt a child with her characteristics, despite the child's sadness at the separation from a sibling. A court may find that a child is likely to be adopted, even before an adoption home study of the prospective adoptive parents has been completed, when the child is happy, healthy, and apparently normal. *In re Marina S.* (2005) 132 CA4th 158, 165–166, 33 CR3d 220. Similarly, a young child in good physical and emotional health, who has shown intellectual growth and the ability to develop interpersonal relationships, has many attributes indicating adoptability. *In re Gregory A.* (2005) 126 CA4th 1554, 1562, 25 CR3d 134.

The case for adoptability is strengthened by the fact that a prospective adoptive parent has expressed interest in adopting the child. See *In re Gregory A., supra*. And the case for adoptability is not diminished by the mere possibility that the child may react badly to adoption once he or she realizes that there will be no more contact with the

mother or grandfather. *In re Jose C.* (2010) 188 CA4th 147, 158–159, 114 CR3d 903.

If there is a prospective adoptive parent, a child with a difficult medical condition may be likely to be adopted even if the severity of the condition is not yet fully known. See *In re Helen W.* (2007) 150 CA4th 71, 79, 57 CR3d 914. And the fact that foster parents wish to adopt the child may be evidence for the child's adoptability despite various behavior and emotional problems. *In re I.W.* (2009) 180 CA4th 1517, 1526–1527, 103 CR3d 538.

(3) [§104.59] When Adoption Not Likely or Evidence Is Insufficient

When DSS has looked for an adoptive family for over ten months, it is reasonable to conclude that the child is not a proper subject for adoption and to order guardianship without termination of parental rights. *In re Tamneisha S.* (1997) 58 CA4th 798, 806–807, 68 CR2d 259. Although a child who has medical or other problems does not need to be in a pre-adoptive home to be considered likely to be adopted, there must be more than an expression of casual interest. See *In re Amelia S.* (1991) 229 CA3d 1060, 280 CR 503. In *Amelia S.,* the fact that a few of the foster parents who had taken in nine siblings said that they might consider adoption does not constitute clear and convincing evidence of adoptability. 229 CA3d at 1065 (children had various emotional, physical, and developmental problems).

Another example of insufficient evidence of adoptability is *In re Brian P.* (2002) 99 CA4th 616, 624–625, 121 CR2d 326, in which there was only a statement that chances of adoption were "very good." There was no adoption assessment report mentioning facts about the child, and there was evidence that the child was somewhat developmentally delayed.

Moreover, when the only prospective adoptive parent has a criminal history involving family violence, this may lead to a finding that the child is not adoptable. See *In re Jerome D.* (2000) 84 CA4th 1200, 1205–1206, 101 CR2d 449. And multiple siblings are not adoptable when the one family who expressed an interest did not know the children and were legally impeded because they had not yet acquired a foster care license or had not yet been the subject of an assessment. *In re B. D.* (2008) 159 CA4th 1218, 1233–1234, 72 CR3d 153. On the other hand, the lack of a home study is not an impediment to adoption when the family who is interested in adopting the child has been caring for the child for some time and had been assessed for criminal background, for the ability to meet the child's needs, and for understanding of an adoptive parent's obligations. *In re Brandon T.* (2008) 164 CA4th 1400, 1411, 80 CR3d 287.

But the fact that the children have behavioral problems does not make them unadoptable; even if possible adoptions do not occur, there is no risk of the children becoming legal orphans because there is always the possibility of reinstatement of parental rights under Welf & I C §366.26(i)(3). *In re I.I.* (2008) 168 CA4th 857, 870, 871, 85 CR3d 784.

f. [§104.60] Indian Child

In cases involving claims that the child is an Indian child, courts must seek to promote stability and security of Indian tribes and families, comply with the Indian Child Welfare Act (ICWA), and seek to protect the best interests of the child. Welf & I C §224(b). Courts must encourage and protect the child's membership in the tribe and his or her connection to the tribal community. Welf & I C §224(a)(2). ICWA must be applied once the tribe determines that the child is either a member or is eligible for membership in the tribe and is a biological child of a tribal member. Welf & I C §224(c); Cal Rules of Ct 5.482(c). In terminating the parental rights of the parents of an Indian child, the court must follow the procedures in Cal Rules of Ct 5.725 and 5.485. Cal Rules of Ct 5.725(a)(4).

Under Welf & I C §366.24, in consultation with the child's tribe, the court may designate tribal customary adoption as the permanent plan without terminating parental rights. Welf & I C §366.26(b)(2); Cal Rules of Ct 5.725(d)(1), (e)(4). This is done through tribal customs, traditions, or law. Welf & I C §366.26(b)(2). If the court has chosen a permanent plan of tribal customary adoption, it must give this tribal order full faith and credit. Welf & I C §366.26(e)(2). The prospective tribal customary adoptive parents must appear before the court in a finalization hearing. Welf & I C §366.26(e)(2).

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

If tribal customary adoption is ordered under Welf & I C §366.24, the court may continue the hearing for up to 120 days to permit the tribe to complete the adoption process. Cal Rules of Ct 5.725(e)(4). The court has the discretion to grant an additional continuance not exceeding 60 days. Welf & I C §366.24(c)(6); Cal Rules of Ct 5.725(e)(4). The tribe must file with the court a completed tribal customary adoption order no less than 20 days before the date of the continued hearing. If the tribe fails to file the order with this time period, the court must make new findings and orders under Welf & I C §366.26(b) and select a new permanent plan for the child. Welf & I C §366.24(c)(6); Cal Rules of Ct 5.725(e)(4).

(1) [§104.61] Findings

Under ICWA, a court may not terminate parental rights unless it finds that active efforts have been made to provide services designed to prevent the breakup of the Indian family and that these services have been unsuccessful. Welf & I C §§361.7(a), 366.26(c)(2)(B)(i); 25 USC §1912(d). The standard of proof for this finding is "clear and convincing" (*In re Michael G.* (1998) 63 CA4th 700, 711, 74 CR2d 642), not by evidence beyond a reasonable doubt. (*In re Adoption of Hannah S.* (2006) 142 CA4th 988, 998, 8 CR3d 605). When the parent of an Indian child did not appear until after the reunification period had ended, despite adequate notification (and the court learned that the child had Indian heritage only after this period had ended), the many attempts to notify the parent constituted "active efforts" under ICWA. *In re William G.* (2001) 89 CA4th 423, 428, 107 CR2d 436.

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

☛ JUDICIAL TIP: This finding normally should have been made at the time reunification services were denied or terminated and the .26 hearing was scheduled. Presumably, it would need to be made at the .26 hearing only if it had not been made earlier. See *In re Michael G.*, *supra*, 63 CA4th at 712–713.

To terminate parental rights for a child of American Indian heritage, a judge must also find by proof beyond a reasonable doubt at the .26 hearing that continued custody by the parent or Indian custodian is likely to result in serious physical or emotional damage to the child. Welf & I C §366.26(c)(2)(B)(ii); 25 USC §1912(f); Cal Rules of Ct 5.485(a)(2). This stringent burden of proof will be met when the evidence shows that the parent's parenting skills are inadequate because of the child's serious behavioral and psychiatric dysfunction, and the inadequacy was caused largely by the parent's schizophrenia and drug abuse. See *In re Krystle D.* (1994) 30 CA4th 1778, 1798–1799, 37 CR2d 132. The Act is applicable to a petition by an Indian child's non-Indian mother to terminate the parental rights of the child's Indian father. *In re Crystal K.* (1990) 226 CA3d 655, 665, 276 CR 619 (decided under former CC §232). Like the "active efforts" finding, the detriment finding required by ICWA will normally be made at the time reunification services are denied or terminated and, if so, need not be made again at the .26 hearing; if not, it should be made at the .26 hearing. *In re Matthew Z.* (2000) 80 CA4th 545, 553–555, 95 CR2d 343.

The ICWA detriment finding (continuing parental custody would bring a risk of detriment beyond a reasonable doubt) under 25 USC §1912(f) does not necessarily need to be renewed at a .26 hearing even if

it had been made as much as 12 months earlier at a review hearing. *In re Barbara R.* (2006) 137 CA4th 941, 952, 40 CR3d 687.

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

(2) [§104.62] Evidence

Evidence regarding detriment for termination must be supported by the testimony of a qualified expert witness. Welf & I C §§366.26(c)(2)(B)(ii), 224.6; 25 USC §1912(f); Cal Rules of Ct 5.485(a)(2). Federal guidelines call for the expert to be a member of the Indian child's tribe; a lay expert witness with substantial experience in delivery of services, customs, standards, and practices; or a person with substantial education and experience in the area of specialty. See *In re Krystle D.* (1994) 30 CA4th 1778, 1801–1802, 37 CR2d 132; 44 Fed Reg 67584–67595 (1979). The fact that a witness does not have demonstrated cross-cultural experience in Indian matters will not preclude the testimony of that witness. 30 CA4th at 1802.

2. [§104.63] Adoption/Adoptive Placement

If the court orders that parental rights be terminated, it must order at the same time that the child be referred to a licensed county adoption agency for placement. See Welf & I C §366.26(b)(1); Cal Rules of Ct 5.725(e)(3). The prospective adoptive parents may have their petition heard in juvenile court or in any other court permitted by law. Welf & I C §366.26(e)(1). The clerk must open a confidential adoption file for each child; this file must be separate and apart from the dependency file, with a number different from the dependency case number. Cal Rules of Ct 5.730(a)(4). The use of postadoption contact agreements under Fam C §8616.5 is also applicable and available to dependent children if the agreement was entered into voluntarily by all parties. Welf & I C §366.26(a); Cal Rules of Ct 5.451(b).

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

If a petition for adoption is filed in the juvenile court, the court must order a hearing on that petition to take place in juvenile court once the natural parents' appellate rights have been exhausted. Welf & I C §366.26(b)(1), (e); Cal Rules of Ct 5.725(e)(3). A report required by Fam C §8715 must be read and considered by the court before the adoption; the preparer of the report may be examined by any party to the adoption proceeding. Welf & I C §366.26(e)(1).

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

a. [§104.64] Identifying Adoption as the Plan Without Termination of Parental Rights

The court may also identify adoption or tribal customary adoption as the permanent placement goal without terminating parental rights and order that the agency responsible for seeking adoptive parents make efforts to locate an appropriate adoptive family within 180 days. Welf & I C §366.26(b)(4); Cal Rules of Ct 5.725(d)(6). This interim order is appropriate only when the child is difficult to place for adoption because of the child's membership in a sibling group or the diagnosis of a medical, physical, or mental disability or because the child is seven years of age or older. Welf & I C §366.26(c)(3); Cal Rules of Ct 5.725(d)(6). The court must not base a finding that the child is not likely to be adopted on the fact that the child is not currently placed in a pre-adoptive home or that there is no relative or foster family willing to adopt. Welf & I C §366.26(c)(1); Cal Rules of Ct 5.725(d)(2).

Once an order is made identifying adoptive placement as a goal within 180 days, the court must hold another hearing at the expiration of that period. Welf & I C §366.26(c)(3); Cal Rules of Ct 5.725(d)(6). At this hearing, the court must proceed with termination of parental rights and with the permanent plan of adoption (if the court can find that the child is likely to be adopted) or with legal guardianship or foster care (if such a finding cannot be made). See Welf & I C §366.26(c)(4)(A); Cal Rules of Ct 5.725(d)(5). *In re Ramone R.* (2005) 132 CA4th 1339, 1349–1351, 34 CR3d 344, and *In re Gabriel G.* (2005) 134 CA4th 1428, 1436–1438, 36 CR3d 847, interpreted Welf & I C §366.26(c)(3) as limiting the options for the court at the continued .26 hearing to only termination of parental rights or the appointment of a guardian, and barring consideration of continued foster care at the hearing.

Because the *probability* of adoption is not the same as *likelihood* of adoption, when the court has found a probability of adoption and continued the case for 180 days in order to identify adoptive parents, the mother may challenge that order on the basis that adoption is not likely. *In re Y. R.* (2007) 152 CA4th 99, 111, 60 CR3d 820, disapproved on other grounds in 46 C4th 529, 537.

An order identifying adoption as the eventual goal and requiring that DSS search for an appropriate adoptive family under Welf & I C §366.26(b)(4), (c)(3) is appealable when there is a probability of adoption

but the child is difficult to place. *In re S.B.* (2009) 46 C4th 529, 537, 94 CR3d 24.

b. [§104.65] Placement of Child

If the child has substantial ties to the foster parent or relative caretaker and that person wishes to adopt the child, that person will be given preference over other prospective adoptive parents if the agency placing the child determines that the child has such substantial emotional ties to that person that removal from that caretaker's custody would be seriously detrimental to the child's well-being. Welf & I C §366.26(k). "Preference" means that that person's application will be processed and the family study completed before the application of any other prospective adoptive parent is processed. Welf & I C §366.26(k). It does not create an evidentiary presumption, but merely places the relative caretaker at the head of the line). *In re Sarah S.* (1996) 43 CA4th 274, 286, 50 CR2d 503.

It is DSS, and not the court, that must determine both prongs of Welf & I C §366.26(k) (that the child has substantial ties to the relative caretaker *and* that removal would be seriously detrimental). *In re Lauren R.* (2007) 148 CA4th 841, 859, 56 CR3d 151.

The preference for placement with a relative, however, may be outweighed by the child's best interests even when the relative's home appears to be a good one. See *In re Stephanie M.* (1994) 7 C4th 295, 321, 27 CR2d 595 (placement decision made under Welf & I C §361.3 but made after the .26 hearing). Moreover, although relative placement has priority in the early stages of proceedings, an ongoing caretaker should receive preferential consideration later on. *In re Daniel D.* (1994) 24 CA4th 1823, 1834, 30 CR2d 245. Because the preference for placement with relatives under Welf & I C §361.3 applies only before the termination of reunification services, once a permanent plan is being considered, this preference switches to "relative *caretakers*" under Welf & I C §366.26(k). *In re Sarah S., supra,* 43 CA4th at 285–286. And once adoption has been made the permanent plan, the "caretaker preference" applies both before and after termination of parental rights. See *In re Lauren R., supra,* 148 CA4th at 855–856.

The Department of Social Services must consider all options and apprise the court of them so that the court is not misled into ordering foster care when adoption or guardianship might be possible. *In re John F.* (1994) 27 CA4th 1365, 1378, 33 CR2d 225. In any event, guardianship should always be considered before foster care. 27 CA4th at 1379; Welf & I C §366.26(c)(4)(A).

The court or parents' counsel are not required to advise parents of the availability of a postadoption agreement before parental rights are terminated. *In re Kimberly S.* (1999) 71 CA4th 405, 415–416, 83 CR2d

740. Nor must the court order DSS to provide the parents with the opportunity to negotiate such an agreement. *In re Zachary D.* (1999) 70 CA4th 1392, 1397, 83 CR2d 407.

c. [§104.66] Placement of Indian Child

The preference order for adoptive placement of an Indian child is for the child to be placed with (Welf & I C §361.31(c); 25 USC §1915(a); see Cal Rules of Ct 5.484(b)):

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

The preference order may be modified only for good cause (Welf & I C §361.31(h); 25 USC §1915(a); Cal Rules of Ct 5.484(b)(4)), except that the tribe may establish a different preference order (Welf & I C §361.31(d); 25 USC §1915(c); Cal Rules of Ct 5.484(b)).

The test to apply when determining whether there is good cause to overcome ICWA's placement preference in 25 USC §1915(a), (b) is a "substantial evidence" test, rather than one based on "abuse of discretion." *Fresno County Dep't of Children & Family Servs. v Superior Court* (2004) 122 CA4th 626, 645, 19 CR3d 155. In this case, the appellate court held that it was preferable to keep a traumatized Indian child in a stable non-Indian placement with a sibling than to move the child to a suitable Indian foster family.

A tribal policy against adoption of dependent children is not entitled to full faith and credit under ICWA in light of the state's compelling interest in providing stable permanent homes for children who are not able to reunify with their parents, particularly when the tribe has neither intervened nor petitioned the court for transfer to tribal jurisdiction. *In re Laura F.* (2000) 83 CA4th 583, 594–595, 99 CR2d 859. In addition, despite former Welf & I C §360.6 (now Welf & I C §224), ICWA does not apply to remove a multi-ethnic child with some Indian heritage from his prospective adoptive parents when the child's minimal relationship to his biological parents (who themselves have virtually no relationship with their Indian tribes) is not sufficient to overcome the child's right to remain in a home where he is loved and well cared for. *In re Santos Y.* (2001) 92 CA4th 1274, 1315–1316, 112 CR2d 692. In such limited circumstances, the child's constitutional right to a stable home outweighs the statutory provisions of the ICWA. *In re Santos Y., supra*; but see *In re Vincent M.* (2007) 150 CA4th 1247, 1265–1266, 59 CR3d 321 (court held that

children have an interest in a stable home, but not a constitutional right to one).

For a discussion of tribal customary adoption, see §104.60.

d. [§104.67] Designating Prospective Adoptive Parents

At the .26 hearing or at a later time, the court may designate a current caretaker as a prospective adoptive parent when the child has lived with that caretaker for at least six months, has made a commitment to adopt the child, and has taken at least one step to facilitate that process. Welf & I C §366.26(n)(1). In making this designation, the court may consider whether the caretaker is listed in the Welf & I C §366.21(i) assessment and may consider the recommendation of the State DSS or licensed adoption agency. Welf & I C §366.26(n)(1). A designation as a prospective adoptive parent under Welf & I C §366.26(n) does not make a parent a party to a dependency proceeding. Welf & I C §366.26(n)(3)(C). Procedures for removal from the home of a prospective adoptive parent are set out in Welf & I C §366.26(n)(3) and (4). Prospective adoptive parents do not have a due process right to appointed counsel. *R.H. v Superior Court* (2012) 209 CA4th 364, 373, 147 CR3d 8.

e. [§104.68] Process After Parental Rights Have Been Terminated

If parental rights are terminated or an Indian child is declared eligible for tribal customary adoption, the court must order the child referred to the State DSS or a licensed adoption agency for adoptive placement. Welf & I C §366.26(j). State DSS or the licensed adoption agency will be responsible for custody and supervision of the child until the adoption is granted. Welf & I C §366.26(j). With the agency's consent, the court may appoint a guardian to serve temporarily until the child is adopted. Welf & I C §366.26(j).

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

After three years have passed (or even earlier on stipulation of the child and State DSS that the child is not likely to be adopted), the court may hold a hearing to determine if there should be reinstatement of parental rights. Welf & I C §366.26(i)(3). See discussion in §104.80.

Because the State DSS or a licensed adoption agency has the exclusive care and control of the child under Welf & I C §366.26(j) from the time adoption is selected as the permanent plan until the child is adopted, a court may not order the child placed in a foster home different

from that selected by DSS unless the DSS decision was clearly absurd or not in the child's best interests. *Department of Social Servs. v Superior Court* (1997) 58 CA4th 721, 734, 68 CR2d 239. Generally, the court may not substitute its independent judgment for that of DSS unless DSS has abused its discretion. *In re Hanna S.* (2004) 118 CA4th 1087, 1092, 13 CR3d 338.

Because an order terminating parental rights extinguishes the rights of any known or unknown person, claiming to be the father, the court lacks jurisdiction to modify the final termination order to grant presumed father status to an interested party. *In re Jerred H.* (2004) 121 CA4th 793, 798–799, 17 CR3d 481.

3. Legal Guardianship

a. [§104.69] In General

If the court finds termination of parental rights or adoption is not in the child's best interests or that termination would be detrimental to the child under Welf & I C §366.26(c)(1)(B), it may appoint a legal guardian for the child at the .26 hearing and issue letters of guardianship. Welf & I C §366.26(b)(3) (relative guardianship), §366.26(b)(5) (nonrelative guardianship); Cal Rules of Ct 5.725(d)(6). Under Welf & I C §366.26(b)(3), relative guardianship is second only to adoption as a permanent plan and is preferable to identifying adoption or tribal customary adoption as a *future* goal under Welf & I C §366.26(b)(4). And when the child is living with a relative who is willing to provide a stable home through guardianship but does not agree to adoption (although not because of unwillingness to accept legal or financial responsibility), and to remove the child from that relative's custody would be detrimental, it appears that the court must choose legal guardianship. Welf & I C §366.26(c)(1)(A); Cal Rules of Ct 5.725(d)(2)(B). In that instance, termination of parental rights and therefore adoption would be precluded. Welf & I C §366.26(c)(1)(A). In any case, if a guardianship with an approved relative is established at a .26 hearing and dependency is dismissed, the child is eligible for aid under the kin-GAP program. Welf & I C §361.5(h).

Legal guardianship must always be considered before foster care if it is in the child's best interests and a suitable guardian is found. Welf & I C §366.26(c)(4)(A). However, guardianship should not be ordered if to do so would mean moving the child from caretakers who do not wish to assume a guardianship role and removal of the child from the caretakers would seriously impair the child's emotional well-being. Welf & I C §366.26(c)(4)(B); Cal Rules of Ct 5.725(d)(6)(D). Moreover, the court is not necessarily bound by an agreement between the parents and other relatives for a permanent plan of guardianship. *In re Jason E.* (1997) 53

CA4th 1540, 1548, 62 CR2d 416 (in this case, there were adoptive parents who were willing and able to adopt the child).

A child for whom a legal guardianship has been established remains within the jurisdiction of the juvenile court until dependency is terminated. See Welf & I C §366.4(a). If a relative was appointed legal guardian and the child had been placed with that relative for at least six months, the court must terminate dependency jurisdiction and retain jurisdiction over the child as a ward of the guardianship except when the relative guardian objects or on a finding of exceptional circumstances. Welf & I C §366.3(a). The objection of a relative guardian to the termination of dependency does not require that dependency be maintained, but can be considered by the court in deciding whether exceptional circumstances exist to justify maintaining dependency. See Welf & I C §366.3(a).

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

The court may not dismiss dependency when there is a permanent plan of long-term placement with a relative not amounting to a guardianship. *In re Rosalinda C.* (1993) 16 CA4th 273, 277–279, 20 CR2d 58. In the absence of an adoption or legal guardianship, continued supervision is necessary because otherwise there is no one with legal custody of the child and no guaranty that the placement is permanent. 16 CA4th at 279.

And even if there is a guardianship in place, if the child is nearly 18 years of age but would be unable to function on his or her own because of various mental and emotional disabilities, the court may terminate the guardianship and continue jurisdiction. See *In re D.R.* (2007) 155 CA4th 480, 487, 488, 66 CR3d 151 (child had been in a guardianship, and court had erroneously refused to reinstate dependency jurisdiction).

The court may appoint an out-of-state guardian for a child when that person is fully capable of taking care of the child's needs. *In re K.D.* (2004) 124 CA4th 1013, 1018, 21 CR3d 711 (guardian was loving and affectionate with child and had hospital access and specialized ability to deal with medical needs). Moreover, the court may appoint a person with a criminal record as a guardian despite Welf & I C §361.4 (excluding those with criminal records from becoming guardians) if the guardianship would

be in the child's best interests. *In re Summer H.* (2006) 139 CA4th 1315, 1321, 1334, 43 CR3d 682.

b. [§104.70] Procedure

The appointment of a legal guardian must be made in the juvenile court as part of the .26 hearing. See Welf & I C §366.26(d); Cal Rules of Ct 5.725(f), 5.735(b). The request for appointment of a guardian may be included in the social study report prepared by DSS, and no separate petition is needed. Cal Rules of Ct 5.735(a), (c). Notice of the guardianship hearing must be given according to Welf & I C §294. Cal Rules of Ct 5.735(b).

An assessment that includes an evaluation of the child's medical, developmental, scholastic, mental, and emotional status and an appraisal of prospective guardians and the child's feelings towards them, including tribal customary adoptive parents in the case of an Indian child (see Welf & I C §§361.5(g)(1)(C), (D), 366.21(i), 366.22(c)(1), 366.25(b)(1)), must be read and considered by the court before the letters of guardianship may be issued. Welf & I C §366.26(d); Cal Rules of Ct 5.735(c)(1). Any party to the guardianship proceeding may call and examine the preparer of the assessment. Welf & I C §366.26(d); Cal Rules of Ct 5.735(c)(2). The judge must note in the minutes that he or she has considered the report. Welf & I C §366.26(d); Cal Rules of Ct 5.735(c)(1).

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

The court may also order visitation with the parent or other relative. Cal Rules of Ct 5.735(d)(2). Under Welf & I C §366.26(c)(4), the court may delegate to the legal guardian the authority to decide the time, place, and manner in which visitation may take place, but the court must specify that the parent has a right to visitation, as well as the frequency and duration of the visitation. *In re M.R.* (2005) 132 CA4th 269, 274, 33 CR2d 629; *In re Rebecca S.* (2010) 181 CA4th 1310, 1314, 104 CR3d 706. The Legislature, in amending Welf & I C §366.26(c)(4)(C), made clear its intent to require juvenile courts to make visitation orders in both long-term foster care placements and legal guardianships. *In re M.R., supra*.

The court may terminate dependency once a guardian is appointed under Welf & I C §366.26. Cal Rules of Ct 5.735(d)(3). But if a court orders legal guardianship accompanied by continued visitation with the mother, it must continue jurisdiction to oversee the visitation. *In re K.D.* (2004) 124 CA4th 1013, 1018, 1019, 21 CR3d 711. Therefore, when establishing a legal guardianship, the court may not terminate jurisdiction

and refer any issues regarding visitation to family court. *In re Kenneth S.* (2008) 169 CA4th 1353, 1359, 87 CR3d 715.

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

c. [§104.71] Indian Child

The court may not order guardianship for an Indian child unless the court finds by clear and convincing evidence that continued custody with the Indian parent or custodian is likely to cause serious emotional or physical harm. Welf & I C §361.7(c); Cal Rules of Ct 5.484(a). Testimony of a qualified expert witness is required. Welf & I C §361.7(c); see Cal Rules of Ct 5.484(a)(1). The court must also find that active efforts have been made to provide remedial services and rehabilitative programs and that these efforts have been unsuccessful. Welf & I C §366.26(c)(2)(B); Cal Rules of Ct 5.484(c).

After establishment of a legal guardianship of an Indian child, if DSS becomes aware that tribal customary adoption might be an appropriate plan for the child, the court may consider vacating a previous order dismissing dependency and order a new .26 hearing. Welf & I C §366.3(c). For a discussion of tribal customary adoption, see §104.60.

The court has the discretion to reject a permanent plan of guardianship selected by the child's tribe. *In re T.S.* (2009) 175 CA4th 1031, 1040, 96 CR3d 706 (in this case, the court chose adoption instead).

4. Foster Care

a. [§104.72] In General

At a .26 hearing, the court may order that the child be placed in foster care subject to the regular review of the juvenile court. Welf & I C §366.26(b)(6); Cal Rules of Ct 5.725(d)(6). If no suitable foster homes are available, the court may transfer custody of the child to a licensed foster family agency subject to further orders of the court. Welf & I C §366.26(c)(5); Cal Rules of Ct 5.725(d)(9). When the court orders a child who is 10 years of age or older to remain in foster care, the court must determine whether DSS has made reasonable efforts to maintain the child's relationships with people who are important to the child. Welf & I C §366.21(g); see Welf & I C §366.22(a).

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

Any preference for placement with a relative may be outweighed by the child's best interests even when the relative's home appears to be a good one. See *In re Stephanie M.* (1994) 7 C4th 295, 321, 27 CR2d 595 (placement decision made post .26).

If a child becomes likely to be adopted after a permanent plan of foster care has been implemented, the court may change the permanent plan at a postpermanency planning review hearing in the absence of a petition for modification. *San Diego County Dep't of Social Servs. v Superior Court* (1996) 13 C4th 882, 887–890, 55 CR2d 396. Indeed, the court must proceed under the assumption that foster care is not appropriate and must consider more permanent types of placements at this stage in the proceedings. 13 C4th at 888. However, as with review hearings held during the reunification phase, a §388 petition brought between postpermanency planning review hearings is the means for dealing with altered circumstances requiring changes in the child's plan. See Welf & I C §388.

If there is to be visitation between a child in foster care and his or her parents, the order must come from the court. *In re M.R.* (2005) 132 CA4th 269, 274, 33 CR2d 629; see Welf & I C §366.26(c)(4)(C).

b. [§104.73] Indian Child

The placement of an Indian child in a pre-adoptive or foster home must be made according to the social and cultural standards of the Indian community in which the parent or family member is most connected; it must be in the least restrictive setting close to the Indian child's home and capable of meeting the child's special needs. 25 USC §1915(b), (d); Cal Rules of Ct 5.484(a). The preference order for foster placement is set out in Welf & I C §361.31(b) and 25 USC §1915(b), and for adoptive placement in Welf & I C §361.31(c) and 25 USC §1915(a).

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

organization and offering programs to meet the Indian child's needs	

The preference order may be modified only for good cause or by tribal resolution. See Welf & I C §361.31(d), (g); 25 USC §1915(b)–(c); Cal Rules of Ct 5.484(b)(2), (4). The burden of proof for establishing good cause to alter the preference order is on the party seeking a different preference order. Welf & I C §361.31(j); Cal Rules of Ct 5.484(b)(3).

The court may not order foster care placement for an Indian child unless it finds by clear and convincing evidence that continued custody with the Indian parent or custodian is likely to cause serious emotional or physical harm. Welf & I C §§366.26(c)(2)(B), 361.7(c); 25 USC §1912(e); Cal Rules of Ct 5.484(a). Testimony of a qualified expert witness is required. Welf & I C §361.7(c); Cal Rules of Ct 5.484(a)(1). The court must also find that active efforts have been made to provide remedial services and rehabilitative programs and that these efforts have been unsuccessful. Cal Rules of Ct 5.484(c); see also Cal Rules of Ct 5.485(a) (to terminate parental rights, the court must find that active efforts have been made to provide remedial services and rehabilitative programs).

H. [§104.74] Right to Modification or Appeal

An order terminating parental rights, ordering adoption under Welf & I C §366.26, or, in the case of an Indian child, ordering tribal customary adoption under Welf & I C §366.24 is conclusive and binding on the child, the parents, and on all others who have been served under Welf & I C §294. Welf & I C §366.26(i)(1); Cal Rules of Ct 5.725(e)(2). Although the order may be appealed, the trial court generally has no power to set it aside or change it. Welf & I C §366.26(i)(1). Once the court makes a termination order, it may not stay execution of that order. *In re Melvin A.* (2000) 82 CA4th 1243, 1248–1249, 98 CR2d 844. Postjudgment evidence may not be used as a basis for reversing a juvenile court order terminating parental rights except possibly in a rare and compelling case. *In re Zeth S.* (2003) 31 C4th 396, 400, 413–414, 2 CR3d 683.

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

The only exception to the finality of an order terminating parental rights is when a child has not been adopted after three years have passed from that order, and the court has determined that adoption is no longer the permanent plan; in such a case the court may reinstate parental rights under certain circumstances. Welf & I C §366.26(i)(3). See discussion in §104.81.

Once an order terminating parental rights has been made, a placement order is not appealable unless a petition for extraordinary writ, which

addressed the substantive issues, was timely filed and summarily denied. See Welf & I C §366.28(b).

Parents may not appeal an order terminating reunification services and setting a .26 hearing as part of an order terminating parental rights unless all the following apply: a petition for a writ was filed in a timely manner, the petition substantively addressed the issues challenged and was supported by an adequate record, and the writ petition was summarily denied or otherwise not decided on the merits. Welf & I C §366.26(*l*)(1)(A)–(C). Failure of the aggrieved party to file a timely petition for an extraordinary writ, to substantively address the issues challenged, or to support the challenge by an adequate record will preclude subsequent review by appeal of the findings and orders made at the .26 hearing. Welf & I C §366.26(*l*)(2). Such a failure precludes appellate review only of issues included in the order setting the .26 hearing; it does not affect appellate review of any matters arising out of the .26 hearing itself. *Sue E. v Superior Court* (1997) 54 CA4th 399, 405, 62 CR2d 726. But see *In re Janee J.* (1999) 74 CA4th 198, 208–209, 87 CR2d 634 (allowing issues to be raised on appeal from the .26 hearing if there was a fundamental defect that prevented parent from pursuing writ relief).

One court has held that a judgment terminating parental rights may not be attacked by a writ of habeas corpus when the parents made no claims to error at any earlier points in the proceedings. See *In re Meranda P.* (1997) 56 CA4th 1143, 1163, 65 CR2d 913. But see *In re Darlice C.* (2003) 105 CA4th 459, 466, 129 CR2d 472 (declining to follow *In re Meranda P.*, the court stated that a termination order may be reviewed by habeas corpus).

In addition, termination of parental rights may not be attacked by a parent for failure to comply with ICWA when the issue was not raised at the .26 hearing, in spite of the parent's being aware of the child's potential Indian status. *In re Derek W.* (1999) 73 CA4th 828, 832, 86 CR2d 742.

A parent cannot appeal the setting of a .26 hearing after filing a writ petition which is denied on the merits. *In re Julie S.* (1996) 48 CA4th 988, 990, 56 CR2d 19. See discussion of effect of failure to file a petition for extraordinary writ review in §104.19.

1. [§104.75] Hearing on Petition for Modification Under Welf & I C §388

Once reunification services have been denied or terminated, the court need not reconsider the plan unless the parent had filed a petition under Welf & I C §388 *before* the .26 hearing was held and showed that changed circumstances require a change in the court's orders. See *In re Baby Boy L.* (1994) 24 CA4th 596, 609–610, 29 CR2d 654. The change of circumstances necessary for holding a modification hearing after a .26

hearing has been *set* may relate to the parents as well as the children. The completion by the parent of a reunification plan for siblings who were then able to return home may be a sufficient change of circumstance to warrant holding a §388 hearing even though the children's circumstances have not changed. *In re Daijah T.* (2000) 83 CA4th 666, 674–675, 99 CR2d 904. Further, the allegation that return to the parent would facilitate keeping a bonded sibling group together may be a sufficient showing to find a change of orders may be best for the children, thus necessitating the granting of a hearing on the §388 petition. *In re Daijah T., supra*.

A .26 hearing is not a substitute for a hearing on the modification petition that seeks return of the child, because at the .26 hearing return is not an option, and the evidence received is therefore different. *In re Aljamie D.* (2000) 84 CA4th 424, 433, 100 CR2d 811. At a modification hearing held to modify a .26 hearing, due process requires that the court permit live witness testimony if there is a contested hearing with an issue of credibility. *In re Clifton V.* (2001) 93 CA4th 1400, 1405, 114 CR2d 1.

Once parental rights have been terminated, however, the juvenile court has no jurisdiction to entertain a subsequent motion for modification under Welf & I C §388 (*In re Ronald V.* (1993) 13 CA4th 1803, 1806, 17 CR2d 334 (time for appeal had passed)) or for visitation with a child in a group home (*Amber R. v Superior Court* (2006) 139 CA4th 897, 901–903, 43 CR3d 297). This is true even if there was inadequate service and therefore no personal jurisdiction over the father (*David B. v Superior Court* (1994) 21 CA4th 1010, 1018, 26 CR2d 586) or when there is intentional misrepresentation about the potential adoptive placement (*In re David H.* (1995) 33 CA4th 368, 385, 39 CR2d 313).

And a court may set a new .26 hearing to change the permanent plan from guardianship to adoption under Welf & I C §366.3(c) without having first heard a petition for modification under Welf & I C §388. *David L. v Superior Court* (2008) 166 CA4th 387, 392–393, 83 CR3d 14.

2. [§104.76] Who May Initiate Appeal/Standing

An appeal on behalf of a parent will not be valid if the parent does not initiate it. *In re Alma B.* (1994) 21 CA4th 1037, 1043, 26 CR2d 592 (appeal from setting of .26 hearing initiated by parent's counsel based on parent's desire to be reunited with children). Lack of consent may be demonstrated by a parent's actions that show no interest in preserving parental rights. *In re Sean S.* (1996) 46 CA4th 350, 352, 53 CR2d 766 (parent had telephoned attorney and stated she was not going to appear at the .26 hearing). When the mother was present at the time the court set the .26 hearing and raised no objection, she may not object for the first time on appeal. *In re Kevin S.* (1996) 41 CA4th 882, 886, 48 CR2d 763 (mother had also submitted the matter on the recommendations in the social study).

When the parent has not received notice of the hearing, however, the parent need not have personally authorized the appeal. *In re Steven H.* (2001) 86 CA4th 1023, 1031, 103 CR2d 649.

A parent cannot raise an issue on appeal that does not affect his or her own rights. *In re Devin M.* (1997) 58 CA4th 1538, 1541, 68 CR2d 666 (child's bond with foster parents); *In re Jasmine J.* (1996) 46 CA4th 1802, 1806–1808, 54 CR2d 560 (child's relationship with siblings); *In re Nachelle S.* (1996) 41 CA4th 1557, 1562, 49 CR2d 200 (child's visitation with siblings); *In re Gary P.* (1995) 40 CA4th 875, 876, 46 CR2d 929 (child's relationship with grandparent); *In re Joshua M.* (1997) 56 CA4th 801, 807, 65 CR2d 748 (ineffectiveness of other parent's counsel); *In re Caitlin B.* (2000) 78 CA4th 1190, 1194, 93 CR2d 480 (failure to give proper notice to other parent).

Neither a parent whose parental rights have been terminated nor a sibling has standing to seek review on the issue of sibling contact. *In re Cliffton B.* (2000) 81 CA4th 415, 425–427, 96 CR2d 778; *In re Frank L.* (2000) 81 CA4th 700, 702–704, 97 CR2d 88. Moreover, an alleged biological father who is not a party of record has no standing to appeal an order terminating parental rights. *In re Joseph G.* (2000) 83 CA4th 712, 715, 99 CR2d 915 (alleged father was notified of proceedings but never appeared). Nor does a mother have the standing on appeal to raise the issue of an unknown biological father's lack of due process. *In re Anthony P.* (2000) 84 CA4th 1112, 1117, 101 CR2d 423.

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

And an appeal from termination of parental rights of a parent is rendered moot by that parent's death. *In re A.Z.* (2010) 190 CA4th 1177, 1181, 118 CR3d 663.

I. Subsequent Hearings

1. [§104.77] Adoption

If parental rights have been terminated, the child remains a dependent until adopted, after which time the court must terminate jurisdiction. Welf & I C §366.3(a); Cal Rules of Ct 5.740(a)(2). Before adoption, the court may review DSS's exercise of discretion regarding post-termination placement, and DSS has the burden of establishing the appropriateness of the placement. *Fresno County Dep't of Children & Family Servs. v Superior Court* (2004) 122 CA4th 626, 650, 19 CR3d 155. If there is a postadoption contact agreement, the adoption court must maintain jurisdiction over the child in order to have the ability to enforce the agreement. Welf & I C §366.29(c).

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

There is a split of opinion as to whether appellate courts should overturn permanent plans of adoption that were free from error when they were made, but that were subsequently revealed as flawed because the children in question were not actually adopted as planned. One case has held that because the law abhors legal orphanage, appellate courts must use the best interests of the child when adoption fails during the postjudgment period, rather than merely looking for prejudicial error during the handling of the case in the lower court. *In re Jayson T.* (2002) 97 CA4th 75, 85–88, 118 CR2d 228. *Jayson T.* suggests that appellate courts should send cases back to juvenile courts for redetermination of the adoptability issue in light of subsequent facts that have cast doubt on the prior adoptability finding. 97 CA4th at 78, 86–91. But see *In re Heather B.* (2002) 98 CA4th 11, 13–15, 119 CR2d 59, holding that the fact that a prospective adoption has failed does not permit an appellate court to relitigate the adoptability issue nor overturn a termination of parental rights unless there has been error in the lower court.

In any case, in considering whether to return a child to the home of prospective adoptive parents after removal under Welf & I C §366.26(n), the court may consider facts subsequent to the removal and not just the facts as they were at the time of removal. *State Dep't of Social Serv*s. *v Superior Court* (2008) 162 CA4th 273, 286–287, 76 CR3d 112. And in a hearing held under Welf & I C §366.26(n) to remove a child from his or her caretakers (who are also prospective adoptive parents), following termination of parental rights, the court must permit these caretakers to fully participate in the hearing. *Wayne F. v Superior Court* (2006) 145 CA4th 1331, 1342–1343, 52 CR3d 519

2. [§104.78] Legal Guardianship

Establishment of a legal guardianship should be ordered at the hearing under Welf & I C §366.26. See Welf & I C §366.26(d). However, if guardianship is not ordered, but a legal guardianship plan is adopted, the court must retain jurisdiction and conduct review hearings at least every six months to ensure completion of the guardianship. Welf & I C §366.3(a), (k); Cal Rules of Ct 5.740(a). Once the legal guardianship has been completed, the court may choose to terminate dependency

jurisdiction or to retain jurisdiction over the child as a ward of the guardianship. Welf & I C §§366.3(a), 366.4(a); Cal Rules of Ct 5.740(a)(3). In a relative guardian situation, unless there are exceptional circumstances, the court must terminate dependency jurisdiction and retain jurisdiction over the child as a ward of the guardianship. Welf & I C §366.3(a). See discussion in §104.69.

A petition to terminate the guardianship, to appoint an additional or successor guardian, or to modify or supplement guardianship orders must be filed and heard either in juvenile court that has jurisdiction over the guardianship (see Welf & I C §366.4) or the court in which the child and guardian reside. See Welf & I C §366.3(b); Cal Rules of Ct 5.740(c). If the legal guardianship is terminated, the court may continue or resume dependency if the child is still in need of court protection, and if the child is not returned to a parent, the court may order reunification services for a six-month period, set a new hearing under Welf & I C §366.26, or order foster care. See Welf & I C §366.3(b); Cal Rules of Ct 5.740(b), (c). Before a guardianship may be terminated and the children placed in foster care, the court must consider whether sufficient maintenance services have been provided to permit the guardianship to continue. *In re Jessica C.* (2007) 151 CA4th 474, 483–484, 59 CR3d 855. The best interests of the child is the standard to use when terminating a guardianship. *In re Jacob P.* (2007) 157 CA4th 819, 831, 68 CR3d 817.

Moreover, the court changed the permanent plan from guardianship to adoption under Welf & I C §366.3(c) by setting a new .26 hearing and without having first heard a petition for modification under Welf & I C §388. *David L. v Superior Court* (2008) 166 CA4th 387, 392–393, 83 CR3d 14.

3. [§104.79] Foster Care

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

- Status must be reviewed at least every six months.
- This review may be by an appropriate local administrative review panel rather than by the court, provided that the court conduct a review on request of the child, nonminor dependent, parent, or guardian or when 12 months has elapsed since holding a .26 hearing, review hearing, or hearing at which foster care was ordered, and at least every 12 months thereafter.
- The parents are entitled to receive notice of, and participate in, those hearings, except for parents of nonminor dependents.

- If, at a review hearing, the parents prove by a preponderance of the evidence that further reunification services would be the best alternative for the child, the court may order further services for up to six months.
- At these hearings, the court must consider all permanency planning options, including whether the child should be returned to the parent or guardian, placed for adoption, have a guardianship established, or remain in foster care, or placed in another planned living arrangement. Welf & I C §366.3(h); Cal Rules of Ct 5.740(b)(8). In this regard, a planned permanent living arrangement may be a particularly stable foster-care placement, but it need not be, and foster care generally does not constitute such a permanent arrangement. *In re Stuart S.* (2002) 104 CA4th 203, 209, 127 CR2d 856.
- The court must hold a new .26 hearing unless it finds by clear and convincing evidence that such a hearing would not be in the child's best interests because the child is being returned home, he or she is not a proper subject for adoption, or there is no one available to assume guardianship care (Welf & I C §366.3(h); Cal Rules of Ct 5.740(b)(9)). No .26 hearing must be held, however, for a nonminor dependent. Welf & I C §366.3(i).
- The court may order the child to remain in foster care if it makes the findings of Cal Rules of Ct 5.740(b)(9) (Welf & I C §366.3(h); Cal Rules of Ct 5.740(b)(10)). The court may order that a nonminor dependent remain in a planned permanent living arrangement. Welf & I C §366.3(i)).
- If, at a review hearing, the parents prove by a preponderance of the evidence that further reunification services would be the best alternative for the child, the court may order further services for up to six months and family maintenance services as needed for an additional six months (Welf & I C §366.3(f)).

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

The review of a nonminor dependent who has a permanent plan of long term foster care must be held according to Welf & I C §366.31. In order to terminate dependency jurisdiction over such a dependent, the court must comply with Welf & I C §391. Moreover, even though jurisdiction may have been terminated and the nonminor left foster care, the nonminor may nevertheless petition the court to resume dependency

jurisdiction if he or she has not yet turned 21. Welf & I C §§303(c), 388(e); see California Judges Benchguide 103: *Juvenile Dependency Review Hearings* §§103.65–103.66 (Cal CJER). Any hearing to terminate jurisdiction over a child less than 18 years of age who is subject to an order for foster care placement is subject to the requirements in Cal Rules of Ct 5.812. Cal Rules of Ct 5.812(a)(3).

At a postpermanency planning hearing, the court or administrative panel must consider the case plan and permanent placement plan and must find that the child was or was not actively involved in developing these plans. Cal Rules of Ct 5.740(b)(2)(A). If it finds that the child was not actively involved, it must order DSS to involve him or her unless the court finds that the child is unable, unwilling, or unavailable to participate. Cal Rules of Ct 5.740(b)(2)(B).

If the child is 12 years of age or older and in a permanent placement, the court must consider the case plan and find either that the child was given the opportunity to review, sign, and receive a copy or was not given the opportunity; if the court found that the child did not have this opportunity, it must order DSS to provide the child with such an opportunity. Cal Rules of Ct 5.740(b)(3).

A court may change the permanent plan at a postpermanency planning review hearing held under Welf & I C §366.3 in the absence of a petition for modification. *San Diego County Dep't of Social Servs. v Superior Court* (1996) 13 C4th 882, 887–890, 55 CR2d 396. Indeed, the court is obligated to proceed under the assumption that foster care is not appropriate and to consider more permanent types of placements at this stage in the proceedings. 13 C4th at 888. However, as with review hearings held during the reunification phase, a §388 petition brought between postpermanency planning review hearings is the means for dealing with altered circumstances requiring changes in the child's plan. See Welf & I C §388.

The court need not hold a contested postpermanency planning hearing for a child in foster care in order to change or continue the permanent plan. *Maricela C. v Superior Court* (1998) 66 CA4th 1138, 1147, 78 CR2d 488. If there is an issue of credibility, however, the court must hold a contested hearing and permit live witness testimony. *In re Clifton V.* (2001) 93 CA4th 1400, 1405, 114 CR2d 1 (modification hearing). At the hearing (whether contested or uncontested), the court must consider all options, including whether the child should be returned home. *Maricela C. v Superior Court, supra.*

And when changed circumstances require the selection of a new permanent plan for a child in long-term foster care (in this case, the beneficial relationship exception to adoption no longer applied), the court may set a new .26 hearing without first holding an evidentiary hearing to determine whether to set this new hearing. *Sheri T. v Superior Court*

(2008) 166 CA4th 334, 339–341, 82 CR3d 410. If the court orders a new .26 hearing under Welf & I C §366.3(h), it must direct DSS and the licensed adoption agency, or the State DSS in a county without a county adoption agency, to prepare an assessment under Welf & I C §366.21(i) or §366.22(c)(1). Welf & I C §366.3(i). This hearing must be held no later than 120 days from the 12-month review at which it was ordered. Welf & I C §366.3(i).

4. [§104.80] Indian Child

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

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

When the Indian Child Welfare Act applies, a parent, the child, an Indian custodian, or the tribe may petition a court to invalidate a foster placement, guardianship, or termination of parental rights. 25 USC §1914; Cal Rules of Ct 5.486(a). If the child is a dependent child of the juvenile court or the subject of a pending petition, the juvenile court is the only court to hear the petition. Cal Rules of Ct 5.486(b). If a decree of adoption is set aside and a biological parent or Indian custodian petitions the court for return of the child, the court must reinstate jurisdiction and hold a new disposition hearing. Cal Rules of Ct 5.486(c)(1), (2). It may consider placement with the biological parent or former Indian custodian if that parent or custodian can show that such a placement would not be detrimental to the child and would in fact be in the child's best interests. Cal Rules of Ct 5.486(c)(3). The court must also set aside a tribal customary adoption order. See discussion in §104.60.

There is a split of opinion as to whether failure to raise ICWA notice requirements earlier may forfeit a parent's right to have the case reviewed. One court held that invoking the forfeiture doctrine because of the parents' failure to bring the issue to the court's attention contradicts the purpose of ICWA. *In re Alice M.* (2008) 161 CA4th 1189, 1196–1197, 74 CR3d 863. But another court held that when the mother failed to bring inadequacies in ICWA notice to the court's attention until the appeal, she forfeited her right to challenge the ICWA defects. *In re Amber F.* (2007) 150 CA4th 1152, 1156, 58 CR3d 874.

When there is continuing litigation to resolve ICWA compliance issues after remand following a writ challenging the setting of a .26

hearing, a parent may participate in that continuing litigation. *In re Justin S.* (2007) 150 CA4th 1426, 1435–1436, 59 CR3d 376.

5. [§104.81] Reinstatement of Parental Rights

When a child has remained unadopted after three years from the date the court terminates parental rights, the child may file a Welf & I C §388 petition to reinstate parental rights. Welf & I C §366.26(i)(3). The child may file such a petition before the three-year period has ended if the child and the state DSS (or licensed adoption agency responsible for custody and supervision of the child) stipulate that the child is no longer likely to be adopted. Welf & I C §366.26(i)(3).

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

6. [§104.82] Repayment of Legal Costs

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

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

IV. SCRIPTS

A. [§104.823] Script: Conduct of Hearing

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

(1) Appointment of Attorney for Parents or Guardians

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

[*Or*]

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

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

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

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

[*When applicable, add*]

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

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

(2) Attorney for Child

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

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

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

[*Or*]

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

(3) Continuance if New Counsel Needed

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

(4) Explanation of Procedure/Notification of Consequences

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

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

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

(5) Notice of Hearing

(a) One parent not present

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

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

(b) Both parents present

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

(c) Notice attempted

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

(d) Insufficient attempts at notice

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

(6) Waiver of Advisement of Rights

[*To each participant*]

Did your attorney explain your rights to you?
Note: Hearing rights are specified in Cal Rules of Ct 5.534(k).

Do you waive advisement of rights?

[*If the answer to both is yes, go to step 8.*]

(7) Advisement of Rights

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

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

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

See discussion in §104.23.

(9) Evidence

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

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

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

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

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

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

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

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

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

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

[*If necessary to ascertain the child's wishes, arrange for child's testimony. Make one or more of the following findings as appropriate to permit the child's testimony in chambers:*]

(1) It is necessary to take testimony in chambers to ensure truthful testimony.

(2) The child is likely to be intimidated by a formal courtroom setting.

(3) The child is frightened to testify in front of the parents [*Welf & I C §366.26(h)*].

(10) Final Question

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

B. [§104.834] Script: Findings and Orders

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

(1) Introduction

The court has read and considered [*name of documents, e.g., the assessment report of* [*date*]], which recommend [*adoption/eventual adoptive placement/guardianship/foster care*], and attached documents.

[*If applicable, add*]

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

(2) Termination of Parental Rights

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

[*If child is of Indian heritage*]

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

(3) Placement for Immediate Adoption

The parental rights of [*name of parents*] with respect to [*name of child*] shall be terminated and [*name of child*] shall be referred to [*name agency, e.g., licensed agency or State DSS*] for adoptive placement immediately.

(4) No Termination/180-Day Placement

Without terminating the parental rights of [*name of parents*] with respect to [*name of child*], the court orders that [*licensed agency or State DSS*] make efforts to locate an appropriate adoptive family within 180 days, that is, by [*date*].

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

(5) Termination of Parental Rights Precluded

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

[*Or*]

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

[*Or*]

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

[*Choose appropriate statement*]

[*Name of parents or guardians*] have maintained continuing visitation and contact with the [*name of child*] and [*name of child*] would benefit

from a continuation of that contact in that [*explain*]. [*Name of parents or guardians*] have assumed a parental role with respect to [*name of child*].

[*Or*]

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

[*Or*]

[*Name of child*] has been placed in a residential treatment facility, adoption is not likely or desirable, and continuation of parental rights will not prevent the child from finding a stable placement if the parents cannot resume custody when the child is released from residential care.

[*Or*]

[*Name of child*] is living with a [*name of relative or foster parent*] who is unwilling to adopt, but is willing to accept legal responsibility for [*name of child*] and to provide a stable home for [*name of child*], and removal of [*name of child*] from that placement would be emotionally detrimental to [*him/her*].

[*Or*]

[*Name of child who is the subject of the .26 hearing*] has a sibling relationship that is very important to [*him/her*], and termination of parental rights would create a substantial interference with that relationship so that termination of parental rights would be detrimental to [*name of child*], when compared with the benefits of legal permanence through adoption.

Note: The party claiming that termination would be detrimental to the child has the burden of proving the detriment. Cal Rules of Ct 5.725(d)(3). See discussion in §104.48.

(6) Legal Guardianship

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

Dependency of [*name of child*] is [*continued/dismissed*].

Visitation between the parents and [*name of child*] *is* [*to continue/terminated*].

(7) Foster Care

[*Name of child*] is to be placed in foster care subject to the regular court review**.**

Note: If no suitable foster homes are available, the court may transfer custody of the child to a licensed foster family agency, subject to further orders of the court. Welf & I C §366.26(b)(6); Cal Rules of Ct 5.725(d)(9). At subsequent hearings, when a nonminor dependent is in foster care, the court may order that he or she remain in a planned permanent living arrangement. Welf & I C §366.3(i).

(8) Future Hearings

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

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