



Preliminary Protective Hearing Benchcard

CASE MANAGEMENT – BEFORE THE HEARING

Persons who should be present at the preliminary protective hearing²

- Judge or judicial officer
- Parents of each child whose rights have not been terminated
 - Mothers, fathers (legal, biological, alleged, putative, named), non-custodial parents – all possible parents
- Child
- Assigned caseworker
- Agency attorney and/or prosecuting attorney
- Attorney for each parent
- Legal advocate for the child
- Guardian *ad Litem* (GAL); CASA
- Child's current placement (caregivers, foster parents, custodial adults, adoptive parents)
- All adult relatives of the child
 - Relatives (P.L. 110-351) with legal standing or other custodial adults, including adult half-siblings; paternal and maternal relatives
- Non-related extended family, fictive kin (persons known and trusted by the families; godparents)
- Parents of a sibling child, where such parent has legal custody of the sibling (P.L. 113-183)

In all states, the preliminary protective hearing must take place within a short time after the child has been removed from the home. The time limit is specified by state law and, in most states, must occur within one to three working days after removal.

The main purpose of the PPH is to determine if probable cause exists to remove a child or keep a child in shelter status pending further investigation of the case and whether removal can be avoided through reasonable efforts by the child welfare agency.

- If ICWA applies: Indian custodian; the child's tribe and attorney; tribal representative/tribal liaison; ICWA-qualified expert witness
- Treatment and/or service providers
- Parent partners, parent mentors if assigned/available, substance abuse coach, DV advocate
- Cultural leaders, cultural liaison, religious leaders
- Education liaison/school representative
- Education surrogate parent if appropriate
- Law enforcement
- Adult or juvenile probation or parole officer
- Court-certified interpreters or court-certified language services
- Court reporter
- Court security

Courts can make sure that parties and key witnesses are present by:

- ensuring that the judge, not the bailiff or court staff, makes the determination about who is allowed to be in the courtroom;
- asking the youth/family if there is someone else who should be present;
- requiring quick and diligent notification efforts by the agency;
- requiring both oral and written notification in a language understandable to each party and witness;
- requiring service/tribal notice to include the reason for removal, purpose of the hearing, and availability of legal assistance in a language and form understandable to each party and witness;
- requiring caseworkers and/or protective service investigators to facilitate attendance of children, parents, relatives (paternal and maternal), fictive kin, and other parties;
- facilitating telephonic or video conferencing appearance at hearings; and
- implementing time-certain calendaring.

Review relevant documents

REVIEW THE PETITION³

- A sworn petition or complaint should be filed prior to the PPH and served/provided to the parents and their counsel.
- The petition should be specific about the facts that bring the child before the court.
- The petition should not be conclusory without relevant facts to explain and support the conclusions.
- Petitions need to include allegations specific to each legal parent or legal guardian if appropriate.
- **If the petition does not contain allegations against a legal parent or legal guardian, the child should be placed with or returned to that parent or legal guardian.**
- Petitions/removal affidavits need to include specific language clearly articulating the current threat to the child's safety.

The court should require submission of agency and/or law enforcement reports at least one hour prior to the PPH.

Reports to the court should describe all circumstances of removal, any allegations of abuse or neglect, and all efforts made to try to ensure safety and prevent the need for removal.

Consider whether there are any related cases in juvenile or other courts

- Are there other family, delinquency, domestic violence, probate, guardianship, or criminal cases or orders of protection involved in this case?
- Can these cases be consolidated before one judge?
- Is there a potential for duplicative or conflicting orders?
- Can the judges consult?

CONDUCTING THE PRELIMINARY PROTECTIVE HEARING

Opening the Hearing

- Call the case.
- Identify the people in the courtroom and their connection to the case.
- Explain the type and purpose of the hearing.

Due Process Considerations

- IDENTIFICATION OF PARENTS AND/OR GUARDIANS
 - Who are the child's parents and/or guardians?
 - Have the identity and location of all parents and/or guardians been determined?
 - If not, what diligent search efforts have been made for all parents and/or guardians?
Are they sufficient?
 - Has paternity of all children been legally established? If so, how?
 - Have efforts to identify and locate fathers been sufficient? What has been done?
- NOTICE
 - How were the parents/guardians and foster parents notified of this hearing?
 - Was the notice in a language and form understandable to the parents/guardians and foster parents?
 - Has the agency exercised due diligence to identify and provide notice to all adult relatives of the child's removal and their options to participate in the child's care and placement? (42 U.S.C. § 671(a)(29))
 - Has the agency exercised due diligence to provide notice to all parents of a sibling of the child, where such parent has legal custody of the child? (P.L. 113-183 § 471(a)(29))
 - Verify that relatives who requested notice actually received notice to attend the hearing (P.L. 110-351 § 103).⁴

- **REPRESENTATION**

- Are the **parents** entitled to representation?
- Are there language issues to consider in appointing counsel?
- Does counsel have sufficient training and experience to provide competent representation in this case?
- Has counsel had sufficient opportunity to consult with his/her client prior to the hearing?
- Has counsel been appointed to represent the **child**?
- Does counsel have sufficient training and experience to represent the child in this case?
- Has counsel met with the child in person? Is he able to determine and advocate the child's position?
- Should the court appoint a Guardian *ad litem* and/or CASA for the child?

- **UNDERSTANDING AND COMPETENCY**

- Do the parents understand the allegations and the purpose of the hearing?
- Are there parental competency issues?

- **APPLICABILITY OF OTHER FEDERAL LAWS AND REGULATIONS**

- Do the provisions of the Americans with Disabilities Act, Service Members Civil Relief Act, Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), Interstate Compact on the Placement of Children (ICPC), or other federal law apply to this case?⁵

Engage parents and any children or relatives present

- What language are you most comfortable speaking and reading?
- Do you understand what this hearing is about? (Explain the purpose of the hearing.)
- Do you understand the petition? (Review the petition with parties.)
- Were you involved in any ADR process used before this hearing? If yes, what was the outcome?
- What family members and/or other important people should be involved in this process?

KEY INQUIRIES, ANALYSES, FINDINGS, AND DECISIONS AT THE PRELIMINARY PROTECTIVE HEARING

REFLECTIONS ON THE DECISION-MAKING PROCESS TO PREVENT BIAS

Take a moment before every hearing or before making decisions in a case to ask yourself:

- What assumptions have I made about the cultural identity, genders, and background of this family?
- What is my understanding of this family's unique culture and circumstances?
- How is my decision specific to this child and this family?
- How has the court's past contact and involvement with this family influenced (or might influence) my decision-making process and findings?
- What evidence has supported every conclusion I have drawn, and how have I challenged unsupported assumptions?
- Am I convinced that reasonable efforts (or active efforts in ICWA cases) have been made in an individualized way to match the needs of the family?
- Am I considering relatives as preferred placement options as long as they can protect the child and support the permanency plan?
- Have I placed the child in foster care as a last resort?
- Have I integrated the parents, children, and family members into the hearing process in a way that ensures they have had the opportunity to be heard, respected, and valued? Have I offered the family and children the chance to respond to each of the questions from their perspective?
- Is this family receiving the same level and tailoring of services as other families?
- Is the parents' uncooperative or negative behavior rationally related to the involvement of the agency and/or the court?
- If this were my child, would I be making the same decision? If not, why not?

Indian Child Welfare Act (ICWA) Determination

Inquire as to whether the child or parents may be of Native American heritage (25 U.S.C. §§ 1903, 1912, and 1922). If such heritage is a possibility, until such a determination is made, the court should proceed as if ICWA applies.

- Has an ICWA determination been made? If yes, different standards apply; refer to the ICWA Checklist.⁵
- If ICWA applies, inquire whether:
 - The party seeking the adjudication has notified the parent or Indian custodian and the Indian child's tribe of the hearing by registered mail with return receipt requested (25 U.S.C. § 1912).
 - There is a qualified expert witness who will be providing testimony about the imminent risk of serious physical or emotional harm to the child if left in the custody of the parents (25 U.S.C. § 1912(e)).
- If an ICWA determination has not been made, does ICWA apply? Refer to the ICWA Checklist.⁶

Key decisions and findings at the adjudication hearing

- **BEFORE ADJUDICATION IN ANY CASE**
 - Are there specific allegations as to each parent?
 - Which allegations have been proven by the applicable burden of proof?⁷
 - Are the allegations, as proven or admitted, legally sufficient to support a finding of abuse, neglect, or dependency? If not, dismiss the dependency and order custody of the child returned to the parents or legal guardians.
 - If there are no allegations or the state is not proceeding as to one or more parents, determine whether the court has statutory authority to take jurisdiction.⁸
- **IS THE PARENT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVING HIS/HER TRIAL RIGHTS? [See sample colloquy]**
 - Does the parent have the capacity to enter an admission?
 - Has the parent been advised by counsel of, and does he/she understand, the rights waived and direct and potential short- and long-term consequences of an admission?
 - Is the admission or consent voluntary?

- Do the pleadings outline specifically the basis for state intervention in a manner that will support specific services rationally related to the jurisdictional findings the court will be asked to make?
- Have the pleadings been amended to reflect the agreement of the parties?
- Is testimony or other evidence necessary to support an admission or consent?
- Do the parents have any questions for the judge regarding the stipulation?

• **IN ICWA CASES, DETERMINE: [See ICWA Adjudication Checklist for more detail]⁹**

- Whether the child is an Indian child under ICWA (25 U.S.C. § 1903(4));
- Whether the state court lacks jurisdiction because the child is already a ward of a tribal court (25 U.S.C. § 1911(a));
- Whether there is evidence, including the **testimony of a qualified expert witness**, that proves by **clear and convincing evidence** that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child (25 U.S.C. § 1912(e));
- Whether the agency made **active efforts** to provide remedial services and rehabilitative programs designed to prevent the breakup of the family. If so, were these efforts successful? (25 U.S.C. § 1912(d))

KEY DECISIONS THE COURT SHOULD MAKE AT THE ADJUDICATION HEARING:

- Which allegations of the petition have been proved or admitted, if any;
- Whether there is a legal basis for continued court and agency intervention.

The court must make specific findings as to the basis of the finding of abuse and/or neglect.

Determine whether:

- The agency is not required to make reasonable efforts to prevent removal, to eliminate the continued removal of the child from the home, or to make it possible for the child to return home safely (42 U.S.C. § 671(a)(15)(D)) ;
- It would be contrary to the welfare and best interests of the child to continue in the home (42 U.S.C. § 672, 472(1)).

- **IN ICWA CASES, CERTIFY THAT:**

[See ICWA Adjudication Checklist for more detail]¹⁰

- The consent to foster placement was executed in writing and filed in court;
- The consequences of the consent were fully explained in detail in English or in a language that the parent or Indian custodian understood;
- The consequences were fully understood by the parent or Indian custodian (25 U.S.C. § 1913).

- **ADDITIONAL FINDINGS AND ORDERS IF THE DISPOSITION HEARING IS NOT HEARD IMMEDIATELY AFTER THE ADJUDICATION HEARING**

If the disposition hearing will not occur immediately after the adjudication hearing, the judge will need to make temporary decisions at the conclusion of the adjudication such as:

- Where will the child be placed prior to the disposition hearing?
- Is the temporary order placing each child extended until the disposition hearing?
- Are there any other orders that the court deems appropriate (e.g., evaluations, services, family time, etc.)?
 - Order further testing or evaluation of the child, parent(s), or Indian custodian in preparation for the disposition hearing, and ensure that all assessments or evaluations are culturally appropriate.
 - Make sure the agency is, in preparation for disposition, making prompt and diligent efforts to identify and evaluate extended family as caretakers (in ICWA cases, if no family member is available, ensure other tribal members or other Indian families are being identified as possible caretakers).
 - Direct the agency to continue its efforts to notify non-custodial parents, including an unwed father whose paternity has been acknowledged or established.
 - Set terms for the type, frequency, and duration of family time, support, and other intra-family communication, including parent-child, sibling, and relative visits.

FEDERALLY REQUIRED TITLE IV-E FINDINGS AT THE PPH

The court must make a finding that continuance in the home of the parent or legal guardian would be **contrary to the child's welfare** (42 U.S.C. § 672(a)(1-2)).

- This finding must be made at the time of the first court ruling authorizing removal of the child from the home (45 C.F.R. § 1356.21(c)).

The court must order that placement and care are the responsibility of the state agency or any other public agency with which the responsible state agency has an agreement (42 U.S.C. § 672(a)(1-2); 45 C.F.R. § 1356.71(d)(1)(iii)).

While federal law requires the judge to determine whether reasonable efforts have been made to prevent or eliminate the need for removal within 60 days of the date of removal (45 C.F.R. § 1356.21(b)(1)), this finding should be made at the PPH when the removal can first be challenged.

Reasonable efforts to allow the child to safely return home

- Is the agency making reasonable efforts to effect the safe reunification of the child and family? (45 C.F.R. § 1356.21(b)(1))
- What is preventing the child from SAFELY returning home TODAY?⁷
- What is the current and immediate safety threat? Has the threat diminished? How do you know that? Specifically, how can the risk be ameliorated or removed?
- What type of safety plan could be developed and implemented in order for the child to return home today?
 - What specifically prevents the parents from being able to provide the minimally adequate standard of care to protect the child?
 - Will the removal or addition of any person from or into the home allow the child to safely return?
- If the safety threat is too high to return the child home, how have the conditions for return been conveyed to the parents, family, and child, and are you satisfied that they understand these conditions?

The court's written findings of fact and conclusions of law at the adjudication hearing should:

- accurately reflect the reasons for state intervention;
- provide sufficiently detailed information to justify agency and court choices for treatment and services;
- provide a defensible basis for refusing to return a child home or terminating parental rights if parents fail to improve;
- be written in easily understandable language so that all parties know how the court's findings relate to subsequent case planning; and
- set date and time of next hearing, if needed.

CONCLUDING THE ADJUDICATION HEARING

Case Management – Prepare for the next hearing

- Identify tasks to be accomplished by the next hearing.
 - Focus on permanency and mandated timeframes.
- Make oral findings and orders that all participants can understand.
 - Make findings and orders on the record.
- Consider the appropriateness of ADR processes, and order if applicable.
- Set the date and time of the next hearing within state and federal timeframes.
 - **If the disposition hearing is not held immediately after adjudication**, set disposition within 30 days and identify tasks to be accomplished, including the filing of the disposition report/case plan if not previously filed with the court.
- Identify persons whose presence is needed at the next hearing.
 - Order that the child (if appropriate) and caregivers receive notice of all proceedings and hearings.
- Ensure all orders are written, signed, copied, and distributed at the end of the hearing.
 - Provide parents with a copy of adjudication orders immediately following the hearing.

Engage parents, children, and family members

- Specifically ask parents and children if they understand what occurred at the hearing, and engage them in a conversation about next steps.
 - Can you tell me what happened here today?
 - Can you tell me what the next steps are?
- Advise parents of the importance of their active participation in all proceedings.
 - Advise parents of the rigorous timeframes for child abuse and neglect cases outlined in state and federal laws.
 - Advise parents of the consequences of failure to appear at future court events.
 - When calendaring the next hearing, all parties, including the parents, should be asked if the scheduling works for them, and if not, ask for a better time.
- Ensure that parents and children have contact information for caseworkers and attorneys and that they understand the process to request court review if necessary.
- Ask if there are any questions for the court.

If the child remains in an out-of-home placement, the court should set the review and permanency hearings at the adjudication hearing to emphasize the importance of the legal timeframes and that the clock is ticking.

ADJUDICATION HEARING BENCHCARD ENDNOTES

¹ The adjudication hearing, which may also be known as the jurisdictional or fact-finding hearing, is the hearing to determine whether allegations in the petition are substantiated by the evidence.

² State and federal laws determine who must be present for any hearing to proceed. Noted participants may or may not be required by law.

³ State and federal laws determine what must be contained in the petition.

⁴ See Federal Law Chapter in the GUIDELINES.

⁵ *The Indian Child Welfare Act Checklists for Juvenile and Family Court Judges* (which is excerpted here for the Adjudication Hearing) provide benchcard checklists for use by judges and child welfare professionals in the implementation of ICWA. The checklists are available from the National Council of Juvenile and Family Court Judges at www.ncjfcj.org.

⁶ *Ibid.*

⁷ State law defines child abuse, neglect, abandonment, and dependency.

⁸ Most state statutes require allegations as to both parents in order to adjudicate the child dependent.

⁹ *Supra* note 5.

¹⁰ *Ibid.*

SETTING THE STAGE FOR SUBSEQUENT HEARINGS AND ACHIEVING POSITIVE OUTCOMES FOR CHILDREN AND FAMILIES (Refer to the PPH Chapter for more detail.)

Aggravated Circumstances: The court should advise the state or agency that if they are seeking relief from making reasonable efforts based on aggravated circumstances, they must file their motion so the matter may be set as soon as possible in the case and prior to the adjudication.

Effective Case Planning Moving Forward: Although the information might not be available as early as the PPH, the court should set clear expectations for parties and advocates regarding the information to be provided to the court at each subsequent hearing by inquiring about:

Trauma:

- Has trauma played a role in the child's behavior? Is trauma being sufficiently considered in decisions about where the child is going to live and with whom?
- Is there reason to believe that the child is a victim of sex trafficking or at risk of becoming a sex trafficking victim? Is the placement able to support their needs, and are appropriate services in place? (P.L. 113-183)

Child Well-Being:

- Has the court fully considered well-being issues including education, physical and dental health, and mental/emotional/developmental health?
- Does the placement facilitate a sense of "normalcy" by supporting the child's participation in developmentally appropriate activities and events? (P.L. 113-183)
- What efforts are being made to ensure children in foster care form and maintain long-lasting connections to caring adults? (P.L. 113-183)
- If the child has been missing from placement(s), why did the child leave? How will the agency address those factors in current/subsequent placements? What experiences did the child have while absent? Was the child exposed to traumatic events? How will the current/subsequent placements address any needs resulting from that trauma? (P.L. 113-183)

CONCLUDING THE PRELIMINARY PROTECTIVE HEARING

Case Management – Prepare for the next hearing

- Identify tasks to be accomplished by the next hearing.
- Make oral findings and orders that all participants can understand.
- Consider the appropriateness of ADR processes, and order if applicable.
- Set the date and time of the next hearing within state and federal timeframes, and identify persons whose presence is needed at the next hearing.
 - Order that the child (if appropriate) and caregivers receive notice of all proceedings and hearings.
- Ensure all orders are written, signed, copied, and distributed at the end of the hearing.
 - Provide parents with a copy of the PPH order immediately following the hearing.

If the court has determined that it is contrary to the welfare of the child to remain in the home, the final order should include the statement, "It is contrary to the welfare of the child to remain in the home. It is in the best interests of the child to be placed." This language must be included in the initial hearing sanctioning removing the child from the home in order for the agency to claim federal reimbursement of placement expenses for the child for the duration of this placement episode (45 C.F.R. § 1356.21(c)).

Engage parents, children, and family members

- Specifically ask parents and children if they understand what occurred at the hearing, and engage them in a conversation about next steps.
 - Can you tell me what happened here today?
 - Can you tell me what the next steps are?
- Advise parents of the importance of their active participation in all proceedings.
 - Advise parents of the rigorous timeframes for child abuse and neglect cases outlined in state and federal laws.
 - Advise parents of the consequences for failure to appear at any further court hearings.

- When calendaring the next hearing, all parties, including the parents, should be asked if the scheduling works for them, and if not, ask for a better time.
- Ensure that parents and children have contact information for caseworkers and attorneys and that they understand the process to request court review if necessary.
- Ask if there are any questions for the court.

THE PRELIMINARY PROTECTIVE HEARING BENCHCARD ENDNOTES

¹ The preliminary protective hearing is the first court hearing in juvenile abuse and neglect cases. In some jurisdictions, this may be called a “shelter care,” “detention,” “emergency removal,” or “temporary custody” hearing.

² State and federal law determine who must be present for any hearing to proceed. Noted participants may or may not be required by law; however, as many as possible should be encouraged to attend the initial hearing.

³ State and federal laws determine what must be contained in the petition.

⁴ The Fostering Connections Act requires the agency to use due diligence to identify and notify all relatives within 30 days of removal (Fostering Connections to Success and Increasing Adoptions Act of 2008, H.R. 6893 / P.L 110-351 § 103).

⁵ See the Federal Law Chapter.

⁶ *The Indian Child Welfare Act Checklists for Juvenile and Family Court Judges* (which is excerpted here for the PPH) provide benchcard checklists for use by judges and child welfare professionals in the implementation of ICWA. The checklists are available from the National Council of Juvenile and Family Court Judges at www.ncjfcj.org.

⁷ The intent of this inquiry is to ensure that the court is fully exploring safety and risk concerns while at the same time examining the current issues that the family faces to ensure that there is no legitimate reason why the child(ren) cannot be returned home.