

## 8

## JUDICIAL PROCEEDINGS

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# 8

## JUDICIAL PROCEEDINGS

### 8.1 Introduction

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This section describes some of the judicial proceedings regarding child abuse or neglect. It is imperative that local departments of social services (LDSS) seek legal counsel and advice when seeking court intervention in a Child Protective Services (CPS) referral or CPS on-going case. See [Appendix D](#) for guidance specific to the emergency removal and court hearings involving an Indian child.

Text that is indented and denoted with a blue vertical line is verbatim from the Code of Virginia or the Virginia Administrative Code (VAC).

#### 8.1.1 Venue

([§16.1-243 A \(1d\)](#) of the Code of Virginia). Abuse and neglect: In cases involving an allegedly abused or neglected child, be commenced (i) in the city or county where the child resides, (ii) in the city or county where the child is present when the proceedings are commenced, or (iii) in the city or county where the alleged abuse or neglect occurred.

#### 8.1.2 Names and contact information of persons with a legitimate interest

([§16.1-229.1](#) of the Code of Virginia). In any proceeding held pursuant to this chapter in which a child is removed from his home, the court may order the parents or guardians of such child to provide the names and contact information for all persons with a legitimate interest to the local department of social services.

### 8.1.3 Court consider person with a legitimate interest

The Code of Virginia (§§ [16.1-252](#), [16.1-277.01](#), [16.1-277.02](#), [16.1-278.2](#), [16.1-278.3](#), and [16.1-283](#)) requires courts consider persons with a legitimate interest for custody of the child when evaluating removal, entrustment, relief of custody, and termination of parental rights petitions.

## 8.2 Emergency removal order

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(§ [16.1-251 A](#) of the Code of Virginia). Emergency Removal Order.

A. A child may be taken into immediate custody and placed in shelter care pursuant to an emergency removal order in cases in which the child is alleged to have been abused or neglected.

The VAC authorizes a CPS worker to petition the court to request an order to remove a child:

([22 VAC 40-705-100 A](#)). A child protective services worker may petition for removal pursuant to §§ [16.1-251](#) and [16.1-252](#) of the Code of Virginia.

The LDSS must work closely with the county or city attorney and the juvenile and domestic relations district court to develop protocols for these actions.

It is important and necessary for the LDSS to obtain legal counsel prior to petitioning for the removal of a child. The evidence supporting the decision to seek court intervention must be well documented in the case record. When an LDSS petitions a court for an emergency removal order, the LDSS may be referred to as the petitioner during the proceedings.

### 8.2.1 Ex parte emergency removal order

(§ [16.1-251 A](#) of the Code of Virginia). [An Emergency Removal Order]... may be issued ex parte by the court upon a petition supported by an affidavit or by sworn testimony in person before the judge or intake officer . . .

Ex parte is defined as “done or made at the insistence and for the benefit of one party only, without notice or argument by, any person adversely interested.”<sup>1</sup> Essentially, an ex parte hearing allows the court to conduct a hearing without the presence of one of

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<sup>1</sup>Black’s Law Dictionary 657 (9th ed. 2009).

the parties because the situation demands immediate action or irreparable harm will likely occur. An emergency removal order may be issued ex parte by the court upon a petition supported by an affidavit or by sworn testimony in person before the judge or intake officer. If a court enters an emergency removal order, a preliminary removal hearing must occur **no later than five (5) business days** after the removal.

#### **8.2.1.1 Petition for an emergency removal order must allege child is abused or neglected**

In order to request an emergency removal order, the LDSS must file a petition requesting removal. The petition requesting removal of the child must allege that the child is abused or neglected.

#### **8.2.2 Affidavit or sworn testimony must accompany petition**

The worker will be required to submit an affidavit or to present sworn testimony to prove that the case meets the criteria set forth for removing a child from the home. Competent evidence by a physician that a child is abused or neglected is considered adequate to support this type of petition.

#### **8.2.3 Affidavit or sworn statement in support of emergency removal order**

##### **8.2.3.1 The petition, affidavit, or sworn statement must specify the factual circumstances warranting removal**

The petition or accompanying affidavit must contain a specific statement or account of the factual circumstances necessitating the removal of the child.

##### **8.2.3.2 Evidence must establish an immediate threat to life or health of the child**

(§ [16.1-251 A1](#) of the Code of Virginia). [The petition, affidavit or sworn testimony must establish that] The child would be subjected to an imminent threat to life or health to the extent that severe or irremediable injury would be likely to result if the child were returned to or left in the custody of his parents, guardian, legal custodian or other person standing in loco parentis pending a final hearing on the petition.

The circumstances of the child are such that remaining with the parent, legal guardian, or caretaker presents an imminent danger to the child's life or health.



### 8.2.3.3 Petition, affidavit, or sworn testimony must show reasonable efforts to prevent removal

(§ [16.1-251 A2](#) of the Code of Virginia). [The petition, affidavit or sworn testimony must establish that] ... reasonable efforts have been made to prevent removal of the child from his home and there are no alternatives less drastic than removal of the child from his home which could reasonably protect the child's life or health pending a final hearing on the petition...

Removal of a child should only occur after consideration of alternatives to out-of-home placement. The court must be presented with an affidavit or sworn testimony establishing that reasonable efforts have been made to prevent removal of the child from his home.

### 8.2.3.4 Petition, affidavit, or sworn testimony must show no alternatives less drastic than removal

(§ [16.1-251 A2](#) of the Code of Virginia). [The petition, affidavit or sworn testimony must establish that]... there are no alternatives less drastic than removal of the child from his home which could reasonably protect the child's life or health pending a final hearing on the petition.

The safety of the child precludes provision of services to prevent placement because there are no alternatives less drastic than removal that could reasonably protect the child's life or health.

#### 8.2.3.4.1 Alternatives less drastic than removal

(§ [16.1-251 A2](#) of the Code of Virginia). [The petition, affidavit or sworn testimony must establish that]... the alternatives less drastic than removal may include but not be limited to the provision of medical, educational, psychiatric, psychological, homemaking or other similar services to the child or family or the issuance of a preliminary protective order pursuant to § [16.1-253](#).

### 8.2.3.5 No opportunity to provide preventive services

(§ [16.1-251 A2](#) of the Code of Virginia). ...when a child is removed from his home and there is no reasonable opportunity to provide preventive services, reasonable efforts to prevent removal shall be deemed to have been made.

Circumstances may occur when there is no reasonable opportunity to provide preventive services before removing a child from the home.

### 8.2.3.6 Petition or affidavit must include the following facts

The petition shall include the following facts:

- The name of the person who took emergency custody, the person's professional capacity, and the telephone number where the person can be reached.
- The child's name and birth date.
- The names of parents or guardians.
- The present or last known address of parents or guardians.
- A detailed description of the child's condition.
- Any information known concerning the circumstances of the suspected abuse or neglect, including the petitioner's name and the nature of the complaint.
- A brief explanation of the reasons why preventive services were not successful or could not be delivered.
- The specific time and date emergency custody was taken.
- Documentation of the petitioning person's efforts to obtain a court order.

### 8.2.3.7 CPS worker shall consult with supervisor and must consult foster care worker

Whenever a worker considers removal of a child, supervisory consultation and concurrence is required. When petitioning the court for removal of the child is seen as the only alternative, the worker must involve the foster care worker in staffing the case. The focus of the staffing shall be to assess whether or not there are any alternatives to removal. Evaluation shall be made of the resources available to meet the needs of the family and the specific child who is to be placed.

### 8.2.4 Five-day hearing must occur following emergency removal order

([§ 16.1-251 B](#) of the Code of Virginia). Whenever a child is taken into immediate custody pursuant to an emergency removal order, a hearing shall be held in accordance with [§ 16.1-](#)

[252](#) as soon as practicable, but in no event later than five business days after the removal of the child.

### 8.2.5 Suitable relatives shall be considered for placement

([§ 16.1-251 C](#) of the Code of Virginia). In the emergency removal order the court shall give consideration to temporary placement of the child with a suitable relative or other interested individual, including grandparents, under the supervision of the local department of social services, until such time as the hearing in accordance with [§ 16.1-252](#) is held.

### 8.2.6 When LDSS has legal custody of child

([§ 16.1-251 D](#) of the Code of Virginia). The local department of social services having legal custody of a child as defined in ([§ 16.1-228 i](#)) shall not be required to comply with the requirements of this section in order to re-determine where and with whom the child shall live, notwithstanding that the child had been placed with a natural parent.

This section of the Code of Virginia means the presumption that it is in the best interest of the child to remain with his parents or guardians no longer exists, unless the child was placed in the custody of a natural parent. For example, if the LDSS has been given legal custody of a child as defined in [§ 16.1-228](#), then the LDSS will not be required to comply with the requirements of this section in order to re-determine where and with whom the child shall live.

[§ 16.1-228](#) of the Code of Virginia defines legal custody as meaning “(i) a legal status created by court order which vests in a custodian the right to have physical custody of the child, to determine and re-determine where and with whom he shall live, the right and duty to protect, train and discipline him and to provide him with food, shelter, education and ordinary medical care, all subject to any residual parental rights and responsibilities or (ii) the legal status created by court order of joint custody as defined in [§ 20-107.2](#).”

## 8.3 Preliminary removal order

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([§ 16.1-252 A](#) of the Code of Virginia). A preliminary removal order in cases in which a child is alleged to have been abused or neglected may be issued by the court after a hearing wherein the court finds that reasonable efforts have been made to prevent removal of the child from his home. The hearing shall be in the nature of a preliminary hearing rather than a final determination of custody.

This order may be requested when the LDSS can prove that the circumstances of the child are such that the child is subject to severe or irremediable injury to his life or health

and that no less drastic alternatives to removing custody are available. This order differs from the emergency removal order in that a hearing must take place before a preliminary removal order can be issued.

### 8.3.1 Service worker shall consult with supervisor and foster care worker

Whenever a worker considers removing a child, supervisory consultation and concurrence is required. When petitioning the court for removal of the child is seen as the only alternative, the CPS worker or service worker shall involve the foster care worker in staffing the case. The focus of the staffing shall be to assess whether or not there are any additional alternatives to removal. Evaluation shall be made of the resources available to meet the needs of the family and the specific child who is to be placed.

### 8.3.2 Notice shall be given to all parties

(§ 16.1-252 B of the Code of Virginia). Prior to the removal hearing, notice of the hearing shall be given at least twenty-four hours in advance of the hearing to the guardian ad litem for the child, to the parents, guardian, legal custodian or other person standing in loco parentis of the child and to the child if he or she is twelve years of age or older. If notice to the parents, guardian, legal custodian or other person standing in loco parentis cannot be given despite diligent efforts to do so, the hearing shall be held nonetheless, and the parents, guardian, legal custodian or other person standing in loco parentis shall be afforded a later hearing on their motion regarding a continuation of the summary removal order. The notice provided herein shall include (i) the time, date and place for the hearing; (ii) a specific statement of the factual circumstances which allegedly necessitate removal of the child; and (iii) notice that child support will be considered if a determination is made that the child must be removed from the home.

Notice shall be sent to the parents, guardian, legal custodian, or other person standing in loco parentis. In loco parentis means, “of, relating to, or acting as a temporary guardian or caretaker of a child, taking on all or some of the responsibilities of a parent.”<sup>2</sup>

#### 8.3.2.1 If notice cannot be provided

Diligent efforts must be made to provide all parties with notice of the hearing. However, if notice to any of the parties cannot be given despite diligent efforts to

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<sup>2</sup> Black’s Law Dictionary 858 (9th ed. 2009).

do so, the hearing shall be held. The parents, guardian, legal custodian, or other person standing in loco parentis shall be afforded a later hearing on their motion regarding a continuation of the summary removal order.

#### 8.3.2.2 Notice shall include specific information

The notice provided to the parties shall state:

- The time, date, and place for the hearing.
- A specific statement of the factual circumstances which allegedly necessitate removal of the child.
- Notice that child support will be considered if a determination is made that the child shall be removed from the home.

#### 8.3.3 Parties may obtain counsel

(§ [16.1-252 C](#) of the Code of Virginia). All parties to the hearing shall be informed of their right to counsel pursuant to [§ 16.1-266](#).

Prior to the preliminary removal hearing by the court of any case involving a parent, guardian or other adult charged with abuse or neglect of a child or a parent or guardian who could be subjected to the loss of residual parental rights and responsibilities, such parent, guardian, or other adult shall be informed by a judge, clerk, or probation officer of his right to counsel and be given an opportunity to:

- Retain counsel; or
- If the court determines that the parent, guardian or other adult is indigent or qualified, the court may appoint counsel; or
- Waive the right to representation by an attorney.

#### 8.3.4 Preliminary removal hearing

The preliminary removal hearing will be conducted in the nature of a preliminary hearing rather than a final determination of custody.

### 8.3.5 For a preliminary removal order to be issued, burden is on the requesting party

The burden to prove that the court should issue the preliminary removal order is placed upon the petitioning party. If the LDSS is the party asking the court to issue the order, then the burden is on the LDSS to prove the need to issue the order. The CPS worker must file a petition requesting a preliminary removal order, which includes a specific statement of the factual circumstances necessitating the removal of the child.

#### 8.3.5.1 Burden of proof – preponderance of the evidence

Each criterion for establishing the need to issue a preliminary removal order must be satisfied by a preponderance of the evidence.<sup>3</sup>

#### 8.3.5.2 Requesting party must prove imminent threat to life or health of child

(§ [16.1-252 E1](#) of the Code of Virginia). In order for a preliminary order to issue or for an existing order to be continued, the petitioning party or agency must prove: 1. The child would be subjected to an imminent threat to life or health to the extent that severe or irremediable injury would be likely to result if the child were returned to or left in the custody of his parents, guardian, legal custodian or other person standing in loco parentis pending a final hearing on the petition;

#### 8.3.5.3 Reasonable efforts must have been made to prevent removal

(§ [16.1-252 E2](#) of the Code of Virginia). In order for a preliminary order to issue or for an existing order to be continued, the petitioning party or agency must prove: 2. Reasonable efforts have been made to prevent removal of the child from his home and there are no alternatives less drastic than removal of the child from his home which could reasonably and adequately protect the child's life or health pending a final hearing on the petition...

#### 8.3.5.4 No alternatives less drastic than removal

(§ [16.1-252 E2](#) of the Code of Virginia). ... the alternatives less drastic than removal may include but not be limited to the provision of medical, educational, psychiatric, psychological, homemaking or other similar services to the child or family or the issuance of a preliminary protective order pursuant to [§ 16.1-253](#).

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<sup>3</sup> See: *Wright v. Arlington County Dept. of Social Services*, 9 Va. App. 411, 388 S.E.2d 477 (1990).

The alternatives less drastic than removal include providing medical, educational, psychiatric, psychological, homemaking, or other similar services to the child or family or the issuance of a preliminary protective order pursuant to [§ 16.1-253](#).

#### 8.3.5.5 No reasonable opportunity to provide services

Circumstances may occur when there is no reasonable opportunity to provide preventive services before removing a child from the home. When there is no opportunity to provide preventive services before removing a child, the court has the authority to deem that reasonable efforts to prevent removal were made by the LDSS.

#### 8.3.6 The preliminary removal hearing

In the hearing, petitioner must prove:

- The child would be subjected to imminent threat to his life or health if the child remained with the caretaker.
- Such circumstances would result in severe and irremediable injury to the child.
- The provision of services to prevent placement was not successful or services to prevent placement could not be given or delivered, and there are no alternatives less drastic than removal which could reasonably protect the child's life and health.

##### 8.3.6.1 Parties may present witnesses and evidence

([§ 16.1-252 D](#) of the Code of Virginia). At the removal hearing the child and his parent, guardian, legal custodian or other person standing in loco parentis shall have the right to confront and cross-examine all adverse witnesses and evidence and to present evidence on their own behalf ...

##### 8.3.6.2 Testimony of the child may be taken by closed-circuit television

([§ 16.1-252 D](#) of the Code of Virginia). ...If the child was fourteen years of age or under on the date of the alleged offense and is sixteen or under at the time of the hearing, the child's attorney or guardian ad litem, or if the child has been committed to the custody of the Department of Social Services, the local department of social services, may apply for an order from the court that the child's testimony be taken in a room outside the courtroom and be televised by two-way closed-circuit television.

The provisions of [§ 63.2-1521](#) shall apply, mutatis mutandis, to the use of two-way closed-circuit television except that the person seeking the order shall apply for the order at least forty-eight hours before the hearing, unless the court for good cause shown allows the application to be made at a later time.

A child, 14 years of age or under at the time of the alleged incident, may testify under certain conditions as determined by the court in any civil proceeding involving allegations of abuse and neglect of that child. By motion of a party, the child's testimony may be taken by closed-circuit television, if the court finds that the child cannot testify in open court in the presence of the alleged abuser or neglecter for the following reasons:

- The child's persistent refusal to testify despite judicial request to do so;
- The child's substantial inability to communicate about the offense; or
- The substantial likelihood, based on expert opinion testimony, that the child will suffer severe emotional trauma as a result of testifying.

Additional information regarding the use of closed-circuit testimony can be found on the [Virginia Department of Criminal Justice](#) (DCJS) website.

### 8.3.6.3 Out-of-court statements made by a child describing act of sexual nature

([§ 63.2-1522 A](#) of the Code of Virginia). In any civil proceeding involving alleged abuse or neglect of a child pursuant to this chapter or pursuant to §§ [16.1-241](#), [16.1-251](#), [16.1-252](#), [16.1-253](#), [16.1-283](#), or [§ 20-107.2](#), an out-of-court statement made by a child 14 years of age or younger at the time the statement is offered into evidence, describing any act of a sexual nature performed with or on the child by another, not otherwise admissible by statute or rule, may be admissible in evidence if the requirements of subsection B are met.

An out-of-court statement may be admitted into evidence if a child, 14 years of age or younger at the time of the hearing, testifies at the proceeding, or testifies by means of a videotaped deposition or closed-circuit television, and at the time of such testimony is subject to cross examination concerning the out-of-court statement or the child is found by the court to be unavailable to testify on any of these grounds:

- The child's death.



- The child's absence from the jurisdiction, provided such absence is not for the purpose of preventing the availability of the child to testify.
- The child's total failure of memory.
- The child's physical or mental disability.
- The existence of a privilege involving the child.
- The child's incompetency, including the child's inability to communicate about the offense because of fear or a similar reason.
- The substantial likelihood, based upon expert opinion testimony, that the child would suffer severe emotional trauma from testifying at the proceeding or by means of a videotaped deposition or closed-circuit television.

#### 8.3.6.4 Use of videotaped statement of alleged victim as evidence

(§ [63.2-1523 A](#) of the Code of Virginia). In any civil proceeding involving alleged abuse or neglect of a child pursuant to this chapter or pursuant to § [16.1-241](#), [16.1-251](#), [16.1-252](#), [16.1-253](#), [16.1-283](#), or § [20-107.2](#) a recording of a statement of the alleged victim of the offense, made prior to the proceeding, may be admissible as evidence, if the requirements of subsection B are met and the court determines that:

1. The alleged victim is 14 years of age or younger at the time the statement is offered into evidence;
2. The recording is both visual and oral, and every person appearing in, and every voice recorded on, the tape is identified;
3. The recording is on videotape or was recorded by other electronic means capable of making an accurate recording;
4. The recording has not been altered;
5. No attorney for any party to the proceeding was present when the statement was made;
6. The person conducting the interview of the alleged victim was authorized to do so by the child-protective services coordinator of the local department;
7. All persons present at the time the statement was taken, including the alleged victim, are present and available to testify or be cross examined at the proceeding when the recording is offered; and
8. The parties or their attorneys were provided with a list of all persons present at the recording and were afforded an opportunity to view the recording at least 10 days prior to the scheduled proceedings.

An out-of-court statement may be admitted into evidence if a child, 14 years of age or younger at the time of the hearing, testifies at the proceeding, or testifies by means of a videotaped deposition or closed-circuit television, and at the time of such testimony is subject to cross examination concerning the out-of-court statement or the child is found by the court to be unavailable to testify on any of these grounds:

- The child's death.
- The child's absence from the jurisdiction, provided such absence is not for the purpose of preventing the availability of the child to testify.
- The child's total failure of memory.
- The child's physical or mental disability.
- The existence of a privilege involving the child.
- The child's incompetency, including the child's inability to communicate about the offense because of fear or a similar reason.
- The substantial likelihood, based upon expert opinion testimony, that the child would suffer severe emotional trauma from testifying at the proceeding or by means of a videotaped deposition or closed-circuit television.

### **8.3.7 If court orders removal, court must determine who shall have custody of the child**

(§ [16.1-252 F1](#) of the Code of Virginia). Prior to the entry of an order pursuant to subsection F of this section transferring temporary custody of the child to a relative or other interested individual, including grandparents, the court shall consider whether the relative or other interested individual is one who (i) is willing and qualified to receive and care for the child; (ii) is willing to have a positive, continuous relationship with the child; and (iii) is willing and has the ability to protect the child from abuse and neglect. The court's order transferring temporary custody to a relative or other interested individual should provide for compliance with any preliminary protective order entered on behalf of the child in accordance with the provisions of § [16.1-253](#); initiation and completion of the investigation as directed by the court and court review of the child's placement required in accordance

with the provisions of [§ 16.1-278.2](#); and, as appropriate, ongoing provision of social services to the child and the temporary custodian.

If the court determines that the child shall be removed pursuant to [§ 16.1-252 E](#), then the court must determine with whom the child shall be placed. The court must place the child in the care and custody of a suitable person. The court must give consideration to placing the child in the care and custody of a nearest kin, including grandparents or personal friend. If such placement is not available, then the court may place the child in the care and custody of a suitable agency.

#### 8.3.7.1 If court orders removal, court may provide for reasonable visitation

([§ 16.1-252 F2](#) of the Code of Virginia). [If the court determines that removal is proper, the court shall] Order that reasonable visitation be allowed between the child and his parents, guardian, legal custodian or other person standing in loco parentis, and between the child and his siblings, if such visitation would not endanger the child's life or health;

If the court finds that the child must be removed pursuant to [§ 16.1-252 E](#), the court shall determine whether reasonable visitation should be allowed between the child and his parents, guardian, legal custodian, or other person standing in loco parentis, and between the child and his siblings. The court may allow reasonable visitation only if such visitation would not endanger the child's life or health.

#### 8.3.7.2 If court orders removal, court shall obtain child support

([§ 16.1-252 F3](#) of the Code of Virginia). [If the court determines that removal is proper, the court shall] Order that the parent or other legally obligated person pay child support pursuant to [§ 16.1-290](#).

If the court finds that the child must be removed pursuant to [§ 16.1-252 E](#), the court shall order that the parent or person legally obligated for the child pay child support.

The court is required by [§ 16.1-290 C](#) to require that the parent or other person legally responsible for the child pay child support.

If a determination is made that the child must be removed from the home, then the LDSS must file a separate petition for child support as soon as practicable. To facilitate the requirement that the court order child support at the initial hearing, it is recommended that the worker request that the petition requesting

removal of the child include a statement that if custody is transferred, the petitioner requests that the court address parental child support as defined in [§ 63.2-909](#).

([§ 16.1-290](#) of the Code of Virginia). C. Whenever a juvenile is placed in foster care by the court, the court shall order and decree that the parents shall pay the Department of Social Services pursuant to [§§ 20-108.1](#), [20-108.2](#), [63.2-909](#), and [63.2-1910](#).

([§ 63.2-909](#) of the Code of Virginia). Pursuant to [§ 16.1-290](#), responsible persons shall pay child support for a child placed in foster care from the date that custody was awarded to the local department of social services. The court order shall state the names of the responsible persons obligated to pay support, and either specify the amount of the support obligation pursuant to [§§ 20-108.1](#) and [20-108.2](#) or indicate that the Division of Child Support Enforcement will establish the amount of the support obligation. In fixing the amount of support, the court or the Division of Child Support Enforcement shall consider the extent to which the payment of support by the responsible person may affect the ability of such responsible person to implement a foster care plan developed pursuant to [§ 16.1-281](#).

### 8.3.7.3 Court may impose additional requirements or conditions

([§ 16.1-252 F](#) of the Code of Virginia). ...In addition, the court may enter a preliminary protective order pursuant to [§ 16.1-253](#) imposing requirements and conditions as specified in that section which the court deems appropriate for protection of the welfare of the child.

### 8.3.8 Court shall make finding of abuse or neglect

([§ 16.1-252 G](#) of the Code of Virginia). At the conclusion of the preliminary removal order hearing, the court shall determine whether the allegations of abuse or neglect have been proven by a preponderance of the evidence. Any finding of abuse or neglect shall be stated in the court order...

#### 8.3.8.1 A party may object to the court making a finding of abuse or neglect

([§ 16.1-252 G](#) of the Code of Virginia). ...However, if, before such a finding is made, a person responsible for the care and custody of the child, the child's guardian ad litem or the local department of social services objects to a finding being made at the hearing, the court shall schedule an adjudicatory hearing to be held within thirty days of the date of the initial preliminary removal hearing...

### 8.3.8.2 Adjudicatory hearing

(§ [16.1-252 G](#) of the Code of Virginia). ...The adjudicatory hearing shall be held to determine whether the allegations of abuse and neglect have been proven by a preponderance of the evidence.

At the adjudicatory hearing, the court shall make a finding of abuse or neglect. It is not necessary to determine the perpetrator of the abuse or neglect in order to make a finding of abuse or neglect.

### 8.3.8.3 Notification of adjudicatory hearing

(§ [16.1-252 G](#) of the Code of Virginia). ...Parties who are present at the preliminary removal order hearing shall be given notice of the date set for the adjudicatory hearing and parties who are not present shall be summoned as provided in § [16.1-263](#). The hearing shall be held and an order may be entered, although a party to the preliminary removal order hearing fails to appear and is not represented by counsel, provided personal or substituted service was made on the person, or the court determines that such person cannot be found, after reasonable effort, or in the case of a person who is without the Commonwealth, the person cannot be found or his post office address cannot be ascertained after reasonable effort...

### 8.3.8.4 Any preliminary removal order or protection orders remain in effect pending adjudicatory hearing

(§ [16.1-252 G](#) of the Code of Virginia). ...The preliminary removal order and any preliminary protective order issued shall remain in full force and effect pending the adjudicatory hearing.

If a party raises an objection at the preliminary removal hearing to the court making a finding of abuse or neglect, the court may still issue a preliminary removal order or a preliminary protective order. The preliminary removal order and any preliminary protective order issued shall remain in full force and effect pending the adjudicatory hearing.

### 8.3.8.5 Dispositional hearing

(§ [16.1-252 H](#) of the Code of Virginia). If the preliminary removal order includes a finding of abuse or neglect and the child is removed from his home or a preliminary protective order is issued, a dispositional hearing shall be held pursuant to § [16.1-278.2](#)...

Regardless of whether the court makes a finding of abuse or neglect at the preliminary removal hearing, the court shall schedule a dispositional hearing pursuant to [§ 16.1-278.2](#).

#### 8.3.8.6 Scheduling the dispositional hearing

([§ 16.1-252 H](#) of the Code of Virginia). ...The dispositional hearing shall be scheduled at the time of the preliminary removal order hearing and shall be held within 60 days of the preliminary removal order hearing. If an adjudicatory hearing is requested pursuant to subsection G, the dispositional hearing shall nonetheless be scheduled at the initial preliminary removal order hearing. All parties present at the preliminary removal order hearing shall be given notice of the date scheduled for the dispositional hearing; parties who are not present shall be summoned to appear as provided in [§ 16.1-263](#).

#### 8.3.9 Person gaining legal custody of child

([§ 16.1-252 I](#) of the Code of Virginia). The local department of social services having legal custody of a child as defined in [§ 16.1-228 i](#) shall not be required to comply with the requirements of this section in order to re-determine where and with whom the child shall live, notwithstanding that the child had been placed with a natural parent.

This section means the presumption that it is in the best interests of the child to remain with his parents or guardians no longer exists, unless the child was placed in the custody of a natural parent. For example, if the LDSS has been given legal custody of a child as defined in [§ 16.1-228](#), then the LDSS will not be required to comply with the requirements of this section in order to re-determine where and with whom the child shall live.<sup>4</sup> This means that when the LDSS has legal custody of a child, it can move the child from the home of a natural parent and can change the child's placement without having to comply with the preliminary removal statute.

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<sup>4</sup> Virginia Code [§ 16.1-228](#) defines legal custody as meaning "(i) a legal status created by court order which vests in a custodian the right to have physical custody of the child, to determine and redetermine where and with whom he shall live, the right and duty to protect, train and discipline him and to provide him with food, shelter, education and ordinary medical care, all subject to any residual parental rights and responsibilities or (ii) the legal status created by court order of joint custody as defined in [§ 20-107.2](#)."

### 8.3.10 Violation of order constitutes contempt of court

(§ [16.1-252 J](#) of the Code of Virginia). Violation of any order issued pursuant to this section shall constitute contempt of court.

## 8.4 Preliminary protective order

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([22 VAC 40-705-100 B](#)). A child protective services worker may petition for a preliminary protective order pursuant § [16.1-253](#) of the Code of Virginia.

### 8.4.1 Purpose of preliminary protective order

(§ [16.1-253 A](#) of the Code of Virginia). Upon the motion of any person or upon the court's own motion, the court may issue a preliminary protective order, after a hearing, if necessary to protect a child's life, health, safety or normal development pending the final determination of any matter before the court...

This order may be requested when it is not necessary to assume custody of the child, but court intervention is necessary. The court may intervene to assure that a child's parent or person responsible for the child's care observe reasonable conditions of behavior in order to preserve the child's life, health and safety, and to maintain the child in his or her own home.

### 8.4.2 The court's authority

(§ [16.1-253 A](#) of the Code of Virginia). ... The order may require a child's parents, guardian, legal custodian, other person standing in loco parentis or other family or household member of the child to observe reasonable conditions of behavior for a specified length of time...

#### 8.4.2.1 The court may order person to abstain from offensive conduct

(§ [16.1-253 A1](#) of the Code of Virginia). To abstain from offensive conduct against the child, a family or household member of the child or any person to whom custody of the child is awarded;

#### 8.4.2.2 The court may order services

(§ [16.1-253 A2](#) of the Code of Virginia). To cooperate in the provision of reasonable services or programs designed to protect the child's life, health or normal development;

#### 8.4.2.3 The court may order home visits

(§ [16.1-253 A3](#) of the Code of Virginia). To allow persons named by the court to come into the child's home at reasonable times designated by the court to visit the child or inspect the fitness of the home and to determine the physical or emotional health of the child;

#### 8.4.2.4 The court may order visitation with the child

(§ [16.1-253 A4](#) of the Code of Virginia). To allow visitation with the child by persons entitled thereto, as determined by the court;

#### 8.4.2.5 The court may order person to refrain from certain acts

(§ [16.1-253 A5](#) of the Code of Virginia). To refrain from acts of commission or omission which tend to endanger the child's life, health or normal development; or ...

#### 8.4.2.6 The court may order person to have no contact with child or family

(§ [16.1-253 A6](#) of the Code of Virginia). To refrain from such contact with the child or family or household members of the child, as the court may deem appropriate, including removal of such person from the residence of the child. However, prior to the issuance by the court of an order removing such person from the residence of the child, the petitioner must prove by a preponderance of the evidence that such person's probable future conduct would constitute a danger to the life or health of such child, and that there are no less drastic alternatives which could reasonably and adequately protect the child's life or health pending a final determination on the petition.

The court may limit contact between the alleged abusive person and the child and the family or household members of the child. The court can remove a person from the residence. In order to remove a person from the residence, the court must find that a preponderance of the evidence establishes that the person's probable conduct in the future constitutes a danger to the life or health of the child. The court must also find, by a preponderance of the evidence, that there are no less drastic alternatives which could reasonably and adequately protect the child's life or health pending a final determination on the petition.

#### 8.4.3 Requesting a preliminary protective order

(§ [16.1-253 B](#) of the Code of Virginia). A preliminary protective order may be issued ex parte upon motion of any person or the court's own motion in any matter before the court,



or upon petition. The motion or petition shall be supported by an affidavit or by sworn testimony in person before the judge or intake officer which establishes that the child would be subjected to an imminent threat to life or health to the extent that delay for the provision of an adversary hearing would be likely to result in serious or irreparable injury to the child's life or health. If an ex parte order is issued without an affidavit being presented, the court, in its order, shall state the basis upon which the order was entered, including a summary of the allegations made and the court's findings. Following the issuance of an ex parte order the court shall provide an adversary hearing to the affected parties within the shortest practicable time not to exceed five business days after the issuance of the order.

A preliminary protective order can be requested by making a motion during any matter before the court or by filing a petition. The court may issue the preliminary protective order ex parte.

#### **8.4.3.1 Motion or petition must establish imminent threat**

Any motion or petition shall be supported by an affidavit or by sworn testimony in person before the judge or intake officer. The testimony or petition must establish that the child would be subjected to an imminent threat to life or health to the extent that any delay would be likely to result in serious or irreparable injury to the child's life or health.

#### **8.4.3.2 Ex parte preliminary protective order**

A preliminary protective order may be issued ex parte by the court upon a petition supported by an affidavit or by sworn testimony in person before the judge or intake officer. Ex parte is defined as "Done or made at the insistence and for the benefit of one party only, without notice or argument by, any person adversely interested."<sup>5</sup> Essentially, an ex parte hearing allows the court to conduct a hearing without the presence of one of the parties because the situation demands immediate action or irreparable harm will likely occur. If an ex parte order is issued without an affidavit being presented, the court must state the basis upon which the order was entered in the order. The preliminary protective order shall also include a summary of the allegations made and the court's findings.

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<sup>5</sup> Black's Law Dictionary 858 (9th ed. 2009).

#### 8.4.3.3 Adversary hearing shall occur within five days of issuance of ex parte order

If a court enters a preliminary protective order ex parte, the court shall provide an adversary hearing within the shortest practicable time **not to exceed five (5) business days** after the issuance of the order.

#### 8.4.4 Notice of hearing shall be given

(§ [16.1-253 C](#) of the Code of Virginia). Prior to the hearing required by this section, notice of the hearing shall be given at least twenty-four hours in advance of the hearing to the guardian ad litem for the child, to the parents, guardian, legal custodian, or other person standing in loco parentis of the child, to any other family or household member of the child to whom the protective order may be directed and to the child if he or she is twelve years of age or older. The notice provided herein shall include (i) the time, date and place for the hearing and (ii) a specific statement of the factual circumstances which allegedly necessitate the issuance of a preliminary protective order.

#### 8.4.5 Right to counsel

(§ [16.1-253 D](#) of the Code of Virginia). All parties to the hearing shall be informed of their right to counsel pursuant to § [16.1-266](#).

Prior to the preliminary protective order hearing by the court of any case involving a parent, guardian, or other adult charged with abuse or neglect of a child or a parent or guardian who could be subjected to the loss of residual parental rights and responsibilities, such parent, guardian, or other adult shall be informed by a judge, clerk, or probation officer of his right to counsel and be given an opportunity to:

- Retain counsel; or
- If the court determines that the parent, guardian, or other adult is indigent or qualified, the court may appoint counsel; or
- Waive the right to representation by an attorney.

#### 8.4.6 Right to present witnesses and cross-examination

(§ [16.1-253 E](#) of the Code of Virginia). At the hearing the child, his or her parents, guardian, legal custodian or other person standing in loco parentis and any other family or household member of the child to whom notice was given shall have the right to confront and cross-examine all adverse witnesses and evidence and to present evidence on their own behalf.

The LDSS may present evidence to establish the need for the protective order to be issued. That evidence may include witnesses, medical reports, or any other evidence relevant to the subject matter. The parties to the proceeding maintain the right to cross-examine all adverse witnesses and evidence and to present evidence on their own behalf.

#### **8.4.7 If the preliminary protective order petition alleges abuse or neglect, then the court shall make finding of abuse or neglect**

(§ [16.1-253 F](#) of the Code of Virginia). If a petition alleging abuse or neglect of a child has been filed, at the hearing pursuant to this section the court shall determine whether the allegations of abuse or neglect have been proven by a preponderance of the evidence. Any finding of abuse or neglect shall be stated in the court order. However, if, before such a finding is made, a person responsible for the care and custody of the child, the child's guardian ad litem or the local department of social services objects to a finding being made at the hearing, the court shall schedule an adjudicatory hearing to be held within thirty days of the date of the initial preliminary protective order hearing. The adjudicatory hearing shall be held to determine whether the allegations of abuse and neglect have been proven by a preponderance of the evidence. Parties who are present at the hearing shall be given notice of the date set for the adjudicatory hearing and parties who are not present shall be summoned as provided in § [16.1-263](#). The adjudicatory hearing shall be held and an order may be entered, although a party to the hearing fails to appear and is not represented by counsel, provided personal or substituted service was made on the person, or the court determines that such person cannot be found, after reasonable effort, or in the case of a person who is without the Commonwealth, the person cannot be found or his post office address cannot be ascertained after reasonable effort.

Any preliminary protective order issued shall remain in full force and effect pending the adjudicatory hearing.

If the petition requesting the issuance of a protective order alleges that the child was abused or neglected, then the court shall make a determination whether the child was abused or neglected. The court shall make that finding during the adversary hearing and based upon a preponderance of the evidence. Any finding of abuse shall be stated in the court order.

##### **8.4.7.1 A party may object to the court making a finding of abuse or neglect**

At the preliminary protective order hearing, any party (a person responsible for the care and custody of the child, the child's guardian ad litem or the LDSS) may object to the court making a finding of abuse or neglect.

#### 8.4.7.2 If a party objects to the court making a finding of abuse or neglect

If one of the parties objects to the court making a finding of abuse or neglect, then the court shall schedule an adjudicatory hearing to determine whether the allegations of abuse or neglect have merit. The adjudicatory hearing shall be scheduled **within 30 days** of the date of the initial preliminary hearing.

#### 8.4.7.3 Purpose of adjudicatory hearing

The adjudicatory hearing will be held to determine whether the allegations of abuse or neglect have been proven by a preponderance of the evidence.

#### 8.4.7.4 Notice for adjudicatory hearing

The court must provide notice and schedule the adjudicatory hearing during the preliminary removal order hearing while all parties are present. Those parties who are not present for the preliminary removal hearing shall be summoned as provided in [§ 16.1-263](#). Pursuant to [§ 16.1-253 F](#), if proper notice has been provided or attempted and a party fails to appear for the adjudicatory hearing, the court may conduct the hearing and make a finding of abuse or neglect without that party present.

#### 8.4.7.5 Court order carries full force and effect

If the court issued a preliminary protective order, the preliminary protective order remains in effect pending the adjudicatory hearing. An objection to the court making a finding of abuse or neglect does not stay the preliminary protective order.

#### 8.4.8 Dispositional hearing

([§ 16.1-253 G](#) of the Code of Virginia). If at the preliminary protective order hearing held pursuant to this section the court makes a finding of abuse or neglect and a preliminary protective order is issued, a dispositional hearing shall be held pursuant to [§ 16.1-278.2](#).

...The dispositional hearing shall be scheduled at the time of the hearing pursuant to this section, and shall be held within 60 days of this hearing. If an adjudicatory hearing is requested pursuant to subsection F, the dispositional hearing shall nonetheless be scheduled at the hearing pursuant to this section. All parties present at the hearing shall be given notice of the date and time scheduled for the dispositional hearing; parties who are not present shall be summoned to appear as provided in [§ 16.1-263](#).

If there is no objection to the court making a finding of abuse or neglect, then the court should schedule a dispositional hearing to be conducted within 60 days of the date of the initial preliminary hearing.

#### 8.4.8.1 Scheduling and notice for dispositional hearing

Scheduling of the hearing and notice to all parties will be made during the initial preliminary hearing. If an objection to a finding of abuse or neglect is made by a party to the proceeding, then the court shall schedule an adjudicatory hearing to be held **within 30 days** of the initial preliminary hearing.

#### 8.4.9 Preliminary protective order cannot remove custody from parents or guardians

(§ [16.1-253 H](#) of the Code of Virginia). Nothing in this section enables the court to remove a child from the custody of his or her parents, guardian, legal custodian or other person standing in loco parentis, except as provided in § [16.1-278.2](#), and no order hereunder shall be entered against a person over whom the court does not have jurisdiction.

A preliminary protective order cannot be used to remove custody of a child from the child's parents, guardian, legal custodian, or other person standing in loco parentis.

#### 8.4.10 Violation of preliminary protective order constitutes contempt of court

(§ [16.1-253 J](#) of the Code of Virginia). Violation of any order issued pursuant to this section shall constitute contempt of court.

### 8.5 Petition for child support

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([22 VAC 40-705-100 C](#)). Whenever the local department assumes custody of a child under subsection A or B of this section, a child protective services worker shall petition the court for parental child support.

At the initial hearing whenever custody of a child is removed (except in emergency removal order hearings) the court is required to order the parents to pay child support.

- To facilitate the requirement that the court order child support at the initial hearing, it is recommended that the worker include in the petition requesting custody of the child a statement that, if custody is transferred, the petitioner requests the court to address parental child support as defined in Code of Virginia § [63.2-909](#).

- The CPS worker is encouraged to discuss this aspect of the removal process with parents; the worker may wish to discuss the parents' financial status with them to help determine whether the court should be requested to exempt them from a support obligation.

## 8.6 Immunity from civil or criminal liability

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([22 VAC 40-705-100 D](#)). Any person who participates in a judicial proceeding resulting from making a child protective services report or complaint or from taking a child into custody pursuant to §§ [63.2-1509](#), [63.2-1510](#), and [63.2-1517](#) of the Code of Virginia, shall be immune from any civil or criminal liability in connection therewith unless it is proven that such person acted in bad faith or with malicious intent pursuant to § [63.2-1512](#) of the Code of Virginia.

## 8.7 Appendix A: Preliminary protective orders in cases of family abuse

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Code of Virginia sections §§ [16.1-253.1](#) (Preliminary protective orders in cases of family abuse), [16.1-253.4](#) (Emergency protective orders authorized in certain cases), and [16.1-279.1](#) (Protective orders in cases of family abuse) are incorporated into the policy manual for reference. The purpose of these protective orders is specifically to address domestic violence (DV). The LDSS does not have standing to petition a court for the issuance of a protective order pursuant to §§ [16.1-253.1](#), [16.1-253.4](#), and [16.1-279.1](#).

### 8.7.1 Statutory authority

(§ [16.1-253.1](#) of the Code of Virginia). Preliminary protective orders in cases of family abuse; confidentiality.

A. Upon the filing of a petition alleging that the petitioner is or has been, within a reasonable period of time, subjected to family abuse, the court may issue a preliminary protective order against an allegedly abusing person in order to protect the health and safety of the petitioner or any family or household member of the petitioner. The order may be issued in an ex parte proceeding upon good cause shown when the petition is supported by an affidavit or sworn testimony before the judge or intake officer. Immediate and present danger of family abuse or evidence sufficient to establish probable cause that family abuse has recently occurred shall constitute good cause. Evidence that the petitioner has been subjected to family abuse within a reasonable time and evidence of immediate and present danger of family abuse may be established by a showing that (i) the allegedly abusing person is incarcerated and is to be released from incarceration within 30 days following the petition or has been released from incarceration within 30 days prior to the petition, (ii) the crime for which the allegedly abusing person was convicted and incarcerated involved family abuse against the petitioner, and (iii) the allegedly abusing person has made threatening contact with the petitioner while he was incarcerated, exhibiting a renewed threat to the petitioner of family abuse.

A preliminary protective order may include any one or more of the following conditions to be imposed on the allegedly abusing person:

1. Prohibiting acts of family abuse or criminal offenses that result in injury to person or property.

2. Prohibiting such contacts by the respondent with the petitioner or family or household members of the petitioner as the court deems necessary for the health or safety of such persons.
3. Granting the petitioner possession of the premises occupied by the parties to the exclusion of the allegedly abusing person; however, no such grant of possession shall affect title to any real or personal property.
4. Enjoining the respondent from terminating any necessary utility service to a premises that the petitioner has been granted possession of pursuant to subdivision 3 or, where appropriate, ordering the respondent to restore utility services to such premises.
5. Granting the petitioner temporary possession or use of a motor vehicle owned by the petitioner alone or jointly owned by the parties to the exclusion of the allegedly abusing person; however, no such grant of possession or use shall affect title to the vehicle.
6. Requiring that the allegedly abusing person provide suitable alternative housing for the petitioner and any other family or household member and, where appropriate, requiring the respondent to pay deposits to connect or restore necessary utility services in the alternative housing provided.
7. Granting the petitioner the possession of any companion animal as defined in § [3.2-6500](#) if such petitioner meets the definition of owner in § [3.2-6500](#).
8. Any other relief necessary for the protection of the petitioner and family or household members of the petitioner.

#### **8.7.2 Name of alleged abuser to be entered Into Virginia Criminal Information Network**

(§ [16.1-253.1 B](#) of the Code of Virginia). B. The court shall forthwith, but in all cases no later than the end of the business day on which the order was issued, enter and transfer electronically to the Virginia Criminal Information Network the respondent's identifying information and the name, date of birth, sex, and race of each protected person provided to the court. A copy of a preliminary protective order containing any such identifying information shall be forwarded forthwith to the primary law-enforcement agency responsible for service and entry of protective orders. Upon receipt of the order by the primary law-enforcement agency, the agency shall forthwith verify and enter any modification as necessary to the identifying information and other appropriate information required by the Department of State Police into the Virginia Criminal Information Network established and maintained by the Department pursuant to Chapter 2 (§ [52-12](#) et seq.) of



Title 52 and the order shall be served forthwith on the allegedly abusing person in person as provided in [§ 16.1-264](#) and due return made to the court. However, if the order is issued by the circuit court, the clerk of the circuit court shall forthwith forward an attested copy of the order containing the respondent's identifying information and the name, date of birth, sex, and race of each protected person provided to the court to the primary law-enforcement agency providing service and entry of protective orders and upon receipt of the order, the primary law-enforcement agency shall enter the name of the person subject to the order and other appropriate information required by the Department of State Police into the Virginia Criminal Information Network established and maintained by the Department pursuant to Chapter 2 ([§ 52-12](#) et seq.) of Title 52 and the order shall be served forthwith on the allegedly abusing person in person as provided in [§ 16.1-264](#). Upon service, the agency making service shall enter the date and time of service and other appropriate information required by the Department of State Police into the Virginia Criminal Information Network and make due return to the court. The preliminary order shall specify a date for the full hearing. The hearing shall be held within 15 days of the issuance of the preliminary order. If the respondent fails to appear at this hearing because the respondent was not personally served, or if personally served was incarcerated and not transported to the hearing, the court may extend the protective order for a period not to exceed six months. The extended protective order shall be served forthwith on the respondent. However, upon motion of the respondent and for good cause shown, the court may continue the hearing. The preliminary order shall remain in effect until the hearing. Upon request after the order is issued, the clerk shall provide the petitioner with a copy of the order and information regarding the date and time of service. The order shall further specify that either party may at any time file a motion with the court requesting a hearing to dissolve or modify the order. The hearing on the motion shall be given precedence on the docket of the court.

Upon receipt of the return of service or other proof of service pursuant to subsection C of [§ 16.1-264](#), the clerk shall forthwith forward an attested copy of the preliminary protective order to the primary law-enforcement agency, and the agency shall forthwith verify and enter any modification as necessary into the Virginia Criminal Information Network as described above. If the order is later dissolved or modified, a copy of the dissolution or modification order shall also be attested, forwarded forthwith to the primary law-enforcement agency responsible for service and entry of protective orders, and upon receipt of the order by the primary law-enforcement agency, the agency shall forthwith verify and enter any modification as necessary to the identifying information and other appropriate information required by the Department of State Police into the Virginia Criminal Information Network as described above and the order shall be served forthwith and due return made to the court.

### 8.7.3 Preliminary order effective upon service

(§ [16.1-253.1 C](#) of the Code of Virginia). The preliminary order is effective upon personal service on the allegedly abusing person. Except as otherwise provided in § [16.1-253.2](#), a violation of the order shall constitute contempt of court.

### 8.7.4 Full hearing on the petition

(§ [16.1-253.1 D](#) of the Code of Virginia). At a full hearing on the petition, the court may issue a protective order pursuant to § [16.1-279.1](#) if the court finds that the petitioner has proven the allegation of family abuse by a preponderance of the evidence.

### 8.7.5 Use of closed-circuit testimony

(§ [63.2-1521 A](#) of the Code of Virginia). In any civil proceeding involving alleged abuse or neglect of a child pursuant to this chapter or pursuant to § 16.1-241, 16.1-251, 16.1-252, 16.1-253, 16.1-253.1, 16.1-253.4, 16.1-278.14, 16.1-279.1, 16.1-283, or 20-107.2, the child's attorney or guardian ad litem or, if the child has been committed to the custody of a local department, the attorney for the local department may apply for an order from the court that the testimony of the alleged victim or of a child witness be taken in a room outside the courtroom and be televised by two-way closed-circuit television. The person seeking such order shall apply for the order at least seven days before the trial date.

## 8.8 Appendix B: Emergency protective orders (EPO) in cases of family abuse

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### 8.8.1 Statutory authority

(§ [16.1-253.4 A](#) of the Code of Virginia). Emergency protective orders authorized in certain cases; confidentiality.

A. Any judge of a circuit court, general district court, juvenile and domestic relations district court or magistrate may issue a written or oral ex parte emergency protective order pursuant to this section in order to protect the health or safety of any person.

Any judge or magistrate may issue an emergency protective order to protect the health and safety of any person in accordance with § [16.1-253.4](#). The emergency protective order may be issued ex parte, either in writing or orally.

### 8.8.2 A police officer or the allegedly abused person may petition the court and must testify to the circumstances

(§ [16.1-253.4 B](#) of the Code of Virginia). B. When a law-enforcement officer or an allegedly abused person asserts under oath to a judge or magistrate, and on that assertion or other evidence the judge or magistrate (i) finds that a warrant for a violation of § [18.2-57.2](#) has been issued or issues a warrant for violation of § [18.2-57.2](#) and finds that there is probable danger of further acts of family abuse against a family or household member by the respondent or (ii) finds that reasonable grounds exist to believe that the respondent has committed family abuse and there is probable danger of a further such offense against a family or household member by the respondent, the judge or magistrate shall issue an ex parte emergency protective order, except if the respondent is a minor, an emergency protective order shall not be required, imposing one or more of the following conditions on the respondent:

1. Prohibiting acts of family abuse or criminal offenses that result in injury to person or property;
2. Prohibiting such contacts by the respondent with family or household members of the respondent as the judge or magistrate deems necessary to protect the safety of such persons;
3. Granting the family or household member possession of the premises occupied by the parties to the exclusion of the respondent; however, no such grant of possession shall affect title to any real or personal property; and

4. Granting the petitioner the possession of any companion animal as defined in § [3.2-6500](#) if such petitioner meets the definition of owner in § [3.2-6500](#).

When the judge or magistrate considers the issuance of an emergency protective order pursuant to clause (i) he shall presume that there is probable danger of further acts of family abuse against a family or household member by the respondent unless the presumption is rebutted by the allegedly abused person.

### 8.8.3 Duration of emergency protective order

(§ [16.1-253.4 C](#) of the Code of Virginia). C. An emergency protective order issued pursuant to this section shall expire at 11:59 p.m. on the third day following issuance. If the expiration occurs on a day that the court is not in session, the emergency protective order shall be extended until 11:59 p.m. on the next day that the juvenile and domestic relations district court is in session. When issuing an emergency protective order under this section, the judge or magistrate shall provide the protected person or the law-enforcement officer seeking the emergency protective order with the form for use in filing petitions pursuant to § [16.1-253.1](#) and written information regarding protective orders that shall include the telephone numbers of domestic violence agencies and legal referral sources on a form prepared by the Supreme Court. If these forms are provided to a law-enforcement officer, the officer may provide these forms to the protected person when giving the emergency protective order to the protected person. The respondent may at any time file a motion with the court requesting a hearing to dissolve or modify the order issued hereunder. The hearing on the motion shall be given precedence on the docket of the court.

### 8.8.4 Law enforcement may request EPO orally, in person, or by electronic means

(§ [16.1-253.4 D](#) of the Code of Virginia). D. A law-enforcement officer may request an emergency protective order pursuant to this section and, if the person in need of protection is physically or mentally incapable of filing a petition pursuant to § [16.1-253.1](#) or [16.1-279.1](#), may request the extension of an emergency protective order for an additional period of time not to exceed three days after expiration of the original order. The request for an emergency protective order or extension of an order may be made orally, in person or by electronic means, and the judge of a circuit court, general district court, or juvenile and domestic relations district court or a magistrate may issue an oral emergency protective order. An oral emergency protective order issued pursuant to this section shall be reduced to writing, by the law-enforcement officer requesting the order or the magistrate on a preprinted form approved and provided by the Supreme Court of Virginia. The completed form shall include a statement of the grounds for the order asserted by the officer or the allegedly abused person.

### 8.8.5 Name of alleged abuser to be entered Into Virginia Criminal Information Network

(§ [16.1-253.4 E](#) of the Code of Virginia). E. The court or magistrate shall forthwith, but in all cases no later than the end of the business day on which the order was issued, enter and transfer electronically to the Virginia Criminal Information Network the respondent's identifying information and the name, date of birth, sex, and race of each protected person provided to the court or magistrate. A copy of an emergency protective order issued pursuant to this section containing any such identifying information shall be forwarded forthwith to the primary law-enforcement agency responsible for service and entry of protective orders. Upon receipt of the order by the primary law-enforcement agency, the agency shall forthwith verify and enter any modification as necessary to the identifying information and other appropriate information required by the Department of State Police into the Virginia Criminal Information Network established and maintained by the Department pursuant to Chapter 2 (§ [52-12](#) et seq.) of Title 52 and the order shall be served forthwith upon the respondent and due return made to the court. However, if the order is issued by the circuit court, the clerk of the circuit court shall forthwith forward an attested copy of the order containing the respondent's identifying information and the name, date of birth, sex, and race of each protected person provided to the court to the primary law-enforcement agency providing service and entry of protective orders and upon receipt of the order, the primary law-enforcement agency shall enter the name of the person subject to the order and other appropriate information required by the Department of State Police into the Virginia Criminal Network established and maintained by the Department pursuant to Chapter 2 (§ [52-12](#) et seq.) of Title 52 and the order shall be served forthwith on the respondent. Upon service, the agency making service shall enter the date and time of service and other appropriate information required by the Department of State Police into the Virginia Criminal Information Network and make due return to the court. One copy of the order shall be given to the allegedly abused person when it is issued, and one copy shall be filed with the written report required by subsection D of § [19.2-81.3](#). The judge or magistrate who issues an oral order pursuant to an electronic request by a law-enforcement officer shall verify the written order to determine whether the officer who reduced it to writing accurately transcribed the contents of the oral order. The original copy shall be filed with the clerk of the juvenile and domestic relations district court within five business days of the issuance of the order. If the order is later dissolved or modified, a copy of the dissolution or modification order shall also be attested, forwarded forthwith to the primary law-enforcement agency responsible for service and entry of protective orders, and upon receipt of the order by the primary law-enforcement agency, the agency shall forthwith verify and enter any modification as necessary to the identifying information and other appropriate information required by the Department of State Police into the Virginia Criminal Information Network as described above and the order shall be served forthwith

and due return made to the court. Upon request, the clerk shall provide the allegedly abused person with information regarding the date and time of service.

#### **8.8.6 EPO not affected by fact family left premise to avoid danger**

(§ [16.1-253.4 F](#) of the Code of Virginia). F. The availability of an emergency protective order shall not be affected by the fact that the family or household member left the premises to avoid the danger of family abuse by the respondent.

#### **8.8.7 Issuance of EPO not evidence of any wrongdoing**

(§ [16.1-253.4 G](#) of the Code of Virginia). G. The issuance of an emergency protective order shall not be considered evidence of any wrongdoing by the respondent.

This code section means that, although the court may have issued an emergency protective order against a person, the court order does not mean the person committed the alleged act. A full hearing on the matter must be conducted to determine whether the alleged act occurred.

#### **8.8.8 Definition of law-enforcement officer**

(§ [16.1-253.4 H](#) of the Code of Virginia). H. As used in this section, a "law-enforcement officer" means any (i) full-time or part-time employee of a police department or sheriff's office which is part of or administered by the Commonwealth or any political subdivision thereof and who is responsible for the prevention and detection of crime and the enforcement of the penal, traffic or highway laws of the Commonwealth and (ii) member of an auxiliary police force established pursuant to subsection B of § [15.2-1731](#). Part-time employees are compensated officers who are not full-time employees as defined by the employing police department or sheriff's office.

#### **8.8.9 Definition of copy includes fax**

(§ [16.1-253.4 J](#) of the Code of Virginia). As used in this section, "copy" includes a facsimile copy.

#### **8.8.10 Use of closed-circuit testimony**

(§ [63.2-1521 A](#) of the Code of Virginia). In any civil proceeding involving alleged abuse or neglect of a child pursuant to this chapter or pursuant to § 16.1-241, 16.1-251, 16.1-252, 16.1-253, 16.1-253.1, 16.1-253.4, 16.1-278.14, 16.1-279.1, 16.1-283, or 20-107.2, the child's attorney or guardian ad litem or, if the child has been committed to the custody of a local department, the attorney for the local department may apply for an order from the

court that the testimony of the alleged victim or of a child witness be taken in a room outside the courtroom and be televised by two-way closed-circuit television. The person seeking such order shall apply for the order at least seven days before the trial date.

## 8.9 Appendix C: Protective orders in cases of family abuse

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### 8.9.1 Statutory authority

(§ [16.1-279.1 A](#) of the Code of Virginia). Protective order in cases of family abuse.

A. In cases of family abuse, including any case involving an incarcerated or recently incarcerated respondent against whom a preliminary protective order has been issued pursuant to § [16.1-253.1](#), the court may issue a protective order to protect the health and safety of the petitioner and family or household members of the petitioner. A protective order issued under this section may include any one or more of the following conditions to be imposed on the respondent:

1. Prohibiting acts of family abuse or criminal offenses that result in injury to person or property;
2. Prohibiting such contacts by the respondent with the petitioner or family or household members of the petitioner as the court deems necessary for the health or safety of such persons;
3. Granting the petitioner possession of the residence occupied by the parties to the exclusion of the respondent; however, no such grant of possession shall affect title to any real or personal property;
4. Enjoining the respondent from terminating any necessary utility service to the residence to which the petitioner was granted possession pursuant to subdivision 3 or, where appropriate, ordering the respondent to restore utility services to that residence;
5. Granting the petitioner temporary possession or use of a motor vehicle owned by the petitioner alone or jointly owned by the parties to the exclusion of the respondent; however, no such grant of possession or use shall affect title to the vehicle;
6. Requiring that the respondent provide suitable alternative housing for the petitioner and, if appropriate, any other family or household member and where appropriate, requiring the respondent to pay deposits to connect or restore necessary utility services in the alternative housing provided;
7. Ordering the respondent to participate in treatment, counseling or other programs as the court deems appropriate;
8. Granting the petitioner the possession of any companion animal as defined in § [3.2-6500](#) if such petitioner meets the definition of owner in § [3.2-6500](#); and



9. Any other relief necessary for the protection of the petitioner and family or household members of the petitioner, including a provision for temporary custody or visitation of a minor child.

A1. If a protective order is issued pursuant to subsection A of this section, the court may also issue a temporary child support order for the support of any children of the petitioner whom the respondent has a legal obligation to support. Such order shall terminate upon the determination of support pursuant to [§ 20-108.1](#).

### 8.9.2 Duration of protective order

([§ 16.1-279.1 B](#) of the Code of Virginia). B. The protective order may be issued for a specified period of time up to a maximum of two years. The protective order shall expire at 11:59 p.m. on the last day specified or at 11:59 p.m. on the last day of the two-year period if no date is specified. Prior to the expiration of the protective order, a petitioner may file a written motion requesting a hearing to extend the order. Proceedings to extend a protective order shall be given precedence on the docket of the court. If the petitioner was a member of the respondent's family or household at the time the initial protective order was issued, the court may extend the protective order for a period not longer than two years to protect the health and safety of the petitioner or persons who are family or household members of the petitioner at the time the request for an extension is made. The extension of the protective order shall expire at 11:59 p.m. on the last day specified or at 11:59 p.m. on the last day of the two-year period if no date is specified. Nothing herein shall limit the number of extensions that may be requested or issued.

### 8.9.3 Name of alleged abuser to be entered Into Virginia Criminal Information Network

([§ 16.1-279.1 C](#) of the Code of Virginia). C. A copy of the protective order shall be served on the respondent and provided to the petitioner as soon as possible. The court shall forthwith, but in all cases no later than the end of the business day on which the order was issued, enter and transfer electronically to the Virginia Criminal Information Network the respondent's identifying information and the name, date of birth, sex, and race of each protected person provided to the court and shall forthwith forward the attested copy of the protective order containing any such identifying information to the primary law-enforcement agency responsible for service and entry of protective orders. Upon receipt of the order by the primary law-enforcement agency, the agency shall forthwith verify and enter any modification as necessary to the identifying information and other appropriate information required by the Department of State Police into the Virginia Criminal Information Network established and maintained by the Department pursuant to Chapter 2 ([§ 52-12](#) et seq.) of Title 52 and the order shall be served forthwith upon the respondent

and due return made to the court. However, if the order is issued by the circuit court, the clerk of the circuit court shall forthwith forward an attested copy of the order containing the respondent's identifying information and the name, date of birth, sex, and race of each protected person provided to the court to the primary law-enforcement agency providing service and entry of protective orders and upon receipt of the order, the primary law-enforcement agency shall enter the name of the person subject to the order and other appropriate information required by the Department of State Police into the Virginia Criminal Information Network established and maintained by the Department pursuant to Chapter 2 (§ [52-12](#) et seq.) of Title 52 and the order shall be served forthwith upon the respondent. Upon service, the agency making service shall enter the date and time of service and other appropriate information required by the Department of State Police into the Virginia Criminal Information Network and make due return to the court. If the order is later dissolved or modified, a copy of the dissolution or modification order shall also be attested, forwarded forthwith to the primary law-enforcement agency responsible for service and entry of protective orders, and upon receipt of the order by the primary law-enforcement agency, the agency shall forthwith verify and enter any modification as necessary to the identifying information and other appropriate information required by the Department of State Police into the Virginia Criminal Information Network as described above and the order shall be served forthwith and due return made to the court.

#### **8.9.4 Violation of court order constitutes contempt of court**

(§ [16.1-279.1 D](#) of the Code of Virginia). D. Except as otherwise provided in § [16.1-253.2](#), a violation of a protective order issued under this section shall constitute contempt of court.

#### **8.9.5 Court costs and attorney's fees**

(§ [16.1-279.1 E](#) of the Code of Virginia). E. The court may assess costs and attorneys' fees against either party regardless of whether an order of protection has been issued as a result of a full hearing.

#### **8.9.6 Other state court orders given full faith and credit**

(§ [16.1-279.1 F](#) of the Code of Virginia). F. Any judgment, order or decree, whether permanent or temporary, issued by a court of appropriate jurisdiction in another state, the United States or any of its territories, possessions or Commonwealths, the District of Columbia or by any tribal court of appropriate jurisdiction for the purpose of preventing violent or threatening acts or harassment against or contact or communication with or physical proximity to another person, including any of the conditions specified in subsection A, shall be accorded full faith and credit and enforced in the Commonwealth as if it were an order of the Commonwealth, provided reasonable notice and opportunity to

be heard were given by the issuing jurisdiction to the person against whom the order is sought to be enforced sufficient to protect such person's due process rights and consistent with federal law. A person entitled to protection under such a foreign order may file the order in any juvenile and domestic relations district court by filing with the court an attested or exemplified copy of the order. Upon such a filing, the clerk shall forthwith forward an attested copy of the order to the primary law-enforcement agency responsible for service and entry of protective orders which shall, upon receipt, enter the name of the person subject to the order and other appropriate information required by the Department of State Police into the Virginia Criminal Information Network established and maintained by the Department pursuant to Chapter 2 (§ [52-12](#) et seq.) of Title 52. Where practical, the court may transfer information electronically to the Virginia Criminal Information Network.

#### **8.9.7 Either party may request dissolution or modification of protective order**

(§ [16.1-279.1 G](#) of the Code of Virginia). G. Either party may at any time file a written motion with the court requesting a hearing to dissolve or modify the order. Proceedings to dissolve or modify a protective order shall be given precedence on the docket of the court.

#### **8.9.8 Copy includes fax**

(§ [16.1-279.1 H](#) of the Code of Virginia). H. As used in this section, "copy" includes a facsimile copy.

#### **8.9.9 Use of closed-circuit testimony**

(§ [63.2-1521 A](#) of the Code of Virginia). In any civil proceeding involving alleged abuse or neglect of a child pursuant to this chapter or pursuant to § 16.1-241, 16.1-251, 16.1-252, 16.1-253, 16.1-253.1, 16.1-253.4, 16.1-278.14, 16.1-279.1, 16.1-283, or 20-107.2, the child's attorney or guardian ad litem or, if the child has been committed to the custody of a local department, the attorney for the local department may apply for an order from the court that the testimony of the alleged victim or of a child witness be taken in a room outside the courtroom and be televised by two-way closed-circuit television. The person seeking such order shall apply for the order at least seven days before the trial date.

## 8.10 Appendix D: Guidelines for State Courts and Agencies in Indian Child Welfare Custody Proceedings

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The following information is taken from the [“Guidelines for State Courts and Agencies in Indian Child Custody Proceedings”](#) published 2-25-2015 by the Indian Affairs Bureau.

### GENERAL PROVISIONS:

#### 8.10.1 What is the purpose of these guidelines?

These guidelines clarify the minimum Federal standards and best practices governing the implementation of the Indian Child Welfare Act (ICWA) to ensure that ICWA is applied in all states consistent with the Act’s express language, Congress’ intent in enacting the statute and the canon of construction that statutes enacted for the benefit of Indians are to be liberally construed to their benefit. In order to fully implement ICWA, these guidelines should be applied in all proceedings and stages of a proceeding in which the Act becomes applicable.

#### 8.10.2 What terms do I need to know?

- **Active efforts** are intended primarily to maintain and reunite an Indian child with his or her family or tribal community and constitute more than reasonable efforts as required by Title IV-E of the Social Security Act ([42 U.S.C. 671\(a\)\(15\)](#)). Active efforts include, for example:
  - Engaging the Indian child, the Indian child's parents, the Indian child's extended family members, and the Indian child's custodian(s);
  - Taking steps necessary to keep siblings together;
  - Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;
  - Identifying, notifying, and inviting representatives of the Indian child's tribe to participate;
  - Conducting or causing to be conducted a diligent search for the Indian child's extended family members for assistance and possible placement;
  - Taking into account the Indian child's tribe's prevailing social and cultural conditions and way of life, and requesting the assistance of representatives

designated by the Indian child's tribe with substantial knowledge of the prevailing social and cultural standards;

- Offering and employing all available and culturally appropriate family preservation strategies;
- Completing a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal;
- Notifying and consulting with extended family members of the Indian child to provide family structure and support for the Indian child, to assure cultural connections, and to serve as placement resources for the Indian child;
- Making arrangements to provide family interaction in the most natural setting that can ensure the Indian child's safety during any necessary removal;
- Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents or extended family in utilizing and accessing those resources;
- Monitoring progress and participation in services;
- Providing consideration of alternative ways of addressing the needs of the Indian child's parents and extended family, if services do not exist or if existing services are not available;
- Supporting regular visits and trial home visits of the Indian child during any period of removal, consistent with the need to ensure the safety of the child; and
- Providing post-reunification services and monitoring.

“Active efforts” are separate and distinct from requirements of the Adoption and Safe Families Act(ASFA), [42 U.S.C. 1305](#). ASFA's exceptions to reunification efforts do not apply to ICWA proceedings.

- **Agency** means a private State-licensed agency or public agency and their employees, agents or officials involved in and/or seeking to place a child in a child custody proceeding.
- **Child custody** proceeding means and includes any proceeding or action that involves:

- Foster care placement, which is any action removing an Indian child from his or her parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, although parental rights have not been terminated;
  - Termination of parental rights, which is any action resulting in the termination of the parent-child relationship;
  - Pre-adoptive placement, which is the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; or
  - Adoptive placement, which is the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.
- **Continued custody** means physical and/or legal custody that a parent already has or had at any point in the past. The biological mother of a child has had custody of a child.
  - **Custody** means physical and/or legal custody under any applicable tribal law or tribal custom or State law. A party may demonstrate the existence of custody by looking to tribal law or tribal custom or State law.
  - **Domicile** means:
    - For a parent or any person over the age of eighteen, physical presence in a place and intent to remain there;
    - For an Indian child, the domicile of the Indian child's parents. In the case of an Indian child whose parents are not married to each other, the domicile of the Indian child's mother. Under the principle for determining the domicile of an Indian child, it is entirely logical that "[o]n occasion, a child's domicile of origin will be in a place where the child has never been." Holyfield, 490 U.S. at 48. Holyfield notes that tribal jurisdiction under [25 U.S.C. 1911\(a\)](#) was not meant to be defeated by the actions of individual members of the tribe, because Congress was concerned not solely about the interests of Indian children and families, but also about the impact of large numbers of Indian children adopted by non-Indians on the tribes themselves. Id. at 49.
  - **Extended family member** is defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, is a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle,

brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent.

- **Imminent physical damage or harm** means present or impending risk of serious bodily injury or death that will result in severe harm if safety intervention does not occur.
- **Indian** means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in 43 CFR part 1606.
- **Indian child** means any unmarried person who is under age eighteen and is either: (1) a member of an Indian tribe; or (2) eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe.
- **Indian child's tribe** means: (1) the Indian tribe in which an Indian child is a member or eligible for membership; or (2) in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has more significant contacts.
- **Indian Child Welfare Act (ICWA) or Act** means [25 U.S.C. 1901](#) et seq.
- **Indian custodian** means any person who has legal custody of an Indian child under tribal law or custom or under State law, whichever is more favorable to the rights of the parent, or to whom temporary physical care, custody, and control has been transferred by the parent of such child.
- **Indian organization** means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians or a tribe, or a majority of whose members are Indians.
- **Indian tribe** means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in [43 U.S.C. 1602\(c\)](#).
- **Parent** means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include an unwed father where paternity has



not been acknowledged or established. To qualify as a parent, an unwed father need only take reasonable steps to establish or acknowledge paternity. Such steps may include acknowledging paternity in the action at issue or establishing paternity through DNA testing.

- **Reservation** means Indian country as defined in [18 U.S.C 1151](#), including any lands, title to which is held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation.
- **Secretary** means the Secretary of the Interior or the Secretary's authorized representative acting under delegated authority.
- **Status offenses** mean offenses that would not be considered criminal if committed by an adult; they are acts prohibited only because of a person's status as a minor (e.g., truancy, incorrigibility).
- **Tribal court** means a court with jurisdiction over child custody proceedings, including a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe vested with authority over child custody proceedings.
- **Upon demand** means that the parent or Indian custodians can regain custody simply upon request, without any contingencies such as repaying the child's expenses.
- **Voluntary placement** means a placement that either parent has, of his or her free will, chosen for the Indian child, including private adoptions.

### 8.10.3 When does ICWA apply?

ICWA applies whenever an Indian child is the subject of a State child custody proceeding as defined by the Act. ICWA also applies to proceedings involving status offenses or juvenile delinquency proceedings if any part of those proceedings results in the need for placement of the child in a foster care, pre-adoptive or adoptive placement, or termination of parental rights.

There is no exception to application of ICWA based on the so-called "existing Indian family doctrine." Thus, the following non-exhaustive list of factors should not be considered in determining whether ICWA is applicable: the extent to which the parent



or Indian child participates in or observes tribal customs, votes in tribal elections or otherwise participates in tribal community affairs, contributes to tribal or Indian charities, subscribes to tribal newsletters or other periodicals of special interest in Indians, participates in Indian religious, social, cultural, or political events, or maintains social contacts with other members of the tribe; the relationship between the Indian child and his/her Indian parents; the extent of current ties either parent has to the tribe; whether the Indian parent ever had custody of the child; and the level of involvement of the tribe in the State court proceedings.

Agencies and State courts, in every child custody proceeding, must ask whether the child is or could be an Indian child and conduct an investigation into whether the child is an Indian child. Even in those cases in which the child is not removed from the home, such as when an agency opens an investigation or the court orders the family to engage in services to keep the child in the home as part of a diversion, differential, alternative response or other program, agencies and courts should follow the verification and notice provisions of these guidelines. Providing notice allows tribes to intervene as early as possible in a child custody proceeding and provides an opportunity for the tribe to bring resources to bear to assist the family in preventing a breakup of the family.

If there is any reason to believe the child is an Indian child, the agency and State court must treat the child as an Indian child, unless and until it is determined that the child is not a member or is not eligible for membership in an Indian tribe.

ICWA and these guidelines or any associated Federal guidelines do not apply to:

- Tribal court proceedings;
- Placements based upon an act by the Indian child which, if committed by an adult, would be deemed a criminal offense; or
- An award, in a divorce proceeding, of custody of the Indian child to one of the parents.

Voluntary placements that do not operate to prohibit the child's parent or Indian custodian from regaining custody of the child upon demand are not covered by the Act.

- Such placements should be made pursuant to a written agreement, and the agreement should state explicitly the right of the parent or Indian custodian to regain custody of the child upon demand.

- Nevertheless, it is a best practice to follow the procedures in these guidelines to determine whether a child is an Indian child and to notify the tribe.

Voluntary placements in which a parent consents to a foster care placement or seeks to permanently terminate his or her rights or to place the child in a pre-adoptive or adoptive placement are covered by the Act.

#### **8.10.4 How do I contact a tribe under these guidelines?**

To contact a tribe to provide notice or obtain information or verification under these Guidelines, you should direct the notice or inquiry as follows:

- Many tribes designate an agent for receipt of ICWA notices. The Bureau of Indian Affairs publishes a list of tribes' designated tribal agents for service of ICWA notice in the Federal Register each year and makes the list available on its Web site at [www.bia.gov](http://www.bia.gov).
- For tribes without a designated tribal agent for service of ICWA notice, contact the tribe(s) to be directed to the appropriate individual or office.
- If you do not have accurate contact information for the tribe(s) or the tribe(s) contacted fail(s) to respond to written inquiries, you may seek assistance in contacting the Indian tribe(s) from the Bureau of Indian Affairs' Regional Office and/or Central Office in Washington DC (see [www.bia.gov](http://www.bia.gov)).

#### **8.10.5 How do these guidelines interact with state laws?**

These guidelines provide minimum Federal standards and best practices to ensure compliance with ICWA and should be applied in all child custody proceedings in which the Act applies.

In any child custody proceeding where applicable State or other Federal law provides a higher standard of protection to the rights of the parent or Indian custodian than the protection accorded under the Act, ICWA requires that the State court must apply the higher standard.

### **PRETRIAL REQUIREMENTS:**

#### **8.10.6 When does the requirement for active efforts begin?**

The requirement to engage in “active efforts” begins from the moment the possibility arises that an agency case or investigation may result in the need for the Indian child

to be placed outside the custody of either parent or Indian custodian in order to prevent removal.

Active efforts to prevent removal of the child must be conducted while investigating whether the child is a member of the tribe, is eligible for membership in the tribe, or whether a biological parent of the child is or is not a member of a tribe.

#### **8.10.7 What actions must an agency and State court undertake in order to determine whether a child is an Indian child?**

Agencies must ask whether there is reason to believe a child that is subject to a child custody proceeding is an Indian child. If there is reason to believe that the child is an Indian child, the agency must obtain verification, in writing, from all tribes in which it is believed that the child is a member or eligible for membership, as to whether the child is an Indian child.

State courts must ask, as a threshold question at the start of any State court child custody proceeding, whether there is reason to believe the child who is the subject of the proceeding is an Indian child by asking each party to the case, including the guardian ad litem and the agency representative, to certify on the record whether they have discovered or know of any information that suggests or indicates the child is an Indian child.

- In requiring this certification, the court may require the agency to provide:
  - Genograms or ancestry charts for both parents, including all names known (maiden, married and former names or aliases); current and former addresses of the child's parents, maternal and paternal grandparents and great grandparents or Indian custodians; birthdates; places of birth and death; tribal affiliation including all known Indian ancestry for individuals listed on the charts, and/or other identifying information; and/or
  - The addresses for the domicile and residence of the child, his or her parents, or the Indian custodian and whether either parent or Indian custodian is domiciled on or a resident of an Indian reservation or in a predominantly Indian community.
- If there is reason to believe the child is an Indian child, the court must confirm that the agency used active efforts to work with all tribes of which the child may be a member to verify whether the child is in fact a member or eligible for membership in any tribe, under 1<sup>st</sup> paragraph in this section.

An agency or court has reason to believe that a child involved in a child custody proceeding is an Indian child if:

- Any party to the proceeding, Indian tribe, Indian organization or public or private agency informs the agency or court that the child is an Indian child;
- Any agency involved in child protection services or family support has discovered information suggesting that the child is an Indian child;
- The child who is the subject of the proceeding gives the agency or court reason to believe he or she is an Indian child;
- The domicile or residence of the child, parents, or the Indian custodian is known by the agency or court to be, or is shown to be, on an Indian reservation or in a predominantly Indian community; or
- An employee of the agency or officer of the court involved in the proceeding has knowledge that the child may be an Indian child.

In seeking verification of the child's status, in a voluntary placement proceeding where a consenting parent evidences a desire for anonymity, the agency or court must keep relevant documents confidential and under seal. A request for anonymity does not relieve the obligation to obtain verification from the tribe(s) or to provide notice.

#### **8.10.8 Who makes the determination as to whether a child is a member of a tribe?**

Only the Indian tribe(s) of which it is believed a biological parent or the child is a member or eligible for membership may make the determination whether the child is a member of the tribe(s), is eligible for membership in the tribe(s), or whether a biological parent of the child is a member of the tribe(s).

The determination by a tribe of whether a child is a member, is eligible for membership, or whether a biological parent is or is not a member of that tribe, is solely within the jurisdiction and authority of the tribe.

No other entity or person may authoritatively make the determination of whether a child is a member of the tribe or is eligible for membership in the tribe.

- There is no requirement that the child maintain a certain degree of contacts with the tribe or for a certain blood quantum or degree of Indian blood.

- A tribe need not formally enroll its members for a child to be a member or eligible for membership. In some tribes, formal enrollment is not required for tribal membership. Some tribes do not have written rolls and others have rolls that list only persons that were members as of a certain date. See *United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir. 1979). The only relevant factor is whether the tribe verifies that the child is a member or eligible for membership.

The State court may not substitute its own determination regarding a child's membership or eligibility for membership in a tribe or tribes.

#### **8.10.9 What is the procedure for determining an Indian child's tribe when the child is a member or eligible for membership in more than one tribe?**

Agencies are required to notify all tribes, of which the child may be a member or eligible for membership, that the child is involved in a child custody proceeding. The notice should specify the other tribe or tribes of which the child may be a member or eligible for membership.

If the Indian child is a member or eligible for membership in only one tribe, that tribe should be designated as the Indian child's tribe.

If an Indian child is a member or eligible for membership in more than one tribe, ICWA requires that the Indian tribe with which the Indian child has the more significant contacts be designated as the Indian child's tribe.

- In determining significant contacts, the following may be considered:
  - Preference of the parents for membership of the child;
  - Length of past domicile or residence on or near the reservation of each tribe;
  - Tribal membership of custodial parent or Indian custodian; and
  - Interest asserted by each tribe in response to the notice that the child is involved in a child custody proceeding;

When an Indian child is already a member of a tribe, but is also eligible for membership in another tribe, deference should be given to the tribe in which the Indian child is a member, unless otherwise agreed to by the tribes. However, if the Indian child is not a member of any tribe, an opportunity should be provided to allow the tribes to determine which of them should be designated as the Indian child's tribe.

- If the tribes are able to reach an agreement, the agreed upon tribe should be designated as the Indian child's tribe.
- If the tribes do not agree, the following factors should be considered in designating the Indian child's tribe:
  - The preference of the parents or extended family members who are likely to become foster care or adoptive placements; and/or
  - Tribal membership of custodial parent or Indian custodian; and/or
  - If applicable, length of past domicile or residence on or near the reservation of each tribe; and/or
  - Whether there has been a previous adjudication with respect to the child by a court of one of the tribes; and/or
  - Self-identification by the child; and/or
  - Availability of placements.
- In the event the child is eligible for membership in a tribe but is not yet a member of any tribe, the agency should take the steps necessary to obtain membership for the child in the tribe that is designated as the Indian child's tribe.
  - Once an Indian tribe is designated as the child's Indian tribe, all tribes which received notice of the child custody proceeding must be notified in writing of the determination and a copy of that document must be filed with the court and sent to each party to the proceeding and to each person or governmental agency that received notice of the proceeding.
  - A determination of the Indian child's tribe for purposes of ICWA and these guidelines does not constitute a determination for any other purpose or situation.

The tribe designated as the Indian child's tribe may authorize another tribe to act as a representative for the tribe in a child custody case, including, for example, having the representative tribe perform home studies or expert witness services for the Indian child's tribe.

#### **8.10.10 When must a State court dismiss an action?**

Subject to above (emergency procedures), the following limitations on a State court's jurisdiction apply:

- The court must dismiss any child custody proceeding as soon as the court determines that it lacks jurisdiction.
- The court must make a determination of the residence and domicile of the Indian child. If either the residence or domicile is on a reservation where the tribe exercises exclusive jurisdiction over child custody proceedings, the State court must dismiss the State court proceedings, the agency must notify the tribe of the dismissal based on the tribe's exclusive jurisdiction, and the agency must transmit all available information regarding the Indian child custody proceeding to the tribal court.
- If the Indian child has been domiciled or previously resided on an Indian reservation, the State court must contact the tribal court to determine whether the child is a ward of the tribal court. If the child is a ward of a tribal court, the State court must dismiss the State court proceedings, the agency must notify the tribe of the dismissal, and the agency must transmit all available information regarding the Indian child custody proceeding to the tribal court.

#### **8.10.11 What are the notice requirements for a child custody proceeding involving an Indian child?**

When an agency or court knows or has reason to know that the subject of an involuntary child custody proceeding is an Indian child, the agency or court must send notice of each such proceeding (including but not limited to a temporary custody hearing, any removal or foster care placement, any adoptive placement, or any termination of parental or custodial rights) by registered mail with return receipt requested to:

- Each tribe where the child may be a member or eligible for membership;
- The child's parents; and
- If applicable, the Indian custodian.

Notice may be sent via personal service or electronically in addition to the methods required by the Act, but such alternative methods do not replace the requirement for notice to be sent by registered mail with return receipt requested.

Notice must be in clear and understandable language and include the following:

- Name of the child, the child's birthdate and birthplace;

- Name of each Indian tribe(s) in which the child is a member or may be eligible for membership;
- A copy of the petition, complaint or other document by which the proceeding was initiated;
- Statements setting out:
  - The name of the petitioner and name and address of petitioner's attorney;
  - The right of the parent or Indian custodian to intervene in the proceedings.
  - The Indian tribe's right to intervene at any time in a State court proceeding for the foster care placement of or termination of a parental right.
  - If the Indian parent(s) or, if applicable, Indian custodian(s) is unable to afford counsel based on a determination of indigency by the court, counsel will be appointed to represent the parent or Indian custodian where authorized by State law.
  - The right to be granted, upon request, a specific amount of additional time (up to 20 additional days) to prepare for the proceedings due to circumstances of the particular case.
  - The right to petition the court for transfer of the proceeding to tribal court under [25 U.S.C. 1911](#), absent objection by either parent: Provided, that such transfer is subject to declination by the tribal court.
  - The mailing addresses and telephone numbers of the court and information related to all parties to the proceeding and individuals notified under this section.
  - The potential legal consequences of the proceedings on the future custodial and parental rights of the Indian parents or Indian custodians.

In order to assist the Indian tribe(s) in making a determination regarding whether the child is a member or eligible for membership, the agency or court should include additional information in the notice, such as:

- Genograms or ancestry charts for both parents, including all names known (maiden, married and former names or aliases); current and former addresses of the child's parents, maternal and paternal grandparents and great grandparents or Indian custodians; birthdates; places of birth and death; tribal affiliation including all known Indian ancestry for individuals listed on the charts, and/or other identifying information; and/or



- The addresses for the domicile and residence of the child, his or her parents, or the Indian custodian and whether either parent or Indian custodian is domiciled on or a resident of an Indian reservation or in a predominantly Indian community.
- In the event that a parent has requested anonymity, the agency and court must take steps to keep information related to the parent confidential and sealed from disclosure.

If the identity or location of the Indian parents, Indian custodians or tribes in which the Indian child is a member or eligible for membership cannot be ascertained, but there is reason to believe the child is an Indian child, notice of the child custody proceeding must be sent to the appropriate Bureau of Indian Affairs Regional Director (see [www.bia.gov](http://www.bia.gov)). To establish tribal identity, as much information as is known regarding the child's direct lineal ancestors should be provided (see section B.6.(c) of these guidelines regarding notice requirements). The Bureau of Indian Affairs will not make a determination of tribal membership, but may, in some instances, be able to identify tribes to contact.

Because child custody proceedings are usually conducted on a confidential basis, information contained in the notice should be kept confidential to the extent possible.

The original or a copy of each notice sent under this section should be filed with the court together with any return receipts or other proof of service.

If a parent or Indian custodian appears in court without an attorney, the court must inform him or her of the right to appointed counsel, the right to request that the proceeding be transferred to tribal court, the right to object to such transfer, the right to request additional time to prepare for the proceeding and the right (if the parent or Indian custodian is not already a party) to intervene in the proceedings.

If the court or an agency has reason to believe that a parent or Indian custodian possesses limited English proficiency and is therefore not likely to understand the contents of the notice, the court or agency must, at no cost, provide a translated version of the notice or have the notice read and explained in a language that the parent or Indian custodian understands. To secure such translation or interpretation support, a court or agency should contact the Indian child's tribe or the local BIA agency for assistance in locating and obtaining the name of a qualified translator or interpreter.

In voluntary proceedings, notice should also be sent in accordance with this section because the Indian tribe might have exclusive jurisdiction and/or the right to intervene. Further, notice to and involvement of the Indian tribe in the early stages of the proceedings aids the agency and court in satisfying their obligations to determine whether the child is an Indian child and in complying with [25 U.S.C. 1915](#).

If the child is transferred interstate, regardless of whether the Interstate Compact on the Placement of Children (ICPC) applies, both the originating State court and receiving State court must provide notice to the tribe(s) and seek to verify whether the child is an Indian child.

The notice requirement includes providing responses to requests for additional information, where available, in the event that a tribe indicates that such information is necessary to determine whether a child is an Indian child.

#### **8.10.12 What time limits and extensions apply?**

No hearings regarding decisions for the foster care or termination of parental rights may begin until the waiting periods to which the parents or Indian custodians and to which the Indian child's tribe are entitled have passed. Additional extensions of time may also be granted beyond the minimum required by the Act.

A tribe, parent or Indian custodian entitled to notice of the pendency of a child custody proceeding has a right, upon request, to be granted an additional 20 days from the date upon which notice was received in accordance with [25 U.S.C. 1912\(a\)](#) to prepare for participation in the proceeding.

The proceeding may not begin until all of the following dates have passed:

- 10 days after each parent or Indian custodian (or Secretary where the parent or Indian custodian is unknown to the petitioner) has received notice in accordance with [25 U.S.C. 1912\(a\)](#);
- 10 days after the Indian child's tribe (or the Secretary if the Indian child's tribe is unknown to the party seeking placement) has received notice in accordance with [25 U.S.C. 1912\(a\)](#);
- 30 days after the parent or Indian custodian has received notice in accordance with [25 U.S.C. 1912\(a\)](#), if the parent or Indian custodian has requested an additional 20 days to prepare for the proceeding; and

- 30 days after the Indian child's tribe has received notice in accordance with [25 U.S.C. 1912\(a\)](#), if the Indian child's tribe has requested an additional 20 days to prepare for the proceeding.

The court should allow, if it possesses the capability, alternative methods of participation in State court proceedings by family members and tribes, such as participation by telephone, videoconferencing, or other methods.

#### **8.10.13 What is the process for the emergency removal of an Indian child?**

The emergency removal and emergency placement of an Indian child in a foster home or institution under applicable State law is allowed only as necessary to prevent imminent physical damage or harm to the child. This requirement applies to all Indian children regardless of whether they are domiciled or reside on a reservation. This does not, however, authorize a State to remove a child from a reservation where a tribe exercises exclusive jurisdiction.

Any emergency removal or emergency placement of any Indian child under State law must be as short as possible. Each involved agency or court must:

- Diligently investigate and document whether the removal or placement is proper and continues to be necessary to prevent imminent physical damage or harm to the child;
- Promptly hold a hearing to hear evidence and evaluate whether the removal or placement continues to be necessary whenever new information is received or assertions are made that the emergency situation has ended; and
- Immediately terminate the emergency removal or placement once the court possesses sufficient evidence to determine that the emergency has ended.

If the agency that conducts an emergency removal of a child whom the agency knows or has reason to know is an Indian child, the agency must:

- Treat the child as an Indian child until the court determines that the child is not an Indian child;
- Conduct active efforts to prevent the breakup of the Indian family as early as possible, including, if possible, before removal of the child;
- Immediately take and document all practical steps to confirm whether the child is an Indian child and to verify the Indian child's tribe;

- Immediately notify the child's parents or Indian custodians and Indian tribe of the removal of the child;
- Take all practical steps to notify the child's parents or Indian custodians and Indian tribe about any hearings regarding the emergency removal or emergency placement of the child; and
- Maintain records that detail the steps taken to provide any required notifications under section B.6 of these guidelines.

A petition for a court order authorizing emergency removal or continued emergency physical custody must be accompanied by an affidavit containing the following information:

- The name, age and last known address of the Indian child;
- The name and address of the child's parents and Indian custodians, if any;
- If such persons are unknown, a detailed explanation of what efforts have been made to locate them, including notice to the appropriate Bureau of Indian Affairs Regional Director (see [www.bia.gov](http://www.bia.gov));
- Facts necessary to determine the residence and the domicile of the Indian child;
- If either the residence or domicile is believed to be on an Indian reservation, the name of the reservation;
- The tribal affiliation of the child and of the parents and/or Indian custodians;
- A specific and detailed account of the circumstances that led the agency responsible for the emergency removal of the child to take that action;
- If the child is believed to reside or be domiciled on a reservation where the tribe exercises exclusive jurisdiction over child custody matters, a statement of efforts that have been made and are being made to transfer the child to the tribe's jurisdiction;
- A statement of the specific active efforts that have been taken to assist the parents or Indian custodians so the child may safely be returned to their custody; and

- A statement of the imminent physical damage or harm expected and any evidence that the removal or emergency custody continues to be necessary to prevent such imminent physical damage or harm to the child.

At any court hearing regarding the emergency removal or emergency placement of an Indian child, the court must determine whether the removal or placement is no longer necessary to prevent imminent physical damage or harm to the child. The court should accept and evaluate all information relevant to the agency's determination provided by the child, the child's parents, the child's Indian custodians, the child's tribe or any participants in the hearing.

Temporary emergency custody should not be continued for more than 30 days. Temporary emergency custody may be continued for more than 30 days only if:

- A hearing, noticed in accordance with these guidelines, is held and results in a determination by the court, supported by clear and convincing evidence and the testimony of at least one qualified expert witness, that custody of the child by the parent or Indian custodian is likely to result in imminent physical damage or harm to the child; or
- Extraordinary circumstances exist.

The emergency removal or placement must terminate as soon as the imminent physical damage or harm to the child which resulted in the emergency removal or placement no longer exists, or, if applicable, as soon as the tribe exercises jurisdiction over the case, whichever is earlier.

Once an agency or court has terminated the emergency removal or placement, it must expeditiously:

- Return the child to the parent or Indian custodian within one business day; or
- Transfer the child to the jurisdiction of the appropriate Indian tribe if the child is a ward of a tribal court or a resident of or domiciled on a reservation; or
- Initiate a child custody proceeding subject to the provisions of the Act and these guidelines.

The court should allow, if it possesses the capability, alternative methods of participation in State court proceedings by family members and tribes, such as participation by telephone, videoconferencing, or other methods.

**8.10.14 What are the procedures for determining improper removal?**

If, in the course of any Indian child custody proceeding, any party asserts or the court has reason to believe that the Indian child may have been improperly removed from the custody of his or her parent or Indian custodian, or that the Indian child has been improperly retained, such as after a visit or other temporary relinquishment of custody, the court must immediately stay the proceeding until a determination can be made on the question of improper removal or retention, and such determination must be conducted expeditiously.

If the court finds that the Indian child was improperly removed or retained, the court must terminate the proceeding and the child must be returned immediately to his or her parents or Indian custodian, unless returning the child to his parent or custodian would subject the child to imminent physical damage or harm.

**8.10.15 Who may serve as an expert witness?**

A qualified expert witness should have specific knowledge of the Indian tribe's culture and customs.

Persons with the following characteristics, in descending order, are presumed to meet the requirements for a qualified expert witness:

- A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.
- A member of another tribe who is recognized to be a qualified expert witness by the Indian child's tribe based on their knowledge of the delivery of child and family services to Indians and the Indian child's tribe.
- A layperson who is recognized by the Indian child's tribe as having substantial experience in the delivery of child and family services to Indians, and knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe.
- A professional person having substantial education and experience in the area of his or her specialty who can demonstrate knowledge of the prevailing social and cultural standards and childrearing practices within the Indian child's tribe.

The court or any party may request the assistance of the Indian child's tribe or the Bureau of Indian Affairs agency serving the Indian child's tribe in locating persons qualified to serve as expert witnesses.