Improving the Court Process for Alaska's Children in Need of Aid

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table of contents

table of contents (continued)

table of contents (continued)

table of contents (continued)

table of contents (continued)

table of contents (continued)

table of contents (continued)

Chapter 1
Introduction

On September 19, 1996, the Anchorage Daily News reported on its front page "an alarming increase in the incidence of child abuse and neglect in this country...."[1] The number of these cases had doubled from an estimated 1.4 million cases in 1986 to an estimated 2.8 million in 1993.[2]

Alaska has by no means escaped this crisis. The Alaska Division of Family and Youth Services reported a 67% increase in reports of harm to children from 1989 to 1993,[3] and a 99.4% increase from fiscal year 1989 to fiscal year 1995.[4] That increase in clients has not been matched with increased funding.[5] The Division has had to do more with less.[6] The implications for Alaska's abused and neglected children are disturbing at best.

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[1] Barbara Vobejda, *Child Abuse Doubles*, ANCHORAGE DAILY NEWS, p. A1, September 19, 1996.

[2] *Id.*

[3] DIVISION OF FAMILY AND YOUTH SERVICES, FISCAL YEAR 1993 ANNUAL REPORT 8 (1994) [hereinafter DFYS FY 1993 ANNUAL REPORT].

[4] DIVISION OF FAMILY AND YOUTH SERVICES, FISCAL YEARS 1994 AND 1995 ANNUAL REPORT 12, Table 1 (1996) [hereinafter DFYS FY 1994 &1995 ANNUAL REPORT].

[5] Although the Division recoups some of its expenditures from the federal government, it relies on the state general fund for around 70% of its budget. *See* DFYS FY 1993 ANNUAL REPORT, *supra* note 3, at 2; DFYS FY 1994 & 1995 ANNUAL REPORT, *supra* note 4, at 1.

[6] For example, from FY 1992 to FY 1993, the Division's expenditures increased less than 1%, but the number of clients it served increased 4%. DFYS FY 1993 ANNUAL REPORT, *supra* note 3, at 2.

This report, part of a nationwide effort, examines how well the Alaska Court System (and to a lesser extent other agencies in the child welfare system) meet the needs of abused and neglected children, their troubled families, and society's interests in these cases. While the courts and other agencies are in many ways handling these cases well, especially given the resources available, there are important areas where improvements and indeed major changes are necessary.

A. National Context and Background of Project

The court's role in child welfare cases has evolved and become more complex over the last two decades. In the 1970's, the juvenile court was expected only to determine whether a child had been maltreated, and the focus was on the need to rescue the child from abusive or neglectful parents.[7] In 1980, Congress responded to problems in the child welfare system by changing its policy.[8] Now the courts are expected to help reform troubled families while at the same time protecting the children. If family preservation fails, the court is expected to ensure that each maltreated child receives a safe, permanent, and stable home.[9] In short, Congress' policy change increased judges' responsibilities, making them an integral part of the operation of the foster care system.[10]

In 1993, Congress decided to assess and improve implementation of the 1980 law.[11] It approved grants to state court systems, including Alaska, to assess and improve their handling of abuse, neglect, foster care and adoption litigation. The Alaska Court System contracted with the Alaska Judicial Council[12] to carry out the

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[7] HARDIN, ONE COURT THAT WORKS 1 (ABA Center on Children and the Law, 1993).

[8] Congress changed its policy by passing the Adoption Assistance and Child Welfare Act of 1980. The legal requirements of the Act are discussed in more detail in Chapter 2, Section A.

[9] WATAHARA & LOBDELL, THE CHILDREN NOBODY KNOWS: CALIFORNIA'S FOSTER CARE-DEPENDENCY SYSTEM 7 (1990).

[10] L. Edwards, *Improving Implementation of the Federal Adoption Assistance and Child Welfare Act of 1980*, JUVENILE AND FAMILY COURT JOURNAL 3 (1994).

[11] Hardin, M., IMPROVING STATE COURTS' PERFORMANCE IN CHILD PROTECTION CASES: USER'S MANUAL FOR CONDUCTING YOUR COURT ASSESSMENT 1 (ABA Center on Children and the Law, 1995). *See* Public Law 103-66, §§ 13711(d)(2) and 13712 (hereinafter ASSESSMENT USER'S MANUAL).

[12] The Judicial Council is a constitutionally created state agency charged with, among other things, conducting studies to improve the administration of justice in Alaska. The Council is composed of three attorney members appointed by the Alaska Bar Association, three non-attorney members appointed by the governor with consent of the legislature meeting in joint session, and the chief justice of the supreme court (who serves *ex officio*).

assessment phase of the DHSS Court Improvement Program. This report is one product of that assessment.[13]

Congress' appropriation and the Alaska Court System's decision to pursue the federal grant underscore the importance of child welfare cases. These cases deeply affect the people directly involved. For the child who is the subject of a child in need of aid proceeding (a CINA case), being separated from the parents is a highly traumatic event. Young children have different perceptions of time than do adults. From the child's perspective, ninety days (the length of time between court review hearings for children taken out of the home) is an entire summer, or a third of the school year. As an experienced juvenile court judge has noted, even children who have been abused or neglected often miss their parents and long to be reunited with them.[14]

CINA cases also affect society in general. Caring for children in foster care is expensive. Caring for children with serious behavioral and emotional problems is more expensive still, and some say that the population of foster children suffers increasingly from these problems. Successful interventions might help foster children grow up to become productive citizens, while unsuccessful interventions will not break the cycles of abuse and dysfunction.[15]

Yet CINA cases are among the most difficult cases for the courts. Aside from the practical difficulty of deciding what is best for someone else's children, these cases present a very real potential for conflict among the rights of children, parents, tribes and institutional players such as the court system, the Department of Law, the Public Defender and the Department of Health and Social Services.[16] For example, a troubled parent has the right to have enough time to work through a case plan; yet children need certainty and prompt decisions. The parties look to judges to hold people accountable, yet many judges feel they lack the expertise or the authority to actively

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[13] As a preliminary part of this assessment, the Council created a number of smaller, more detailed reports on various aspects of child welfare cases. These reports include interview summaries, a memo analyzing case file data and a memo analyzing survey data. Contact the Council, 1029 W. Third Ave., Ste. 201, Anchorage, AK 99501, for copies of those reports.

[14] L. Edwards, Preface to THE CHILDREN NOBODY KNOWS: CALIFORNIA'S FOSTER CARE-DEPENDENCY SYSTEM 2 (1990).

[15] Several studies have noted connections between abuse or neglect of a child and later development of violent and delinquent behavior. *See* Thornberry (1994), Wright & Wright (1994), and Widom (1992). *Id.*

[16] Within the Department of Health and Social Services, the Division of Family and Youth Services (DFYS) handles child abuse and neglect matters in Alaska.

manage cases. Tribes have a strong interest in seeing Indian children placed in relative care or Indian foster homes (in compliance with the federal Indian Child Welfare Act), yet a parent who lives in Anchorage might oppose placement in the village because it is too far away to visit.

B. Overview of Child in Need of Aid Process

Few people outside the child welfare system understand the child in need of aid process. First, the system is complicated. Second, CINA cases are confidential by law. Third, CINA cases in Alaska have not previously been studied, and little has been written about how they are handled. To help readers understand the process, this section follows a hypothetical CINA case as it might progress through the system.

This hypothetical case involves Brittany (2 years old), and Tyler (4 years old). They and their young mother, Anne, live in Anchorage.

This CINA case, like most, begins with a report of harm that a child has been abused or neglected. In this case, a babysitter phones DFYS to say that the children's mother said she would be back ten hours ago but has not returned.[17] She says that the mother has a history of binge drinking. Brittany's father lives out of state, and she does not know about Tyler's father. The babysitter reports that there is no food for the children to eat in the apartment, and that Brittany has a bad cold. She has no information about other relatives.

The social worker who takes the call refers to DFYS policies to categorize the level of seriousness.[18] In this case, the social worker decides to investigate the case right away. Upon investigation, the social worker takes emergency custody of the children. She places the two children in different foster families. The social worker cannot find the mother to notify her of the emergency custody.

Within 12 hours after taking custody, the social worker files a written petition for adjudication with the court. The court appoints a Guardian ad Litem to represent

[17] Sometimes a neighbor, relative, or health worker makes the report directly to DFYS, and sometimes the child makes the report to a teacher, friend or other person who notifies DFYS or the police.

[18] The more serious the risk and potential of harm to the child, the more quickly DFYS responds. DFYS may take emergency custody of the child with or without a court order.

Tyler and Brittany,[19] and calendars a hearing to be held 48 hours later. The social worker did not have time to notify the parents or guardian, or any Indian custodian and Indian tribe before this hearing. The social worker does notify Anne, but does not locate or notify Brittany or Tyler's fathers. The Guardian ad Litem begins investigating the case. Noticing that Brittany and Tyler were not put in the same home, the GAL tries to contact the social worker to find a way to place them together.

Anne does not appear at the temporary custody hearing, although the assistant AG, the social worker and the GAL all appear. The court appoints an attorney to represent Anne. Anne's attorney says he will not oppose temporary custody for up to 30 days.[20] The master recites findings of probable cause to believe the children are in need of aid pursuant to the definition in the statute.[21] He also finds that DFYS made reasonable efforts under the circumstances to prevent removal. The entire hearing takes three minutes.

If Anne had appeared and decided to challenge DFYS's petition for temporary custody, the court would have taken evidence and made findings about the alleged maltreatment and about whether DFYS made reasonable efforts under the circumstances to help the parents and prevent removal. However, the court almost certainly would have postponed this contested hearing, or continued the hearing to be completed another day because of time constraints.

The temporary custody hearing technically is only a preliminary proceeding at which the judge decides whether probable cause exists to believe that the child is a child in need of aid. After the temporary custody order, DFYS can ask the court to adjudicate the child a child in need of aid.[22] In practice, however, DFYS infrequently asks for adjudication hearings.[23] Instead, the parties usually agree to a series of review hearings every 90 days, during which time the focus is on helping the parents or giving the parents a chance to work on their treatment plans. The review hearings continue

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[19] In Anchorage, the court appoints the GAL before the temporary custody hearing. In most other locations, the court appoints the GAL at the temporary custody hearing.

[20] Parents commonly stipulate at the temporary custody hearing to letting DFYS have temporary custody for a few more weeks or months. Thus, few temporary custody hearings take more than 5 or 10 minutes.

[21] In order to approve the temporary custody order, the master must find that the child is a child in need of aid as a result of parental neglect or abuse.

[22] While DFYS may file a petition for adjudication before the temporary custody hearing, the court does not set the petition on for hearing without a request from DFYS.

[23] The exception to this practice occurs in Bethel, where DFYS routinely takes cases to adjudication.

every 90 days until DFYS is satisfied that the children can be returned to the parents, or until it becomes obvious that the parents will not improve. During this review time, the children usually continue in foster care, often in multiple foster care placements. Sometimes DFYS places children with relatives. In other cases DFYS returns the children home subject to supervision, or other conditions.

In this case, the AG decides to work with Anne for a while before considering asking for an adjudication hearing. After the temporary custody hearing, Anne had contacted her attorney and said she wanted her children back. She admitted to an alcohol problem and said she was ready to make a change and wanted treatment.

On her attorney's advice, Anne contacts the social worker who investigated the report of harm. She learns, however, that the case is being transferred to the ongoing social worker. She tries to contact the ongoing case worker, but the worker has not yet received the file.

After a few weeks, Anne meets with the ongoing social worker. They agree that she should get an alcohol assessment. They also discuss placement for Tyler and Brittany. Anne says Tyler's paternal aunt might be willing to take him, although the aunt has had little prior contact with him. The social worker establishes a weekly visitation schedule with the children and a case plan for Anne. She also contacts the aunt, who agrees to take Tyler. Brittany continues in foster care. The GAL tries to move the case along by asking the social worker whether Tyler's aunt would be willing to take Brittany as well, and by encouraging Anne to work on her case plan.

Thirty days after the emergency custody hearing, the parties' attorneys appear in court with a stipulation to extend temporary custody for 30 days so that Anne can get an alcohol assessment. The GAL also attends the hearing. The hearing takes two minutes.

A few weeks later, Anne begins missing visitations with Tyler. She complains that Tyler's aunt is making visitations difficult and unpleasant. However, she is on a waiting list for alcohol treatment.

By the time of the next review hearing, Anne has begun alcohol treatment. She has been visiting the children regularly and apparently has not been drinking. The parties stipulate to extend temporary custody for 60 days so she can finish treatment. The hearing takes five minutes.

Thirty days later, when DFYS's temporary custody order is ready to expire, Anne has completed alcohol treatment. She takes her children back, after two months in out-of-home care. The court registers no further activity in the case.

Four months later, DFYS receives a report of harm from Tyler's aunt that Anne left the children unsupervised and was drunk. The social worker who investigates finds the children alone in the apartment and again takes emergency custody.

Tyler goes back to his aunt's and Brittany goes to another foster family. The social worker notifies the court of the removal, and the court sets a hearing for 48 hours later. Minutes before the subsequent emergency custody hearing, Anne and her lawyer and the GAL meet outside the courtroom with the assistant AG. Anne denies drinking, claiming that she was at the grocery store, she had asked a neighbor to watch the children, and she came right back. The attorneys work out a stipulated finding of probable cause and present it to the court. The hearing lasts 4 minutes.

The case continues with several months of temporary custody orders and a 90-day review hearing. During this time, Tyler remains with his aunt and Brittany continues in foster care. The GAL again advocates that Brittany and Tyler be placed together; however, Tyler's aunt is initially unwilling to take Brittany.

Meanwhile, Anne has been resisting the social worker's recommendation for more alcohol treatment (she does not like the program and feels she does not need it). She does agree to take a parenting class and to attend Alcoholics Anonymous, and she follows through on those promises. She continues to visit both children, although she misses some visits. The GAL works with Anne and the social worker to resolve their differences about the appropriateness of alcohol treatment. The GAL also talks to the children and the foster parents to keep track of how they are doing.

At the next 90-day review hearing, DFYS asks for a hearing on its adjudication petition. The purpose of the adjudication hearing will be to decide whether the children are children in need of aid as a result of parental neglect or abuse. This hearing will mark the first opportunity for DFYS to show beyond probable cause that the children are children in need of aid and that state intervention is therefore legally justified.

Parents often agree to the CINA adjudication, sometimes after negotiating with the assistant attorney general about how the facts will appear in the stipulation. Such uncontested hearings are short and not adversarial. Other times, parents contest the

CINA adjudication. These contested hearings take more court time and tend to be difficult to schedule. In this case, Anne's attorney decides to contest the adjudication, and the court calendars the hearing before a superior court judge for 60 days later.

At the time appointed for the adjudication hearing, Tyler's father, who was located by an attorney assigned to represent his interests, appears for the first time. The court advises him of his rights and postpones the adjudication hearing for 30 days. During the postponement, the Anchorage Citizens' Foster Care Review Panel locates Brittany's father, who is incarcerated in California. Brittany's father writes a letter to the court, and the court assigns him an attorney.

At the hearing thirty days later, all parties, including the GAL, are present. The attorney assigned to represent Brittany's father asks for a continuance because he has not had a chance to talk to his client. The court continues the case for one week. During the week-long hiatus, the attorneys, GAL and social worker try to negotiate a resolution to the case.

A week later, the parties or their attorneys and the GAL again appear in court to announce they have reached an agreement for adjudication. They say that they need more time to work out an agreement for disposition, however. Since the second report of harm, Anne has been doing well, visiting regularly, attending Alcoholics Anonymous and keeping appointments with her social worker. Tyler's father wants him to stay with his aunt. Brittany's father is not scheduled for release for several years, and has not voiced an interest in having custody, although he does plan to return to Alaska.

The judge continues the current placement arrangement (an interim disposition), and then schedules the disposition hearing for 60 days later. At the disposition, the court for the first time will decide about the children's longer-term placement and about Anne's treatment plan. The court will hear evidence, and receive written reports from the GAL, the social worker and others about appropriate placements for the children. In this case, the GAL probably will advocate for placing the children together, among other things. The court will choose among longer-term foster care, relative placement, or releasing the children to Anne under DFYS supervision. The court's disposition order will be good for two years, although DFYS can ask for extensions.

Another type of disposition, which is relatively rare in Alaska, is termination of parental rights. The court may terminate a parent's rights to a child if it finds that the parent's conduct caused the harm to the child, and that the conduct is likely to continue. In some cases, a parent voluntarily relinquishes parental rights. In other cases the parent contests the petition for termination. Once a parent's rights are terminated, the child is free to be adopted or placed in a guardianship; however, in practice time often elapses before the child is adopted or achieves a permanent placement after termination of parental rights.

About a year after the court decides on a disposition for Tyler and Brittany, it will review the disposition order, probably without a hearing. The purpose of this annual review will be to establish whether the children continue to be children in need of aid, and whether the children can be returned to Anne (assuming she does not have custody and her parental rights have not been terminated). The court also will make findings as to whether DFYS has been making reasonable efforts to help her rehabilitate herself so she can regain custody.

Another type of post-disposition review is the permanency planning hearing. Federal and state statutes require this hearing to occur either eighteen months after the child is taken into emergency custody or eighteen months after a disposition order is entered. The purpose is to review the child's placement, the services provided, and to determine the child's future status. Until recently, Alaska courts seldom held permanency planning hearings, perhaps because the CINA rules do not mention them. In any event, the court will hold the annual review (usually without a hearing) a year after the disposition. The court and DFYS will continue to have jurisdiction over Anne and her children until the two-year custody order expires, DFYS dismisses the case, or until the court finds that the children are no longer children in need of aid. If DFYS wishes to retain jurisdiction for more than two years, it must petition to extend custody.

C. The Assessment

In 1993, Congress approved grants to state court systems to improve their handling of child maltreatment cases. Courts were to assess how they handle abuse, neglect, foster care and adoption litigation (using methodical observation and collection of data), then develop a plan to improve the administration of justice in foster care and

adoption cases, and implement the plan.[24] The legislation anticipated examining issues such as completeness and depth of hearings (emphasizing effective compliance with state and federal mandates), sufficient and timely notice to parties, quality of parties' legal representation, efficient and timely decision-making, adequacy of funding, and quality of treatment of parties. The legislation also encouraged courts to assess the selection and training of judicial officers, judicial time to prepare for and conduct hearings, role and training of court staff, case flow management to avoid delays, selection and training of attorneys and guardians ad litem, and the use of technology in order to fully plan for improved court roles in foster care.[25]

1. Source of Funds

The Alaska Court System contracted with the Alaska Judicial Council to carry out the assessment required under the DHSS Court Improvement Program, using federal funds allocated to each state to improve the courts' ability to handle these cases. These activities included evaluating court compliance with federal standards for foster care hearings, and working with a statewide advisory committee to recommend changes and improvements. The one-year grant had about $79,000 in funding for staff, data collection and analysis, review of legal standards and issues, and preparation of a plan for improvements to take place in the next several years. The plan to implement improvements will use a mixture of federal funds (75%) and state match (25%) during the following three years.

2. Participants, Advisory Committee, and Roles

The Judicial Council, the court system, five state agencies, Alaska Native organizations, and private citizens agreed to examine foster care issues in Alaska during 1995 and 1996. State and local government agencies (including Division of Family and Youth Services and the Department of Law) provided data, and advised the Council and court system. The Judicial Council provided staff and guidance, the court assisted with access to data and some administrative needs, and other agencies encouraged staff to cooperate and participate in the evaluation.

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[24] ASSESSMENT USER'S MANUAL, *supra* note 11, at 1.

[25] *Id.* at 4.

Advisory Committee members included Judge Larry Zervos (Superior Court, Sitka), Children's Court Master William Hitchcock (Anchorage), Susan Miller (Special Projects, Alaska Courts), Division of Family and Youth Services staff Diane Worley (Juneau) and Mark Preston (Bethel), Kimberly Martus (UAA Justice Center, Anchorage), Vicki Otte (Native Justice Center, Anchorage and Juneau), Kathy Craft (Family Centered Youth Services, Fairbanks), Barbara Malchick (Office of Public Advocacy, Anchorage), Linda Beecher (Public Defender Agency, Anchorage), Susan Parkes (Department of Law, Anchorage), William Walters (Tanana Chiefs Conference, Fairbanks), Candace Wheeler (Citizens Foster Care Review Panel, Anchorage), Pat Kennedy (Anchorage), Verneta Wallace (Anchorage), Kerry Reband (Anchorage), and Angela Olson (Anchorage).

3. Methods

The Council relied on two national sources to design much of the assessment. The American Bar Association's Center for Children and the Law worked with Alaska[26] to help design interview and data collection forms, and suggested methodologies and structure for the assessment.[27] The federal Department of Health and Human Services also gave guidance and support throughout the project.

The assessment used data from five major sources: (1) a detailed study of case files in four courts; (2) interviews with attorneys, judges, guardians ad litem, tribal representatives, and others in each of the four communities and interviews with other persons; (3) observations of actual hearings in three courts;[28] (4) analysis of the laws, court rules and cases governing Child in Need of Aid (CINA) cases; and (5) input from the public, the Advisory Committee for the project, and from special interest organizations.

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[26] The Center contracted with the federal Department of Health and Social Services to help all states that received funds to assess or improve court's efforts in permanency planning.

[27] The ABA Center for Children and the Law suggested that an assessment of the state court's handling of permanency planning should examine the following issues: 1) Quality of proceedings, including depth of hearings, notice to parties, representation of parties, timeliness of decisions, adequacy of funding, and quality of treatment of parties; and 2) Organizational characteristics, including training of judicial officers, judge time to prepare for and conduct hearings, court staff resources, caseflow management, use of technology, and selection and training of attorneys and guardians ad litem. ASSESSMENT USER'S MANUAL, *supra* note 11. The Center outlined a wide variety of data sources and measures for assessing the court's performance. The Council relied on the Center's work to design its assessment, and will refer to the Center's performance measures throughout this report.

[28] Anchorage, Bethel, and Fairbanks. Staff worked in Sitka during a week in which the court had not set any CINA hearings.

The Council reviewed 473 closed and open cases from four court locations.[29] The court case files contained information about the length of time the case took, how many children were involved, the nature of the parental problem that brought the case to the CINA system, the number of hearings in the case (who was present, who spoke on the record and the outcome of the hearing), the judicial orders in the case, and the final outcome of the case.[30]

Staff spoke to about 60 people in structured interviews. The interviews described the relationships among parties in the case, descriptions of the CINA process and roles of the different participants, reasons for delays and possible solutions, and suggested changes to the system. Input from the public, Advisory Committee, and others raised issues about the handling of specific cases, overall policy considerations for foster care, and much information about aspects of the CINA and foster care system beyond the scope of this report.[31]

The legal analysis focused on the federal legislation and its interactions with state laws, and court rules. The legal analysis is set out in Chapter 2.[32] Each court had major strengths in the way it handles children's cases. Anchorage was well-organized, with careful attention to order in files, responsiveness to parties, and efficiency in case management. Fairbanks judges had a strong commitment to individual handling of each case, and set a high priority for children's cases. The Fairbanks court also had a long history of working closely with the Attorney General's office. In Bethel, the court and DFYS cooperated closely in recent years to improve case handling and coordination with tribal services, and to reduce backlogs. Sitka had a long history of coordination among the court, DFYS, and tribal workers in children's cases. Although fewer attorneys participated in Sitka cases, the court encouraged other parties to speak in court and take active roles.

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[29] Anchorage, Bethel, Fairbanks, and Sitka. Anchorage (about 260,000 population) and Fairbanks (about 70,000 in the area) were considered urban courts. Sitka, in southeast Alaska, has the fourth largest population (about 8,500) of any city in the state but one of the lower caseloads. Bethel serves its own population of about 4,000, and fifty-six villages spread throughout western Alaska along the Yukon and Kuskokwim rivers and the Bering Sea coast.

[30] Some case files (N= 259) did not show a final outcome. These are discussed *infra*.

[31] To the maximum extent possible, we have tried to pass this information on to the appropriate agencies and parties. When individuals gave us information about their own cases or ones they were familiar with, we included their data in the overall look at the way the system works.

[32] Questions about data and methodology not discussed in this report should be addressed to the Judicial Council, 1029 W. Third Ave., Ste. 201, Anchorage, AK 99501.

The report also discusses some areas in which the court system could improve its handling of CINA cases. All the courts surveyed could decrease delay in permanence for children, although the Sitka court was the timeliest on some measures. Second, the assessment found numerous inconsistencies in courts' handling of children in need of aid cases statewide. While different courts certainly need not have identical procedures, courts should increase the consistency with which they handle these cases statewide. Third, courts could do more to ensure that tribes receive early, actual notice and actively participate in cases involving the Indian Child Welfare Act. Finally and most importantly, judges need to reassess the approach that they have taken in CINA cases and begin taking a much more active role in ensuring that the interests of children are not eclipsed by the rights of others and the pressure of limited resources.

D. Structure of Report

This report is divided into thirteen chapters. The chapters fall under the general headings of Introduction, Legal Framework, Findings, Recommendations, Implementation and Conclusion. This Introduction contains information about the project and the structure of the report. Chapter 2 explains the law governing CINA cases in Alaska.

The Findings chapters (3, 4, and 5) lay out the most important information revealed during this assessment. Chapter 3 covers what we refer to as preliminary data and findings, including information about the scope of child abuse and neglect cases in Alaska (including the court's role in child abuse and neglect cases), differences in how the four courts reviewed handle cases, local legal culture and general information from CINA case files. Chapter 4 organizes findings by legal stages in the court's CINA process. Chapter 5 organizes data by topic (for example, the proper role for judges, reasonable efforts findings, delay, and case management issues). Readers may notice that the same information occasionally appears in more than one of the Findings chapters. Although we tried to minimize it, some repetition was unavoidable because of the way we divided the Findings chapters.

The next two chapters (6 and 7) contain findings on special topics. Chapter 6 discusses child in need of aid cases governed by the Indian Child Welfare Act. Chapter 7 discusses what the assessment revealed about state agencies other than the court system.

The Recommendation chapters (8, 9, 10 and 11) are based on the findings described earlier. Chapter 8 contains general recommendations and organizes them by topic (the same topics covered in Chapter 5). Chapter 9 contains recommendations specific to each legal stage of the court's proceedings (covering the same stages used in Chapter 4). Chapter 10 makes recommendations about ICWA cases. Chapter 11 makes recommendations for agencies other than the court system, including the legislature.

Finally, the Implementation chapter (Chapter 12) describes how the court system can implement the recommendations contained in the earlier parts of the report. The last chapter sums up the Judicial Council's conclusions, based on the data and impressions gained throughout this assessment and the drafting of this report.

Chapter 2
The Law Governing CINA Cases in Alaska

This chapter provides an overview of federal and state law governing child in need of aid cases in Alaska. The chapter will review the intent and major provisions of federal and state laws and local court rules governing abused and neglected children, and will summarize the most important Alaska case law interpreting these enactments. It also notes where local practice does not conform to the procedures set out by the statutes and rules.

A. Overview of Federal and State Laws Affecting Foster Care

Child in Need of Aid cases are governed by a combination of laws, primarily the federal Adoption Assistance and Child Welfare Act of 1980, the Indian Child Welfare Act of 1978, Alaska Statutes 47.10, and the Alaska Supreme Court Child in Need of Aid Rules (CINA rules). This section gives an overview of each of these laws and the supreme court rules.

1. Federal Adoption Assistance and Child Welfare Act of 1980

In 1980, Congress found that foster care systems across the country were failing to provide maltreated children with stable and permanent homes. It found that children were being needlessly removed from their homes and placed into foster care, were repeatedly moved from foster home to foster home, and were left in foster care indefinitely without finding permanent placements. To address these problems, and to assure the overall quality and safety of foster care placements, Congress created a comprehensive set of requirements and fiscal incentives to improve state foster care practice.[33]

As discussed in Chapter 1, the Adoption Assistance and Child Welfare Act broadened the role of state courts in cases involving abused and neglected children. Before 1980, state court judges generally addressed two basic questions in such cases: whether the child had been abused and neglected, and whether the child should be removed from the home.[34] Now, the Adoption Assistance Act requires more from state courts:

1) The court must determine whether the child welfare agency has made "reasonable efforts" to provide social services and parent education to the family, before removing the child from the home or moving to terminate parental rights;[35]

2) A case plan must be developed for each child in foster care, and must be reviewed at least once every six months for progress toward returning home or being placed for adoption;[36]

3) The court must hold a hearing within eighteen months to determine a permanent placement for the child;[37]

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[33] Mark Hardin, *Ten Years Later: Implementation of P.L. 96-272 by the Courts* (American Bar Association 1990). Public Law 96-272 is codified at 42 USC §§670-677.

[34] *See, e.g., In re C.L.T.*, 597 P.2d 518 (Alaska 1979).

[35] 42 USC §671(a)(15).

[36] 42 USC §671(a)(16) and §675(5)(B).

[37] 42 USC §675(5)(C). AS §47.10.080(l) also calls for the court to review the case eighteen months after the child is removed from the home. Until recently, Alaska courts held permanency planning hearings only sporadically.

4) Courts must ensure procedural safeguards for parents when children are removed from the home, or when there are changes in placement or visitation.[38]

The Adoption Assistance Act also reorganized federal funding for foster care, to give states greater incentive to find children permanent homes. It created a new funding source for social services to assist parents and prevent removal from the home, and provided maintenance funds and AFDC eligibility for foster parents.[39] While Congress repealed some of the Act's financial incentives to states in 1994,[40] the procedural protections and emphasis on permanency planning remain.

Most of the Adoption Assistance Act's requirements have been incorporated into Alaska law (AS §47.10) and the Alaska CINA rules. The federal courts have issued few rulings interpreting the Act.[41]

2. The Indian Child Welfare Act of 1978

Congress passed the Indian Child Welfare Act (ICWA)[42] to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum federal standards for the removal of Indian children[43] from their families."[44] Congress found that Indian children were often removed from their families by nontribal agencies who misunderstood Indian home life and child rearing, and that these children suffered emotional harm when placed in non-Indian homes. In addition to harming individual children, the massive removal of

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[38] 42 USC §675(5)(C).

[39] *Id.*

[40] P.L. 103-432, amending 42 USC §671(b).

[41] The only question much addressed by the federal courts is whether parents and children have a private right of action to sue the state government for damages for violations of the Adoption Assistance Act, such as failure to comply with a case review plan or failure to use reasonable efforts. In *Suter v. Artist M.*, __ US __, 112 S.Ct. 1360, 118 L.Ed.2d 1 (1992), the United States Supreme Court determined that the Act did not create a private right to sue the state for damages.

[42] 25 USC §§1901-1923, 1951.

[43] ICWA defines "Indian" to include any person who is an Alaska Native and a member of a regional corporation under the Alaska Native Claims Settlement Act, or a member of another Indian tribe. 25 USC §1903(3)-(4). *See Matter of J.M.*, 718 P.2d 150, 152 (Alaska 1986).

[44] 25 USC §1902.

children from Indian families seriously affected long-term tribal survival.[45] To combat these problems, Congress established minimum standards for the removal of Indian children from their homes, for both voluntary relinquishment for adoption and child abuse and neglect proceedings.[46] ICWA requires courts to recognize the critical role of the child's tribe in determining the future of the child.[47]

The child's tribe or tribes must be given notice of involuntary proceedings in state court,[48] and some voluntary proceedings as well.[49] The tribe has the right to intervene in both voluntary and involuntary state court child custody proceedings, including foster care placement, termination of parental rights, and adoption.[50] The tribe's presence helps assure that Indian values are considered, Indian placement preferences are met, and appropriate support is provided for the Indian parents.[51]

ICWA applies different standards of proof to some factual determinations in CINA cases, providing additional procedural protections for the parents:

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[45] For an extensive discussion of the Congressional intent behind ICWA, see *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989).

[46] 25 USC §1902. During 1996 Representative Don Young of Alaska introduced a bill in the U.S. House to amend a number of ICWA provisions. Representative Young offered the legislation after extensive negotiations among tribes, adoption attorneys, and federal officials. The bill, introduced July 16, 1996, would provide for notice to tribes for voluntary adoptions, terminations of parental rights, and foster care proceedings. It would provide time lines for tribal intervention in voluntary cases and clarify the limits on parental consent to adoptions. It would require attorneys and agencies to inform Indian parents of their rights under ICWA, and would clarify tribal court authority to declare children wards of the tribal court. The Senate Indian Affairs Committee approved the bill on July 24, 1996.

[47] *Matter of J.R.S.*, 690 P.2d 10, 18 (Alaska 1984).

[48] 25 USC §1912(a). Notice requirements need not be met before DFYS takes emergency custody of a child, but they must be met as soon as practicable. *See D.E.D. v. State*, 704 P.2d 774, 779 (Alaska 1985).

[49] While the notice provision of §1912(a) on its face applies only to involuntary foster care and termination proceedings, the Alaska Supreme Court has also required notice to tribes in adoptions. *J.R.S.*, 690 P.2d at 15. However, the court construed this section of ICWA more narrowly in *Catholic Social Services v. C.A.A.*, 783 P.2d 1159 (Alaska 1989), when it held that a tribe is not entitled to notice of a voluntary relinquishment of parental rights. Rep. Young's bill attempts to clear up this issue.

[50] 25 USC §1911(c); *Holyfield*, 490 U.S. at 38 n. 12; *J.R.S.*, 690 P.2d at 15. Time lines for intervention are laid out in Rep. Young's bill.

[51] ICWA also addresses tribal court jurisdiction over child custody cases, 25 USC §§1911(a), 1918, but its effect is unclear in Alaska. The federal and state court decisions conflict on this issue, and a thorough discussion is beyond the scope of this chapter. *Compare Native Village of Venetie IRA Council v. Alaska*, 687 F. Supp. 1380, 1395-95 (D. Alaska 1988) *with Native Village of Nenana v. Dept. of Health & Social Services*, 722 P.2d 219 (Alaska 1986). For discussion, *see* Di Pietro, *Tribal Court Jurisdiction and Public Law 280: What Role for Tribal Courts in Alaska?*, 10 AK L.REV. 333, 347-350 (1993).

1) There must be a greater showing as to preventive and reunification measures: the state must make "active efforts" to prevent removal and to reunify the family, compared to "reasonable efforts" for non-Indian children.[52]

2) There are different standards for harm to the child in the context of removal: the state must show, by clear and convincing evidence, that continued placement in the home would be likely to cause the child to suffer "serious emotional or physical damage,"[53] or qualified expert witnesses testify that removal is necessary to prevent "imminent danger of physical harm."[54]

3) There are additional procedural protections for parents voluntarily relinquishing their rights in removal and termination proceedings: the court must explain the relinquishment in detail in whatever language is most appropriate; the parent may withdraw consent to foster care placement at any time; the parent may withdraw consent to termination or adoption until it is final, and relinquishments of parental rights can be taken only in open court.[55]

4) Additional findings are necessary in termination proceedings: the state must show "beyond a reasonable doubt" that the continued custody by the parent is likely to cause serious physical or emotional damage to the Indian child, compared to showing "by clear and convincing evidence" that the parental conduct caused the non-Indian child to be a child in need of aid.[56]

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[52] *Compare* 25 USC §1912(d) *with* 42 USC §671(a)(15); *see also* CINA Rule 17(c)(2) (active efforts in context of removal) and CINA Rule 18(c)(2) (active efforts in context of termination of parental rights).

[53] *See* 25 USC §1912(e) (to authorize foster care placement), CINA Rule 10(c)(3)(B) (to authorize removal at the temporary custody hearing), and CINA Rule 17(c)(2) (to authorize removal in the context of disposition).

[54] *Compare* 25 USC §1912(e) (to authorize foster care placement), and §1922 (emergency removal) and CINA Rule 10(c)(3)(B) (to authorize removal at the temporary custody hearing) *with* AS §47.10.142(a), AS §47.10.010(a) and CINA Rule 10(c)(3)(A) (authorizing removal of non-Indian children if leaving the children in the home is contrary to the children's best interests).

[55] 25 USC §1913(a)-(c). Return of custody to the natural parent also is favored if adoption or foster care placements do not work out. 25 USC §1916(a), (b). Representative Young's bill would require attorneys and private and public agencies to inform Indian parents of their rights under the law.

[56] *Compare* 42 USC §1912(f) *with* AS §47.10.080(c)(3); *see also* CINA Rule 18(c)(1) and (2). In order to terminate parental rights to both Indian and non-Indian children, the state also must show by clear and convincing evidence that the parental conduct that caused the harm is likely to continue. *See* AS §47.10.080(c)(3), CINA Rule 18(c)(1).

5) There are provisions for additional testimony in court: removal and termination proceedings may include "qualified expert witnesses" testifying about whether leaving the child with the parents would result in serious harm to the child.[57]

When an Indian child is placed in foster care or released for adoption, ICWA expresses a preference for placement with an Indian family, as well as an order of preference: first with extended family members, then with other members of the child's tribe or tribes, then with other Indian families, then with an Indian institution.[58] The law requires that a child be placed within a reasonable proximity of home.[59] The child's tribe may intervene to defend the placement preference system.[60]

3. Review

ICWA has its own provisions for court review in addition to those provided by state law. The child's tribe may petition the court to invalidate any action for foster care placement or termination violating ICWA §1911 (jurisdiction), §1912 (notice, preventive measures, foster care placement, termination) or §1913 (voluntary termination of parental rights).[61] The act also provides that if any petitioner in a child custody proceeding has improperly removed a child from the home, the court should decline jurisdiction over the petition and return the child home unless to do so would put the child in immediate danger.[62]

4. Alaska Statute 47.10

Alaska Statute 47.10 governs child in need of aid cases and foster care. Key provisions permit the state to take emergency custody of a neglected or abused child,

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[57] *See* 25 USC §1912(e),(f); CINA Rules 10(c)(3)(B), 17(c)(2) and 18(c)(2). *See also* 25 USC §1915(d); 25 USC §1901(5). In *Matter of Termination of Rights of T.O.*, 759 P.2d 1308 (Alaska 1980), the Alaska Supreme Court rejected the mother's argument that the court should not have qualified as experts witnesses who were experts in their fields but did not have knowledge of Native culture. *Id.* at 1309. The court cited federal guidelines for expert witnesses which permitted testimony of a "professional person having substantial education in the area of his or her specialty." *Id.*

[58] 25 USC 1915(a), (b). The tribe can establish a different order of preference in individual cases. 25 USC §1915(c).

[59] 25 USC §1915(b); *D.H. v. State*, 723 P.2d 1274 (Alaska 1986).

[60] *Matter of J.R.S.*, 690 P.2d at 15.

[61] 25 USC §1914; CINA Rule 20.

[62] 25 USC §1920.

seek placement out of the home, and petition for termination of parental rights. The statutes incorporate many of the requirements of the federal Adoption Assistance Act, and protect the confidentiality of children's proceedings.[63] The statutes address four main issues: jurisdiction of the court, emergency custody and temporary placement, adjudication and disposition, and termination of parental rights.

The Alaska Supreme Court has interpreted various provisions of these statutes as attempting to balance the potentially competing rights of parents to the custody and control of their children against the interest of a child in an adequate home.[64] In an early case, the court acknowledged the "serious and substantial" nature of parental rights, while noting that "in recent years the courts have become increasingly aware of the rights of children."[65]

Taken as a whole, however, the Alaska Supreme Court's CINA decisions seem to resolve the tension between parents' and children's rights in favor of parents, at least in the context of adoption or termination of parental rights proceedings. For example, the court recently said, "The private interest of a parent whose parental rights may be terminated via an adoption petition is of the highest magnitude."[66] In an earlier case, the court said that the statutes were designed to help reintegrate children into the family and to allow the resumption of parental control.[67] In another decision, the court overturned a trial judge's adjudication of CINA because the judge had considered the best interests of the child as part of its CINA decision.[68] The court's strong statements about parental rights are consistent with this assessment's general findings, discussed later, that the children's interests in CINA cases often took second or third place to parents' rights and other parties' institutional needs, resulting mainly in delayed permanency for Alaska's children in need of aid.

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[63] AS §47.10.090; *see also* CINA Rule 22; 25 USC §1912(c).

[64] *See In re C.L.T.*, 597 P.2d at 526; *In the Matter of D.C.*, 596 P.2d 22, 23 (Alaska 1979)(citing *In the Matter of S.D., Jr.*, 549 P.2d 1190, 1201 (Alaska 1976)).

[65] *D.M. v. State*, 515 P.2d 1234, 1237 (Alaska 1973)(footnote omitted).

[66] *Matter of K.L.J.*, 813 P.2d 276, 279 (Alaska 1991). The court quoted several U.S. Supreme Court cases and Alaska cases affirming parents' rights. *Id.* The court subsequently reaffirmed that statement in *Matter of J.L.F.*, 828 P.2d 166, 170 (Alaska 1992)(overruled on other grounds), another termination case.

[67] *L.A.M. v. State*, 547 P.2d 827, 835 (Alaska 1976).

[68] *Nada A. v. State,* 660 P.2d 436, 439-40 (Alaska 1983). The supreme court instructed the trial court not to consider the child's best interests until after the adjudication (in other words, not until disposition). *Id.* The court rejected the state's argument, based on language in AS §47.10.082, that the child's best interests should be a significant, but not dispositive, consideration at each step in determining whether to terminate parental rights. *Id.*

5. The Child in Need of Aid Rules

The Alaska Supreme Court has the constitutional authority to adopt rules governing procedural matters in child in need of aid and other cases.[69] The court's Child in Need of Aid rules were designed to promote fairness, accurate fact-finding, quick determination, the best interests of the child, and the preservation of family life.[70] The rules detail the steps courts must follow from the beginning to end of a CINA case. The rules incorporate most of the requirements of the federal and state statutes.[71] They set out the required court procedures and findings in chronological order for each stage of the proceedings.

B. Legal Process for Child Abuse and Neglect Cases in Alaska

This section explains each stage in the legal process of a child abuse or neglect case in Alaska, from the time the court takes jurisdiction until the case is dismissed. The section is arranged chronologically by stage of the proceeding. It incorporates federal and state law, Alaska case law and court rules.

1. Jurisdiction of the Court

The first legal issue in a child abuse or neglect case is whether the court has the legal authority to intervene in the family. A court can assume jurisdiction over a minor child only if it finds the child to be a delinquent minor because the child violated a criminal law,[72] or if it finds the child to be a child in need of aid as a result of parental neglect or abuse.[73] AS §47.10.010(a) sets out the six situations that create CINA jurisdiction in the court:

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[69] CINA Rule 1(d). The Judicial Council's director, William T. Cotton, was the court rules attorney and reporter of the committee that completely redrafted the CINA rules in 1987.

[70] CINA Rule 1(c).

[71] One hearing required by the Adoption Assistance Act and state statutes is missing from the CINA rules. 42 USC §675(5)(C) and AS §47.10.080(l) call for a permanency planning hearing eighteen months after a child is removed from home. This hearing requires findings similar to those required by Rule 19(d), the annual review hearing, but requires the court to decide whether the child should return home, remain in out-of-home care for a specified period of time, or be adopted. Rule 19(d) only requires the court to find whether the case plan establishes a permanent plan. The court's CINA Rules committee currently is considering an amendment to include the permanency planning hearing.

[72] *See* AS §47.12. The forthcoming report of the Governor's Task Force on Juvenile Justice will review delinquency law and recommend reforms.

[73] AS §47.10.010(a).

A) The child is habitually absent from home or refuses to accept available care; or the child has no one caring or willing to provide care, including abandonment by the parent;[74]

B) The child needs substantial medical care or mental health care that the parent has knowingly failed to provide;

C) The child has suffered or is likely to suffer substantial physical harm caused by the parent or by the parent's failure to supervise the child;

D) The child has been or is likely to be sexually abused;

E) The child is committing delinquent acts as a result of the parent's pressure or approval;

F) The child has suffered substantial physical abuse or neglect as a result of conditions created by the parent.

Few of these provisions have engendered much litigation. One exception, however, has been the language in subsection (A), "having no parent, guardian, custodian, or relative caring or willing to provide care."[75] In one case, the trial court cited subsection (A) when it terminated the parental rights of a mother who was willing but unable to care for her children (the mother could not meet the children's significant needs for structure and nurturing).[76] The supreme court disagreed with the trial court's reading of the statute, holding that the rights of a willing parent could not be terminated for that reason. It interpreted subsection (A) to cover only situations where a child refuses the parent's care or where the child has been abandoned by the parent, situations of equal seriousness to the conditions described in subsections (B)-(F). It held that inability to care must arise under one of those sections, not just the generalized inability to meet the child's needs.[77] In another case, the supreme court

[74] "Parent" here refers to parents, guardians, or custodians. For purposes of subsection (A), the court also will consider whether a suitable relative is caring or willing to provide care for the child. *In re J.L.F. and K.W.F.*, 912 P.2d 1255, 1260-61 (Alaska 1996).

[75] "Caring" is defined as providing for the physical, emotional, mental, and social needs of the child. AS §47.10.990(1).

[76] *In re S.A. and D.A.*, 912 P.2d 1235, 1239, 1242 (Alaska 1996).

[77] The court overruled contrary language or holdings in three of its previous cases. *Id.* at 1242. This ruling provoked a strongly worded dissent, arguing that subsection (A) is concerned with performance, not with the good intentions or willingness of a parent already shown to be incapable. *Id.* at 1243. In response to this case, the Alaska legislature in 1996 introduced CSHB 339 (HES), amending the statute to require a parent to be "willing *and* able," but this provision was stricken from the final bill.

held that adjudication is inappropriate if a relative of ordinary parenting ability is willing to care for the children.[78]

2. Emergency Custody and Temporary Placements

A CINA case most often begins when a state social worker investigates and substantiates a report of harm to a child, then files a petition for adjudication or a petition for emergency or temporary custody in court.[79] DFYS can take emergency custody of a minor under circumstances indicating the need for immediate removal from the home: abandonment, gross neglect threatening the child's life or health, child abuse or neglect,[80] or sexual abuse.[81] DFYS can take emergency custody with or without a court order.[82] If it takes custody, DFYS must notify the child's parent or custodian within 12 hours.[83] If DFYS decides to retain custody of the child for more than 12 hours, it must file a child in need of aid petition with the court.[84]

a. Petition for temporary custody or supervision — DFYS commences court proceedings by filing a petition for temporary custody or a petition for adjudication, alleging that the child is in need of aid under AS §47.10.010(a).[85] The petition must be served on the child, parents, guardian, and guardian ad litem.[86] Special notice provisions apply for Indian tribes.[87] If the child is in custody, the court must hear the petition within 48 hours of filing; if the child is not in custody the court must hear the petition within a reasonable time after filing.[88]

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[78] *In re J.L.F and K.W.F.*, 912 P.2d at 1260-61; *R.R. v. State*, 919 P.2d 754, 758 (Alaska 1996).

[79] *See* AS §47.10.020; CINA Rule 6(b).

[80] AS §47.17.290 defines "child abuse or neglect" as "physical injury or neglect, mental injury, sexual abuse, sexual exploitation, or maltreatment of a child under the age of 18 by a person under circumstances that indicate the child's health or welfare is harmed or threatened thereby."

[81] AS §47.10.142 (a). Emergency removal under ICWA requires a showing of "imminent physical damage or harm." 25 USC §1922.

[82] *See* CINA Rules 6(a), 6(b).

[83] AS §47.10.142(c). If DFYS returns the child home within 12 hours, it must file a report with the court explaining why it took the child into custody. AS §47.10.142(c).

[84] *Id.*

[85] *See* CINA Rule 7(a).

[86] CINA Rule 7(c). *See* note 216 (Chapter 3), for explanation of the GAL's role.

[87] CINA Rule 7(e), applying 25 USC §1912. Among other things, the rule requires the state to notify "any tribe that may be the child's tribe" of rights under ICWA.

[88] AS §47.10.142(b), (c), and (d); CINA Rule 10(a)(1), (2).

b. Temporary custody hearing — At this hearing, the court determines whether there is probable cause to believe the minor is a child in need of aid and that the child's welfare requires immediate assumption of custody.[89] The hearing is held in front of a judge, a master, or a magistrate.[90]

At the beginning of this hearing, the court advises the parent and child of their rights and obligations.[91] Their rights include the right to counsel (court-appointed if necessary), their right to confront the state's witnesses and to present witnesses of their own and their privilege against self-incrimination.[92] Their obligations include the possibility that they will be required to pay child support for a child in foster care.[93]

After hearing the evidence, the court decides whether probable cause exists to believe that the child is in need of aid, as defined by statute.[94] In addition to the probable cause finding, the court also decides if DFYS made reasonable efforts to offer services to the family to prevent removal from the home.[95] In ICWA cases, the court also must determine whether the state complied with the ICWA placement preferences.[96]

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[89] CINA Rule 6(b)(3); AS §47.10.142. In the case of an Indian child, the court may not order removal unless necessary to prevent imminent physical harm to the child. CINA Rule 6(b)(3); 25 USC §1922. Many CINA workers refer to this hearing as a probable cause hearing.

[90] In many areas of the state, superior court judges hear CINA proceedings. In Anchorage and a few other places, a standing master appointed by the court hears some of them. The master has the power to issue most procedural and emergency orders. In the adjudication and disposition phases of a case the master may make findings of fact and recommendations for approval by the superior court, or the superior court judge may conduct the hearing. CINA Rule 4. District court judges and magistrates have authority to protect minors in emergency situations. CINA Rule 5.

[91] CINA Rule 10(b).

[92] The court will appoint counsel for any parent or guardian who is financially unable to employ counsel, for a parent on active military duty, and for an absent parent whose parental rights may be terminated. The court may also appoint counsel for the child where the child's interests require it. CINA Rule 12. An indigent Indian custodian has the right to court-appointed counsel under 25 USC §1912(b). *See also Matter of K.L.J.*, 813 P.2d at 283 (due process clause of state constitution requires court to appoint counsel for father facing termination of parental rights).

[93] *See* CINA Rule 10(b).

[94] AS §47.10.030(c); CINA Rule 10(c).

[95] CINA Rules 10(c)(4) and 15(g), applying 42 USC §671(a)(15). In cases involving Indian children, DFYS must satisfy the court that it made "active efforts" to provide services to prevent the breakup of the Indian family, and that these efforts were unsuccessful. *See* 25 U.S.C. §1912(d). However, the court's failure to find reasonable or active efforts does not deprive it of jurisdiction over the case. *See* Edwards, L., *supra* note 10, at 19.

[96] CINA Rule 10(c)(4)(B).

c. Temporary custody — The possible outcomes of the temporary custody hearing are determined by statute and applied in the court rules.[97] If the court finds probable cause to believe that the child is a child in need of aid, it can return the child to the parents subject to the supervision of DFYS, or it can approve removal from the home, committing the child to DFYS for temporary placement, usually in foster care.[98] However, the court can approve removal only if it finds placement in the home is contrary to the welfare of the child (for a non-Indian child) or necessary to prevent imminent physical harm or physical or emotional damage (for an Indian child).[99] If the court does not find probable cause to believe that the child was in need of aid, it dismisses the petition[100] and returns the child to the parents.[101] A copy of the custody order must be served on the child, the parents, Indian custodian, and guardian.[102]

The court approves the terms, conditions, and duration of the placement, such as treatment, social services, and visitation.[103] During the temporary placement, parents have the right to reasonable visitation and the right to consent to adoption, marriage, military enlistment, and major medical treatment.[104] If the child is placed in foster care, DFYS ordinarily pays the costs of maintenance and monitors the quality of the placement.[105]

3. Predisposition Review Hearings

The court must review CINA cases periodically after the temporary custody order. Court rules require a hearing every 90 days at which the court reviews an order

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[97] *See* AS §47.10.030(c); CINA Rule 10(c). DFYS must offer counseling, supervision, parenting classes, or other services to strengthen the family and help the parent. If the court authorizes removal, it also must determine whether DFYS made reasonable efforts to prevent the need for removal. *In re J.L.F.*, 828 P.2d at 171 (overruled on other grounds); *E.A. v. State*, 623 P.2d 1210, 1213 (Alaska 1981).

[98] *See* AS §47.10.142(e) and CINA Rule 10(c)(2)-(4).

[99] CINA Rule 10(c)(3)(A),(B), applying AS §47.10.142(a) and 25 USC §1922.

[100] CINA Rule 10(c)(1). The court may dismiss any petition at any point based on good cause and return the child to the parent. CINA Rule 7(f).

[101] *See* AS §47.10.142(e).

[102] CINA Rules 6(b)(4), 6(b)(5). If some person or agency other than DFYS requested the emergency custody order, DFYS also must be notified. CINA Rule 6(b)(5).

[103] AS §47.10.142(f).

[104] AS §47.10.084(c).

[105] AS §47.10.230(b); AS §47.10.240-230.

for temporary custody or supervision.[106] The rules do not explain the purpose of the hearing.[107]

4. Adjudication and Disposition

If DFYS does not dismiss the case after the temporary custody hearing, the case can progress to the adjudication and disposition stages. In practice, however, relatively few cases ever reach the adjudication stage. Most are dismissed or abandoned before adjudication (this practice is discussed more in Chapters 3, 4 and 5).

a. Adjudication — DFYS must petition the court to adjudicate the child a child in need of aid.[108] At adjudication, DFYS must move beyond probable cause to establish the legal grounds for the court's jurisdiction and DFYS's intervention.

The court rules describe the adjudication hearing as a court trial on the merits of the petition for adjudication.[109] At the adjudication hearing, the parents are entitled to an attorney, and the social worker is represented by an assistant attorney general. DFYS has the burden of proving by a preponderance of the evidence that the child is a child in need of aid.[110]

To make its adjudicatory findings, the court hears evidence or reviews stipulations, then makes findings of fact as to whether the child is a child in need of aid.[111] In any case in which the court authorizes DFYS to remove the child from the child's home, or continues a previous order for removal, the court also must decide

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[106] CINA Rule 10(d)(1). In addition, any party may request review any time between the temporary custody hearing and adjudication upon a showing of changed circumstances. CINA Rule 10(d)(2). AS §47.10.440(b) calls for review every six months by the citizen review panel. The Adoption Assistance Act calls for review every six months by either the court or the review panel. 42 USC §675(5)(C).

[107] In practice, courts hold multiple predisposition hearings, often keeping the case in the system for months without ever moving to adjudication. While this use of multiple predisposition hearings is not forbidden, it may undercut the importance of the adjudication hearing and other provisions of the statutes designed to monitor and reduce the length of time children spend in foster care. *See, e.g.*, 42 USC §671(a)(14) (goal of the Act is to reduce the number of children in foster care longer than two years); 42 USC §675(C)(5) (case review system should assure disposition hearing and determination of the child's future no later than 18 months after removal from the home); AS §47.10.080(c) and CINA Rule 19(e) (to continue custody after two year limit, the state must petition the court for an extension.)

[108] AS §47.10.020(a)(1)(B) and (a)(2).

[109] *See* CINA Rule 15(a).

[110] CINA Rule 15(a), (c).

[111] CINA Rule 15(d).

whether DFYS made reasonable efforts to prevent or eliminate the need to remove the child.[112]

If the court finds that the child is not a child in need of aid, it orders the child returned to the parents.[113] If it finds the child to be in need of aid, the court orders a disposition.

b. Disposition — At the disposition hearing, the court decides the placement for the child, and addresses the case plan for the parents.[114] The court can proceed directly from adjudication to disposition, or can allow placement outside the home pending the disposition hearing.[115]

Before the disposition hearing, DFYS prepares a report detailing family behavior, previous efforts to work with the family, reasons why the child can not be protected in the home, and a description of any harm that might result to the child from removal.[116] The GAL also writes and files a report summarizing the child's status and recommending to the court things the parents and DFYS should do to promote the child's best interests.[117] Disposition for an Indian child requires additional efforts to place the child in an Indian home, in accord with the placement preferences of ICWA.[118]

At the disposition hearing, the parties can present evidence and make statements to the court.[119] The court then makes findings of fact regarding the best interests of the child, and the ability of the state to protect the child's best interests.[120] If the court decides to authorize continued removal from the home, it also must make a finding about whether DFYS made reasonable efforts to prevent the removal and to

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[112] CINA Rule 15(g), applying 42 U.S.C. §671(a)(15).

[113] CINA Rule 15(e).

[114] CINA Rule 17(a) defines the purpose of a disposition hearing as to "determine the appropriate disposition of a child who has been adjudicated a child in need of aid."

[115] CINA Rule 15(f), requiring the same findings as for temporary custody hearings.

[116] AS §47.10.081; CINA Rule 16(a).

[117] The GAL's report is not required by court rule or state law.

[118] CINA Rule 16(a); 25 USC §1914.

[119] CINA Rule 17 (a), (b).

[120] AS §47.10.082; *see also* CINA Rule 17(c)(1).

make it possible for the child to return home.[121] For an Indian child, the court must make two additional findings.[122]

Statutes give the court four choices for disposition of the child:

1) If the court finds the child in need of aid, it may order the child committed to DFYS for placement in an appropriate setting. The placement may be for two years or until the minor's 19th birthday, with possible extensions;[123]

2) If the court finds the child in need of aid, it may order the child released to the parents or other suitable person, with or without the supervision of DFYS;[124]

3) If clear and convincing evidence shows that the child is in need of aid as a result of parental conduct that is likely to continue, the court may terminate the rights of the parent and commit the child to DFYS or to a legal guardian. DFYS may also consent to the child's adoption at this point;[125]

4) If the court does not find the child in need of aid, it must order the child released to the parent's custody and dismiss the case.[126]

c. Authority over placement and visitation — If the court commits the child to the custody of DFYS, DFYS (not the court) determines the child's placement.[127] The court reviews DFYS's placement decisions under the abuse of discretion standard to

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[121] CINA Rule 17(c)(3).

[122] The court must find, based on clear and convincing evidence, that custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child, and by a preponderance of the evidence that the party requesting removal has shown that active efforts were made to prevent the breakup of the Indian family. CINA Rule 17(c)(2).

[123] AS §47.10.080(c)(1). The placement may not be extended without proof that the child continues to be in need of aid. AS §47.10.083.

[124] AS §47.10.080(c)(2).

[125] AS §47.10.080(c)(3), (d).

[126] AS §47.10.080(e). If the court finds that immediate reunification would be detrimental to the child, it can establish a time table for gradual reunification. AS §47.10.083, CINA Rule 19(f).

[127] *Matter of B.L.J.*, 717 P.2d 376, 380-81 (Alaska 1986); *State v. E.E.*, 912 P.2d 1, 2 n.1 (Alaska App. 1996).

determine whether DFYS's decisions are in the best interests of the child.[128] DFYS can place the child in a foster home, group home or institution, with a preference for the most family-like setting.[129] DFYS also determines visitation rights to children in its custody,[130] subject to review by the trial court.[131]

The court retains some authority over decisions in the case, however. For example, in some circumstances the court can require DFYS to implement programs DFYS already had chosen for the child.[132] The court also can include in its disposition order the terms under which it will allow the child to return home.[133]

d. Termination of parental rights — One of the four dispositions available after adjudication is termination of parental rights.[134] The private interest of a parent whose parental rights may be terminated is an interest of the highest order;[135] yet at the same time "courts have become increasingly aware of the rights of children."[136] The statute therefore attempts to balance the parent's right to raise the child with the child's interest in an adequate home.[137]

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[128] *Matter of A.B.*, 791 P.2d 615, 618 n.3 (Alaska 1990); *Matter of B.L.J.*, 717 P.2d at 380-81; *Department of Health & Social Services v. AC*, 682 P.2d 1131, 1134-35 (Alaska App. 1984); *see also D.H. v. State*, 723 P.2d at 1276. The supreme court reasoned that the Legislature had committed placement decisions to DFYS's discretion, and that DFYS, not the superior court, possessed the expertise to make such placement decisions. *B.L.J.*, 717 P.2d at 380. For a more detailed discussion of standards of review, see subsection 6, *infra.*

[129] AS §47.10.230(a); AS §47.10.440(f). If a child's blood relatives request custody, the child will be placed with them unless such a placement would cause physical or mental harm to the child. AS §47.10.230(e).

[130] *Matter of D.P.*, 861 P.2d 1166, 1167 (Alaska 1993)(citing *Matter of A.B.*, 791 P.2d at 618 n.3).

[131] *Matter of D.P.*, 861 P.2d at 1167.

[132] *Matter of A.B.*, 791 P.2d at 623-24. In that case, the supreme court upheld the trial court's authority to order DFYS to implement a previously recommended course of treatment for the mother. *Id.*

[133] *D.A.W. v. State*, 699 P.2d 340, 343 (Alaska 1985). In that case, the supreme court upheld the superior court's order requiring the mother to complete an alcohol abuse program and maintain sobriety before placing the child back in the home. *Id.*

[134] *See* AS §47.10.080(c)(3).

[135] *Matter of J.L.F.*, 828 P.2d at 170 (overruled on other grounds).

[136] *In re D.C.*, 596 P.2d 22, 23 (Alaska 1979).

[137] *Id.* at 23; *In re C.L.T.*, 597 P.2d at 526. Note, however, that the court can not consider the best interests of the child in deciding whether to terminate parental rights. In deciding whether to terminate parental rights, the court first considers whether there is sufficient parental conduct to justify termination, and only then considers the child's best interests. *Nada A. v. State*, 660 P.2d at 439.

DFYS can file a petition seeking termination of parental rights, to be heard immediately after the adjudication or at a separate proceeding.[138] The court will terminate parental rights and responsibilities only after DFYS proves that the child should be adjudicated a child in need of aid,[139] that the parental conduct caused the child's neglect or abuse, and that the conduct is likely to continue.[140] DFYS is required to show this conduct by clear and convincing evidence.[141] Different standards apply for Indian children.[142]

The court can terminate parental rights in cases of physical abandonment of the child.[143] To terminate on the grounds of abandonment, the court must find that the parent has shown a conscious disregard for parental obligations that led to destruction of the parent-child relationship.[144] The acts of the parent must be willful, not caused by circumstances beyond the parent's control.[145] For this reason, the Alaska Supreme Court has held that long-term incarceration and mental illness are not sufficient to justify termination of parental rights under the statutes.[146] In 1996, the Alaska legislature amended AS §47.10.080 to let the court consider incarceration as a factor if the sentence length is significant considering the child's age and need for supervision, and if the parent has failed to make adequate provision for the child's care while the parent is in prison.[147]

Parents may decide not to contest the termination petition and to relinquish custody of the child voluntarily.[148] Whether voluntary or involuntary, a termination of

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[138] CINA Rule 18(a), (b).

[139] CINA Rule 15(c).

[140] *Matter of T.W.R*, 887 P.2d 941, 946 (Alaska 1994); *R.C. v. State*, 760 P.2d 501, 505 (Alaska 1988); CINA Rule 18(c)(1), applying AS §47.10.080 and AS §25.23.180.

[141] AS §47.10.080(c)(3); CINA Rule 18(c)(1).

[142] In the case of an Indian child, DFYS also must prove beyond a reasonable doubt that continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. 25 U.S.C. §1912(f); *In re J.R.B.*, 715 P.2d 1170, 1171 (Alaska 1986). The court also must find that active efforts have been made to provide remedial services and to prevent the breakup of the Indian family, but these efforts have been unsuccessful. CINA Rule 18(c)(2), applying 25 U.S.C. §1913.

[143] *See* AS §47.10.080(c)(3).

[144] *A.M. v. State*, 891 P.2d 815, 820 (Alaska 1995).

[145] *Id.*; *see also In re R.K.*, 851 P.2d 62, 66 (Alaska 1993).

[146] *A.M. v. State*, 891 P.2d at 820-824; *Nada A. v. State*, 660 P.2d at 439-440.

[147] CSHB 339(Jud) (1996), adding new Section (o) to AS §47.10.080.

[148] *See* AS §25.23.180(c)(2), (3) and CINA Rule 18(d). For Indian parents, see 25 USC §1913.

parental rights means that the minor is committed to the custody of DFYS for placement. DFYS then reports to the court annually on efforts to find a permanent placement for the child.[149]

5. Post-Disposition Procedures: Annual Review and Permanency Planning

After disposition, the court reviews the case periodically. State and federal laws require two types of post-disposition reviews: the annual review and the permanency planning hearing.

a. Annual review — The court must annually review its disposition order to determine if continued placement is in the child's best interest.[150] The annual review may take place without a hearing, based on written reports and affidavits, unless a hearing is requested by one of the parties or ordered by the court.[151] If DFYS intends to request continued custody after expiration of the existing disposition order, it must request a hearing and notify the parent, guardian, and Indian tribe.[152]

If the child is not returned home after the annual review, the court must make further findings.[153] If the court decides the child is to return home, it may provide for a period of state custody or supervision to make an appropriate transition.[154]

b. Permanency planning — Within eighteen months after the child is taken into emergency custody or adjudicated a child in need of aid, the court must hold a hearing to review the placement and services provided, and to determine the child's future status.[155]At this hearing, the court decides whether to return the child to the

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[149] CINA Rule 18(e).

[150] AS §47.10.080(f); CINA Rule 19(a). Also, a party may request a review of a disposition order at any time. AS §47.10.080(f); CINA Rule 19(a), (b).

[151] CINA Rule 19(a).

[152] CINA Rule 19(e)(1).

[153] These additional findings are: 1) whether reasonable efforts have been made to return the child to the home; 2) what services have been used by the parents and what additional services are needed; 3) for a child reaching age 16, what services will assist a transition to independent living; 4) whether there is a case plan in effect to either return the child home, place the child for adoption or guardianship, or continue in foster care on a long-term basis. CINA Rule 19(d)(1)-(4), applying AS §47.10.080(c), (f) and 42 USC §671(a)(15), (16).

[154] CINA Rule 19(f), applying AS §47.10.083.

[155] AS §47.10.080(l), applying 42 USC §675(5)(C). The Adoption Assistance Act schedules this hearing eighteen months after the child is placed outside the home; state law schedules it 18 months after placement *or* after disposition or termination of parental rights.

parent, keep the child out of the home on a short- or long-term basis, or whether DFYS should place the child for adoption or legal guardianship.[156] Until recently, Alaska courts rarely scheduled permanency planning hearings.

6. Other Kinds of Review

CINA proceedings are confidential by law and thus not usually subject to review outside of the court and the social service agency. At least two exceptions exist, however, since state law permits cases to be reviewed by a panel of volunteer citizens, and the Alaska Supreme Court has authority to review the actions of trial court judges on appeal.

a. Citizen review panels — In 1990, the Alaska Legislature created citizen review panels for permanency planning.[157] The legislature created a statewide panel, composed of citizens and state agency representatives.[158] It also authorized local panels, composed of citizens not employed in the child abuse and neglect and foster care system.[159]

The statewide panel's duties are to coordinate the work of the local panels and to make CINA policy recommendations to agencies and the legislature.[160] The statewide panel has never been fully implemented.

The local panels' duties to include reviewing cases of children removed from the home, both pre- and post-adjudication, determining whether the child has a case plan designed to achieve placement in the least restrictive, most family-like setting consistent with the best interests and special needs of the child, evaluating the necessity of continued placement, setting a date for return home or placement for adoption, and determining compliance with the laws governing court review.[161] The statute requires the panel to submit a written report to the parties involved in the

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[156] AS §47.10.080(l).

[157] *See* AS §47.10.400; AS §47.10.440.

[158] AS §47.10.400.

[159] AS §47.10.420.

[160] AS §47.10.410.

[161] AS §47.10.440.

case, along with advisory recommendations based on the best interests of the child.[162] At this writing, only one local panel has operated in the state (at Anchorage). The Anchorage court normally does not accept the Anchorage panel's reports, because CINA evidence rules limit submissions to parties.[163]

b. Trial court and appellate review — A parent or child may ask the trial court to review certain DFYS decisions. For example, the trial court can review DFYS's placement decisions, although it normally will use the relatively loose abuse of discretion standard.[164] In a case involving an Indian child, the child, parent, Indian custodian or tribe may petition the court to invalidate an order that violates certain sections of ICWA.[165]

Dissatisfied parties can appeal certain of the trial court's final orders, such as adjudication and termination of parental rights, to the state supreme court. Parties also may petition the appellate court for discretionary review of temporary custody and other interim orders.[166] The appellate court reviews the trial court's factual findings supporting a CINA adjudication or disposition under the "clearly erroneous" standard.[167] The appellate court reviews the trial court's interpretation of statutes and constitutions under the substitution of judgment standard.[168]

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[162] AS §47.10.420.440.

[163] AS §47.10.470(a) permits the court to consider a citizen panel report at its annual review and other disposition hearings if the report is "admissible under court rules." AS §47.10.440(g) limits distribution of the report to persons listed in §47.10.440(c). CINA Rule 16 permits the court to order "any other reports in aid of disposition."

[164] *Matter of D.P.,* 861 P.2d at 1167; *In re A.B.*, 791 P.2d at 618 n.3. However, more stringent standards apply where DFYS has limited or eliminated reasonable parental visitation. *Matter of D.P.*, 861 P.2d at 1167. In those cases, the parent is entitled to a hearing at which DFYS must prove by clear and convincing evidence that the order serves the child's best interests. *Id.* Where DFYS merely restricts a parent's reasonable visitation rights, the parent is entitled to a court hearing at which DFYS must prove by a preponderance of the evidence that the restriction is in the child's best interests. *Id.*

[165] CINA Rule 20 and 25 USC §1914, allowing review of orders alleged to violate 25 USC §§1911-1913.

[166] *See* CINA Rule 21(a).

[167] *A.H. v. State*, 779 P.2d 1229, 1231 (Alaska 1989). The trial court's finding is clearly erroneous where the appellate court is "'left with the definite and firm conviction that a mistake has been made.'" *Id.* (citing *E.J.S. v. State*, 754 P.2d 749, 750 n.2 (Alaska 1988) and *E.A. v. State*, 623 P.2d at 1212).

[168] *Matter of A.B.*, 791 P.2d at 618 n.3.

C. Conclusion

The state and federal statutes on child abuse and neglect are fairly consistent in purpose and procedure. The court rules do a good job of translating state and federal requirements into court procedures and requirements in CINA cases. As noted above, an exception involves the permanency planning hearing. First, AS §47.10.080(l) is somewhat inconsistent with 42 USC §675(5)(C) as to the timing of the permanency planning hearing. Second, the court rules omit any mention of the permanency planning hearing.

Chapter 3
Preliminary Data and Findings

This chapter presents an overview of Alaska's foster care system. After briefly summarizing statistical data about the child protection system, the chapter compares and contrasts characteristics of the four communities evaluated for this report. The next section discusses the flow of cases through the child welfare and court processes, with a flowchart and summary of the court's action at each stage. Finally, the chapter sets out basic findings about the characteristics of the case files reviewed for this project.

A. Data About the Scope of the Foster Care System and Children in Need of Aid Cases

Few have studied Alaska's foster care system and reported to the public on its structure and scope. The system cloaks its actions in discretion and confidentiality, to respond to the unique needs of the people using it, and to protect the children and families in it. A handful of facts appeared in reports for the early 1990s, including information about reports of abuse and neglect, children in foster care, and court system CINA filings.

1. Reports of Harm Received by DFYS

In fiscal year 1993, the Division of Family and Youth Services received 14,617 reports of harm involving 10,521 children.[169] Of these reports, the Division investigated 9,323 and substantiated neglect or abuse in 4,316 cases.[170] The Division removed children from their homes in 6% of the investigations.[171] In FY95, reports of harm increased to a total of 15,706 for the state.[172] Of these, 10,945 were referred, 6,584 were investigated, and 3,513 were substantiated.[173]

2. Children Involved in Reports of Harm

Children involved in the FY95 substantiated investigations were almost equally divided between girls and boys;[174] however, Alaska Natives and African-Americans were over-represented compared to their numbers in the general population. Forty-six per cent of children involved in substantiated investigations were Alaska Native or American Indian, 39% were Caucasian, 6% were African-American, 2% were Hispanic, 2% were Asian/Pacific-Islander or other, and 5% were unknown.[175] Alaska Natives constitute approximately 16% of the general population in Alaska, and African-Americans constitute about 4%.

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[169] DFYS FY 1993 ANNUAL REPORT, *supra* note 3, at 8. The report noted that this represented an increase of 18% over FY92, and an increase of 67% since 1989. *Id.*

[170] Types of harm reported in FY93 included 33 reports of abandonment, 316 of mental injury, 2,249 of sexual abuse, 4,817 of physical abuse, and 7,202 of neglect. *Id.* at 9.

[171] *Id.* at 10.

[172] Oct.1, 1995, Fiscal Year 1995 Prober® Data Tables from DFYS.

[173] *Id.* DFYS reported slightly lower numbers of 15,465 reports of harm and 10,402 investigations. DFYS FY 1994 & 1995 ANNUAL REPORT, *supra* note 4, at 49. Of those, 9,529 resulted in completed investigations and 4,137 were substantiated investigations. *Id.* The report cited a figure of 3,575 abused and neglected children (substantiated reports). *Id.* at 4. That report noted that reports of harm increased nearly 100% between 1989 and 1995. *Id.* at 12-13. The report added that while reports of harm increased slightly between FY94 and FY95, the number of children involved decreased slightly. *Id.*

[174] Forty-eight per cent were male and 51% were female. An exception was the southeast Regional Office, where only 43% were male and 56% were female. In the other two offices, the numbers split about 50/50. *Id.*

[175] Note that these percentages were somewhat different from the FY92 figures, with more Natives and fewer Caucasians, others, and unknowns. The database may have been slightly different, or the differences could reflect more accurate descriptions of ethnicity in FY95. By region, the primary ethnicities were: Northern Region, 71% Ak. Native/Am. Indian, 5% African-American, 21% Caucasian; in the Southcentral Region, 32% Ak. Native/Am. Indian, 8% African-American, 47% Caucasian; and in the southeast Region, 44% Ak. Native/Am. Indian, 1% African-American, 43% Caucasian, and 8% unknown (each region also had small percentages of Hispanic, Asian, and other ethnicities).

Children involved in reports of harm in FY95 resembled the group involved in substantiated reports, except that Natives constituted a smaller percentage of children involved in reports of harm as compared to substantiated reports of harm. In terms of ethnicity, forty-three per cent were white, 35% were Alaska Native, 6% were African-American, 2% were Hispanic, 1% were Asian/Pacific Islander, 1% were other, and 12% were unknown.[176] Along gender lines, children involved in reports of harm were closely divided between boys and girls.[177] In addition, about 60% of children involved in reports of harm were school age.[178]

3. Children in Foster Care

Nationally, percentages of children in out-of-home care fluctuated considerably. Between 1990 and 1993, the rate dropped by 47%.[179] Alaska's rates also fluctuate, although not so drastically. In Alaska in FY95, DFYS had 1,153 licensed foster homes in Alaska.[180] In that same year, 1,118 children entered foster care for the first time. A year earlier, in FY94, 926 children entered foster care for the first time, compared to 1,245 in FY93.[181] In FY93, an average of 1,390 children per month were in custody.[182]

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[176] DFYS FY 1994 & 1995 ANNUAL REPORT, *supra* note 4, at 53.

[177] Fifty-two percent were female and 48% were male. *Id.* at 49, 53.

[178] Twenty-nine percent were 6 to 10 years old, 21% were 11 to 14 years old, and 10% were 15 to 17 years old. *Id.* at 49, 53. Nationwide, 39% of abused or neglected children were ages 6 to 12, as compared to 37% of the overall population of children. Only 21% of the abused or neglected children were aged 13 and older, as compared to 30% of the overall population. CURTIS, BOYD, LEOPOLD & PETIT, CHID ABUSE AND NEGLECT: A LOOK AT THE STATES 16, Fig. 1.6 (1995) [hereinafter CHILD ABUSE AND NEGLECT]. The rate was 36.6 children per thousand children in the population. The median rate was 14.3 children per 1,000 children in the population. *Id.*

[179] CHILD ABUSE AND NEGLECT, *supra* note 178, at 52, Table 2.1.

[180] DFYS FY 1994 & 1995 ANNUAL REPORT, *supra* note 4, at 29.

[181] DFYS FY 1993 ANNUAL REPORT, *supra* note 3, at 10; DFYS FY 1994 &1995 ANNUAL REPORT, *supra* note 4, at 15. One source cited a figure of 789 children removed from their homes in Alaska in 1993. CHILD ABUSE AND NEGLECT, *supra* note 178, at 38 Fig. 1.15. That number gave Alaska the 10th highest rate of removal of children per 1,000 children reported among the fifty states. Alaska had the fourth highest rate of children in out-of-home care in 1993, per 1,000 children in the population. *Id.* at 50 Fig. 2.2.

[182] DFYS FY 1993 ANNUAL REPORT, *supra* note 3, at 10. DFYS reported that of the 1,427 children in its custody at the beginning of FY94, 401 were in relative placements, 848 were in foster care, and 178 were in residential care. At the end of FY95 (two years later), DFYS reported 1,381 children in its custody: 349 in relative placements, 845 in foster care and 187 in residential care. In addition, at the end of FY95, DFYS had 187 children in residential care facilities that included levels of care ranging from emergency shelter to psychiatric treatment programs. DFYS FY 1994 & 1995 ANNUAL REPORT, *supra* note 4, at 29.

The cost of caring for children out of the home is substantial. In FY93 Alaska spent about $9,000,000 on foster care payments.[183]

What happened to children who left foster care? In FY93, most (79%) returned to the family of origin.[184] Of the remaining children, 107 reached age 18 or were emancipated, 91 were adopted, 85 were placed with relatives as guardians, and 24 were placed with non-relatives as guardians.[185]

How long did children stay in foster care? Averages ranged from nine to almost eleven months. For children who returned home in FY95, the average length of time in out-of-home placement was 9.4 months. In FY94, the average was 10.7 months.[186]

How many times were children in an out-of-home placement moved to a different out-of-home placement?[187] The FY95 children had been in an average of 2.6 different placements, slightly up from the 2.4 placements in FY94.[188] A sample of 183 Anchorage-area children studied in 1995 showed that the majority (60%) had more than two placements, and over a third (39%) had more than five placements.[189]

B. Court System's Role in Child Abuse and Neglect Cases

1. Child in Need of Aid Caseloads

DFYS caseloads directly impact workloads in Alaska's court system. Substantiated reports of harm leading to removal from the home require filings with

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[183] Conversation with Faye Moore, Sept. 20, 1996. An additional approximately $4,000,000 went to subsidize children with special financial or medical needs who had been adopted or placed in permanent guardianships. *Id.*

[184] DFYS FY 1993 ANNUAL REPORT, *supra* note 3, at 11.

[185] *Id.*

[186] DFYS FY 1994 & 1995 ANNUAL REPORT, *supra* note 4, at 15.

[187] The number of placements is of interest because of the generally accepted principle that continuity of relationships, surroundings and environmental influence are essential for a child's normal development. *See* CITIZENS' REVIEW PANEL FOR PERMANENCY PLANNING, ANNUAL REPORT: 1995, at 10 (1996) (hereinafter CRP 1995 ANNUAL REPORT) (citing GOLDSTEIN, FREUD & SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD).

[188] DFYS FY 1994 & 1995 ANNUAL REPORT, *supra* note 4, at 15. In FY94 and FY95, the average lengths of time for placements with relatives or in foster care ranged from 12.2 months to 13.7 months. *Id.* at 29.

[189] CRP 1995 ANNUAL REPORT, *supra* note 187, at 10. Forty-three of the children lived in 5-8 different homes. eleven lived in 9-10 different homes, eleven lived in 11-15 different homes, and six of the children lived in more than 15 different homes. *Id.*

the court system. In fiscal year 1995, 1,049 CINA cases were filed in Alaska's courts (about half in Anchorage). During that same year, the court disposed of 641 CINA cases. The FY95 filings represent a 32% increase over the previous year, when 713 child in need of aid cases were filed (over half in Anchorage). Also in FY94, the state's courts disposed of 607 CINA cases.[190]

In addition to child in need of aid cases, the court system also handles delinquency cases. In fiscal year 1995, CINA cases represented about 46% of all children's filings statewide.[191]

2. Case Flow In Alaska Child in Need of Aid Cases

The flow chart (Figure 1) outlines the process that most Anchorage CINA cases, and with certain variations, most other CINA cases, followed. In essence, the process usually included the following major court events:

a. Temporary/emergency custody/probable cause — Within 12 hours after taking custody of a child, DFYS is required to file a petition with the court asking authority to continue custody for a specific period of time. The court must schedule a hearing within 48 hours after the petition is filed. The judge or master assigned to the case often makes a finding about whether the child is a child in need of aid at this hearing, although the judge or master might continue the hearing for any number of reasons without making the finding.

b. Review hearings — Court rules require review of a CINA case at least every ninety days during the period before the court formally adjudicates the child as a child in need of aid. Most cases reviewed for this study went through more than one ninety-day review hearing.

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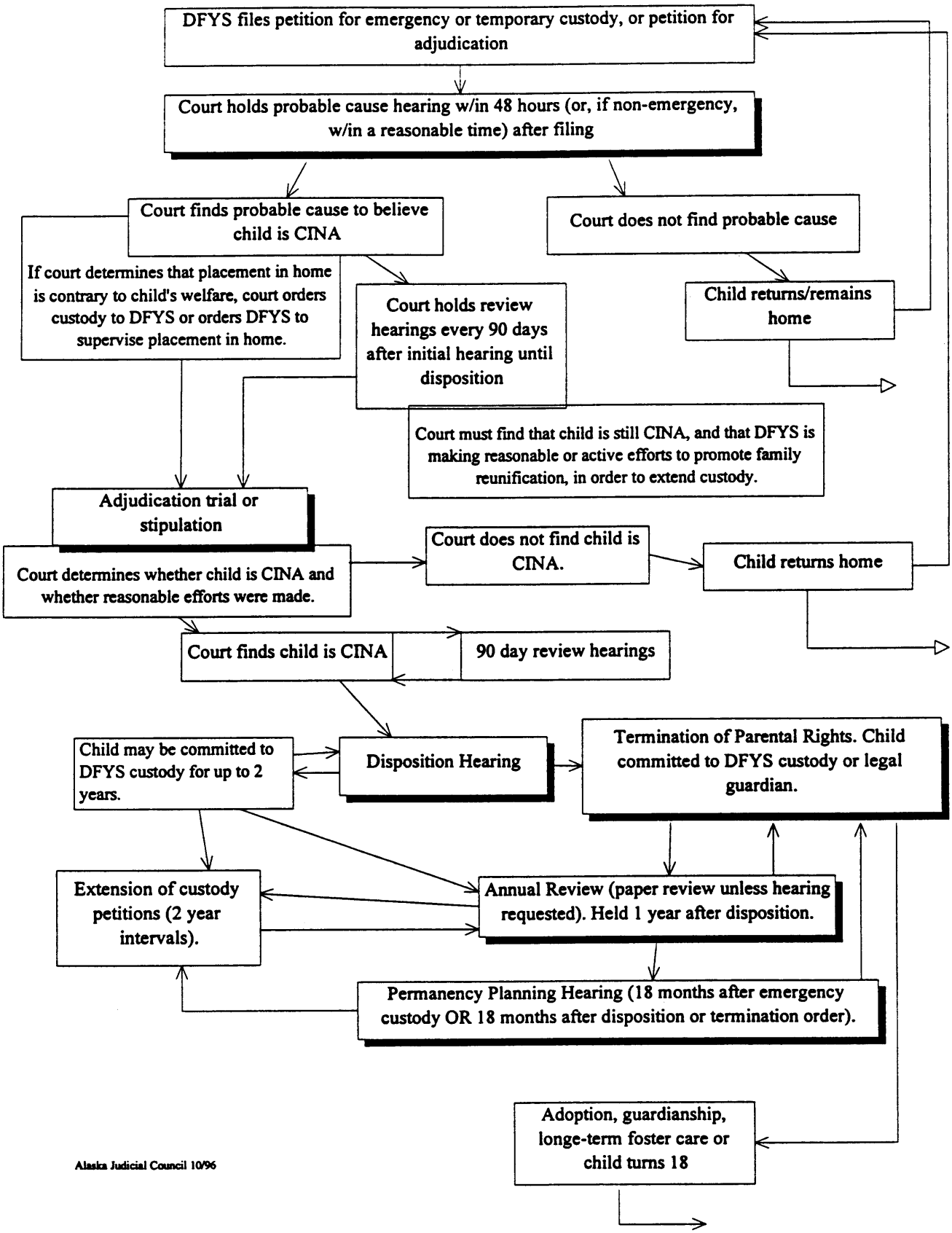
[190] Data compiled by the Alaska Court System's Office of Technical Operations (on file with the Alaska Judicial Council).

[191] In FY95, 2,294 CINA and delinquency cases were filed in the state's courts, up from 2,001 in fiscal year 1994. ALASKA COURT SYSTEM, 1995 ANNUAL REPORT, at S-18 (1996); ALASKA COURT SYSTEM, 1994 ANNUAL REPORT, at S-18 (1995). The FY95 filings represented a 5% increase over FY91 filings (N=2,172). ALASKA COURT SYSTEM, 1995 ANNUAL REPORT, at S-35. After 1991, the number of children's case filings dropped to 1838 in FY92, and then steadily increased to the FY95 level. Between FY91 and FY92, filings dropped by nearly 50% in Barrow and Fairbanks, but increased substantially in Kodiak, Nome, Palmer and Valdez. *Id.* at S-35. Anchorage case filings were 899 in FY91, dropped to 817 in FY92, and increased to 1,115 in FY95. Some observers believed that most of the increase came in delinquency cases rather than in CINA cases.

Alaska Legal Framework for Child in Need of Aid Cases



c. Adjudication — The adjudication is a trial at which the judge decides whether DFYS has shown by a preponderance of the evidence that the child is a child in need of aid. The cases reviewed for this study showed that adjudicatory findings are not common in CINA cases in Alaska; however, where they do occur, the parties often stipulate or agree to the finding before the hearing.

d. Disposition — After the court finds a child to be in need of aid, the court makes a disposition order setting out placement, and a plan for the family and the state to provide a safe environment for the child. The state can ask the court to make a two-year placement and treatment disposition, a disposition terminating a parent's parental rights, or the parents can voluntarily relinquish rights.

e. Post-disposition reviews — Statutes and court rules potentially require two different types of court reviews after disposition: annual reviews and the permanency planning review. Depending on the nature of the review and the parties' requests, courts conduct some of these reviews without a hearing.

C. Differences Among Communities Studied

A primary finding of this assessment was significant variations among the four courts reviewed — Anchorage, Sitka, Bethel and Fairbanks. The assessment found differences not only in the characteristics of the cases filed, but also in the ways in which the courts processed cases. For example, each of the courts numbered case files, recorded information, structured hearings and made decisions in different ways. These variations ranged from minor to distinct enough to raise questions of equal treatment and due process. This section summarizes the most important of those differences.[192]

1. Procedure

a. Case numbering — Fairbanks numbered the case files so that all children of one mother had the same case number, with each child distinguished by "A," "B," "C," etc. The Fairbanks court then recorded all subsequent events throughout the children's minorities in that same case file. All other communities assigned a unique case number to each child when the first case was opened for that child,[193] and recorded

[192] This evaluation does not show the additional differences that probably exist in communities that the project did not review in detail.

[193] A court administrative order (Administrative Bulletin #7, effective Jan. 1, 1982) requires this case numbering system rather than the Fairbanks system.

all subsequent events for that child in the same case file.[194] A Fairbanks judge said that the Fairbanks court's "matriarchal" case numbering system helped judges make "the best decision" using "the fullest resources." In Bethel, the court assigned each child a separate case number, but kept all of the documents related to the children of one mother in a single file.

b. Case closing — Fairbanks and Bethel had a much higher percentage of cases lacking a closing document than did Anchorage and Sitka.[195] Reasons for this were somewhat speculative, but could include different administrative practices among the court locations, substantive differences in the courts' CINA caseloads, and different case management practices.

Interviewees offered other reasons for absence of a closing document in Fairbanks cases. In Fairbanks, one judge said, "The word 'closed' isn't used. . . . The child stays with us." Instead of closing the case, DFYS typically asked the court for an order of temporary custody or an extension of an order of custody, and then simply to let the order expire. A number of Fairbanks hearings contained the phrase, "We'll just let custody run out," or words to that effect. A careful reading of the record might suggest that the child had returned to the parents, but in some cases, no mention appeared in the case file of where the child was at the end of the case. While the case file lacked an order closing or dismissing the case, the case appeared on the court's computerized list of closed cases with a date that seemed to have been assigned administratively rather than relating to any specific action by the court.

One assistant Fairbanks A.G. said that her office was "rigorous" about closing cases after an adjudication or disposition. This statement was consistent with the lack of a closing document, because a minority of Fairbanks cases had adjudications.

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[194] One exception was found. In that case, the child had been adopted, but the adoption had not worked out satisfactorily. DFYS was asking for termination of parental rights on behalf of the adoptive parents. The case file referred to an earlier CINA file for the same child that had a different case number.

[195] For purposes of data collection, the project categorized a case as open if it did not contain an order of dismissal or other court order closing the case. A large number of the cases that were randomly selected from the list of closed Fairbanks cases supplied by the court had no document in them that showed that the case was closed. Of the 109 cases selected for a random sample from the list supplied by the Fairbanks court, 38 were listed by the court as open and 71 as closed. After reviewing the documents in the case file, research staff categorized 19 as open, 25 as closed, and 65 as "unknown" because no document in the file showed an official dismissal or other end to the case.

In Bethel, the project reviewed most of the cases on file in the court's offices and found that 64% of them were open.[196] Interviewees suggested that Bethel cases remained open longer because they were more complex and therefore more difficult to resolve than cases elsewhere. They suggested that Bethel cases involved greater numbers of siblings,[197] originated in villages with limited treatment options, or where distance created barriers to visitation and reunification,[198] and because the cases lacked adequate records.[199] One interviewee also noted that as many as six years might elapse before DFYS felt that it had a record of parental conduct sufficient to support a petition to the court for termination of parental rights. Another respondent commented that although the Bethel computer system treated a court order of disposition as the final event in the case, the court itself and DFYS treated the case as open until the child returned to the family or until another permanent event occurred in the case.

A related problem involved post-disposition cases for which the state's two-year custody order was expiring. Before the order expired, some assistant AGs in Anchorage filed a notice of custody expiration, while others filed a motion to terminate custody, a dismissal, or another document. Elsewhere, assistant AGs filed no documents, instead simply letting state custody lapse. The latter practice made it impossible for the court or the Judicial Council's data collector to know whether the state simply forgot to petition for extension of custody or whether the state intended for custody to expire and the child to return to the parents.

c. Parties at hearings — The persons who appeared at and participated in hearings differed somewhat by location. In Sitka, persons who were not parties to the case (*e.g.*, grandparents, foster parents, friends) were substantially more likely to appear in court.[200] GALs appeared less frequently in Sitka cases, possibly because the

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[196] In Bethel, some of the older closed cases had been sent to archives, so the drawers contained open cases and more recently closed cases. The project reviewed the great majority of cases in the file drawers.

[197] Bethel children were more likely to have siblings than Anchorage, Fairbanks and Sitka children. The Bethel families also had more children: only 10% of the Fairbanks and Sitka children and 15% of the Anchorage children had three or more siblings, as compared to 32% of the Bethel children.

[198] Bethel had by far the most cases that originated in villages.

[199] Interviewees noted that before 1994, DFYS had at times made retroactive requests for custody because months had elapsed between the expiration of the last custody order and the date on which DFYS had petitioned the court to extend custody. In other cases, the court had extended custody without hearings, or the case had periods as long as one to one and a half years in which no order provided for custody. Most interviewees appeared to agree that at least since 1994 both DFYS and the court had greatly improved the handling of CINA cases in this respect.

[200] Other parties' roles are discussed in Chapter 5.

community had fewer GALs and it was more difficult for them to get to court. In Anchorage, tribal representatives appeared very infrequently.

d. Length and frequency of hearings — The number and length of hearings in a case varied somewhat by community. Sitka and Bethel cases had longer hearings. Bethel cases also had more hearings, while Sitka cases had the fewest hearings. Anchorage cases had the shortest hearings, and spent the least hearing time, on average, per case. Sitka and Bethel spent the most hearing time on average per case (see subsection D(4), *infra*, for details on hearing length and frequency).

2. Local Legal Culture

One of the most basic differences among communities was the local legal culture.[201] This term refers to the styles that courts and attorneys within a community or region develop for handling legal matters. Local legal culture strongly affected the way parties and the court handled CINA cases reviewed in this study. The First Judicial District's local legal culture has emphasized cooperation in resolving cases. CINA cases appeared to follow this pattern in southeast Alaska. Also, the Sitka court has long held close ties to the Sitka Tribal Court, and ICWA cases in Sitka were characterized by open and active cooperation between the courts. Sitka social workers and DFYS social workers also collaborated in the handling of Indian children's cases in Sitka.

Anchorage, perhaps because of its heavier caseload, had more active case management practices than other communities. Anchorage also followed a model of using specialized judges and masters for CINA cases (in part because of its larger caseload and number of judges) that did not exist in other courts. Some evidence suggested that Anchorage cases were more likely to be contested than cases in other communities.

Fairbanks and Bethel courts and judges also had individual styles affecting the ways those courts managed CINA cases. The judges' practices by and large related to the local legal culture adopted by the attorneys and parties who appeared before them.

[201] The effects of local legal culture on the handling of CINA cases also is discussed in Chapter 5, Section E.

3. Substance

a. Adjudication/disposition — In Bethel, an adjudication of CINA or a disposition (or both) appeared in 78% of all the cases reviewed. In contrast, only about 35% to 40% of the cases in Anchorage, Fairbanks and Sitka had an adjudication or disposition. (Adjudication rates are discussed in more detail later in this chapter, and in Chapters 4 and 6).

b. Required case conferences — Anchorage requires parties to meet before certain types of scheduled hearings. Although parties had often met before hearings in many courts, the practice was informal. Barriers to holding meetings in most courts included lack of private meeting space, inability to get all parties together at a given time, and lack of training or guidelines for effective ways to hold productive meetings. Again, requiring case conferences in some courts but not in others may have resulted in substantive differences in the ways cases were handled, and may have caused disparate outcomes in cases.

c. Resources issues — Agency and local resources appeared to be unevenly distributed around the state, with possible differences in outcomes as a result. Interviewees noted substantial differences in attorney general caseloads, and some differences in social worker caseloads. Parents in Anchorage and Fairbanks may have had better access to attorneys than in other communities. Guardian ad litem[202] resources appeared to be more available in Anchorage and some of the larger communities than in smaller communities. Sitka in particular seemed not to have as much GAL participation as the other courts. CASAs (Court Appointed Special Advocates)[203] helped mainly in Anchorage cases. Tribal representatives, who often could offer tribal resources, appeared to participate less often in Anchorage than in the other communities.

Judicial resources also varied by community. During the period covered by the assessment (1989-1995), judges in Fairbanks and Bethel handled nearly all of their own CINA cases. In Sitka, the judge appointed the magistrate as a standing master

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[202] Guardian ad litem's role in CINA cases is discussed *infra* at note 216.

[203] The CASA program, established ten years ago, is operated by the Office of Public Advocacy (OPA). OPA recruits, screens and trains community volunteers to work closely with GALs and help children involved in CINA cases. Each CASA volunteer is assigned 1-3 cases under the supervision of a staff GAL. The CASA program, originally limited to Anchorage, has expanded in the past two years to Kenai and the Matanuska-Susitna Valley, and OPA is seeking a grant to expand further to Fairbanks and rural villages. In Anchorage in 1996, over 100 CASAs were involved in about 300 cases.

for children's cases, and he handled a significant part of the work. In Anchorage, two standing masters for children's cases handled a large percentage of the workload, with superior court judges reviewing and approving decisions and handling many of the contested matters.[204] Committing Magistrates heard a significant number of emergency CINA cases on weekends and holidays.

D. General Information About CINA Cases

This section summarizes some findings about CINA cases in the sample reviewed for this report. The significant differences described throughout this report suggest that this group of communities might not accurately reflect the types of cases handled in other communities, so caution about generalizing from these findings to the whole state is warranted.

1. Age, Gender and Number of Siblings of Children in Cases

In the cases reviewed statewide, about half the children were five years old or less, about one-quarter (27%) were aged six to twelve, and about 20% were teenagers between 13 and 17 years old. Bethel had very few teenagers in CINA cases, only 6% as compared to 22% of the group reviewed statewide.

Bethel children were more likely than children in any other community to have siblings.[205] Anchorage and Fairbanks children were more likely than Sitka children to have siblings.[206]

Girls, particularly teenage girls, were the subject of CINA proceedings more often than boys, although the differences were not statistically significant. The disproportion was particularly noticeable in Fairbanks.

2. Parents in Cases

The files reviewed did not clearly state marital status for nearly half of the parents involved (42%). Of those for whom the file had information, just under half (47%) of the parents were married. In comparison, 56% of Alaska households were

[204] See Chapter 5, Section B(2) for more information about calendaring and case assignment.

[205] About 74% of Bethel children had siblings.

[206] About half of Anchorage and Fairbanks children had siblings, compared to 30% of Sitka children.

husband-wife in 1990.[207] Twenty-nine per cent of the parents involved in CINA proceedings were single, while about 14% of Alaska households were single (either male-headed or female-headed) in 1990.[208]

The description of the parents' problems varied throughout the state, partly resulting from different terms that DFYS used. For example, 34% of the Bethel fathers were described as having alcohol problems, and for 31%, the main problem appeared to be criminal charges, but no Bethel fathers were characterized as having parenting difficulties. In other communities' files, drug abuse and parenting problems appeared more often than either alcohol abuse or criminal charges. Similarly, alcohol was listed for 76% of the mothers in Bethel as a problem, but they were described as having problems with drugs or parenting much less often.

The reasons for removal of the child were related to the problems described for the parents. Again, significant differences among communities in describing the reasons might or might not have described actual differences in the reasons. For example, Bethel case files showed "parent intoxicated" as a reason for removal in 33% of the cases, while Fairbanks had this reason in only 4% of the cases. Statewide, the reasons given included abuse (30%), abandonment (15%), neglect (14%) and parent intoxicated (13%). Data from Anchorage cases compiled by the Citizens' Foster Care Review Panel indicated that 83% of the children reviewed came from families in which one or both parents had "serious, chronic substance abuse problems."[209]

The assessment also sought to understand whether parents had been involved previously in CINA court proceedings.[210] In only 13% of the cases did the file contain a record of previous court action.[211]

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[207] ALASKA DEPARTMENT OF LABOR, ALASKA POPULATION OVERVIEW: 1991 ESTIMATES 38 (1993).

[208] *Id.*

[209] CRP 1995 ANNUAL REPORT, *supra* note 187, at 16. Alcohol, cocaine and marijuana were the most frequently abused drugs. *Id.*

[210] Once a CINA petition is filed with the court, the court requires all subsequent cases or petitions for adjudication of CINA to be filed in the original file. This was true for all locations studied, despite differences in case numbering.

[211] The assessment did not collect information about whether the children studied had previously been the subjects of a report of harm. One person involved with the Anchorage Citizens' Foster Care Review Panel said that "most" CINA petitions in the CRP's caseload were filed after more than one report of harm. Other interviewees agreed that the court record may have shown only a few of the prior incidents in a family's history.

3. Final Action in the Case

The final information in the case file about the location of the child appeared to differ somewhat by community. Some of these differences may have arisen from the different courts' methods of closing cases or leaving them open. (For example, Bethel and Fairbanks had low percentages of closed cases.) The child was shown as "with relatives" in 17% of Sitka cases and 13% of Bethel cases, but only 7% of Anchorage cases and 4% of Fairbanks cases. About 4% of the Anchorage and Fairbanks cases ended with an adoption, 9% of Sitka, and none of the Bethel cases reviewed. In 34 of the cases, court orders showed that one or both parents had voluntarily relinquished their rights to the child.

If the case file showed that the child returned home (39%), the reasons given in the case file included parents' compliance with the case plan (17%), parent completed treatment (6%), or child returned to the other parent (5%).

4. Length and Frequency of Court Hearings

This assessment studied a number of procedural features of CINA cases. Of interest were findings concerning how much time the court spent in hearings in CINA cases. Generally speaking, CINA cases were characterized by multiple, short hearings.

a. Length of hearings — Despite some local differences in patterns, statewide most (84%) hearings concluded in twenty minutes or less.[212] Interestingly, this finding tended to be true whether they were routine review hearings, adjudications or dispositions. The median hearing length was ten minutes (60% of the hearings finished in 10 minutes or less). The mode for hearing time was five minutes. Note that guidelines published by the National Council of Juvenile and Family Court Judges call for hearings of 60 minutes (for the first hearing in the case), and 30 minutes at most other stages.[213]

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[212] Statewide, 45 cases (9%) lacked a hearing.

[213] NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE &NEGLECT CASES 42, 51, 62, 74 (1995)(hereinafter RESOURCE GUIDELINES). The Guidelines recommend sixty minutes for permanency planning hearings (*id.* at 84) and termination hearings (*id.* at 98). The purpose of the guidelines is to "set forth the essential elements of properly conducted court hearings." The guidelines describe the proper role for juvenile and family court judges in implementing the federal child abuse and neglect laws, suggest ways to efficiently manage court calendars to avoid delays, and explain the court staffing and organization necessary to make the judicial process run smoothly. *Id.* at 11. The guidelines were developed by a committee of the National Council of Juvenile and Family Court Judges, comprised of active member judges and representatives from the National Conference of Chief Justices and the American Bar Association Judicial Administration Division. *Id.* at 8.

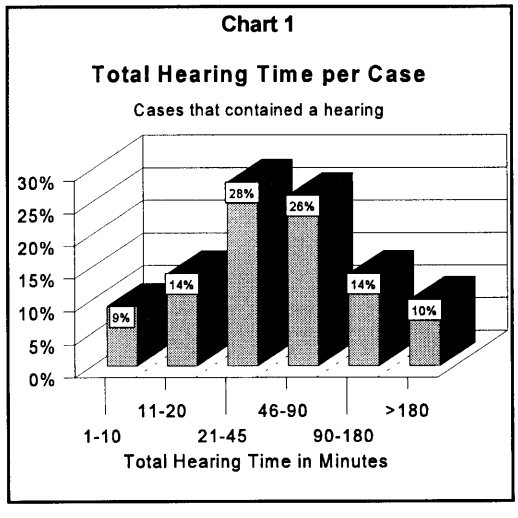
Analyzed by location, variations emerged. Anchorage stood out as the location with the most short hearings: only 8% of the 801 hearings in the 197 case files reviewed lasted over 20 minutes.[214] Of the hearings most likely to last a longer time, 83% of the adjudication hearings, 89% of the disposition hearings and 38% of the termination of parental rights hearings lasted less than twenty minutes.

Hearings tended to be slightly longer in Sitka, with 43% lasting more than twenty minutes. Only 19% of Sitka adjudication hearings lasted less than twenty minutes, although termination and disposition hearings tended to be relatively short. Only 23% of Sitka hearings lasted 10 minutes or less.

In Bethel, 17% of hearings lasted more than twenty minutes. Most (81%) of the hearings characterized as adjudication hearings lasted less than twenty minutes. About half (56%) of all Bethel hearings finished in 10 minutes or less.

In Fairbanks, 16% of all hearings went beyond twenty minutes, with 78% of the adjudication hearings lasting under twenty minutes. Fairbanks had more termination hearings than other locations, and 66% of them exceeded twenty minutes. In Fairbanks, 64% of all hearings finished in 10 minutes or less.

b. Total hearing time per case — The study also calculated total hearing time per case. Just over half (51%) of the cases consumed less than 45 minutes of court hearing time from start to finish (hearing time was based on the elapsed time shown in the court log notes). Chart 1 shows the breakdown of total hearing time for the 428 cases that had a hearing.



As with other variables, total hearing time per case varied by location, with Sitka and Bethel judges taking the most time. Anchorage judges spent an average of 51 minutes in hearings per case, and Fairbanks judges spent an average total of 106 minutes per case. The Bethel judge spent an average of 114 minutes in total hearing

[214] One-quarter (27%) of the Anchorage hearings took five minutes or less, while 43% took only six to ten minutes.

time per case, and the Sitka judge spent 127 minutes, on average, per case. Sixty-two percent of Anchorage cases had less than 46 minutes in total hearing time, compared to 70% of Fairbanks cases, but only 37% of Sitka cases and 25% of Bethel cases.

c. Frequency of hearings — The average case reviewed had 4.7 hearings. Bethel cases had more hearings (an average of 6.6), while Sitka cases had the fewest hearings (an average of 2.7). Fairbanks had 3.2 hearings on average, while Anchorage had 4.1.

5. Adjudication Rates

A second set of interesting procedural findings concerned adjudication rates. Statewide, fewer than half of CINA cases ever progressed to adjudication, although variations between Bethel and the other three communities were significant.

Low adjudication rates had potential consequences for the child, because although the child might (and often did) spend months in state custody, the court never found the child to be "In Need of Aid." If another incident occurred later, parents could argue that their parenting had not been officially found wanting, and that they deserved another chance.

Interviews helped explain the widespread practice (except in Bethel) of deferring or avoiding adjudication. Interviewees agreed it was common to defer adjudication as long as the parents were "working the case plan."[215] In this respect, the parties viewed adjudication as a punishment or a step to be taken only in "hopeless" cases. An assistant AG expressed the widely held sentiment that adjudications (particularly contested adjudications) demoralize parents and foster adversarial relationships between parents and social workers. Also, parents with adjudications on their records might be more prejudiced in subsequent contacts with the system than parents whose cases never reached adjudication. It seemed clear from the interviews and the adjudication rate data that the system tended to view adjudication as a punishment or threat to the parent rather than as a tool to assist the child. These findings are discussed more in Chapter 4.

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[215] In fact, the Alaska Supreme Court recently recognized and perhaps implicitly agreed with this practice. In discussing the propriety of an Alaska court's return of a child to a parent whose parental rights had been terminated by a Colorado court, the court said, "it seems likely that, had [the parent] completed the [case plan] to the satisfaction of the State, it would not have attempted to have [the child] adjudicated as a child in need of aid." *T.B. v. State*, Slip Op. No. 4400, at 12 n.9 (September 6, 1996).

Also, the assessment uncovered an adjudication rate disparity between cases involving Natives and cases involving non-Natives, with Native children being adjudicated CINA at significantly higher rates. These findings, and their potential explanations and consequences, are discussed in Chapter 6.

6. Parties in Cases

Numerous parties participated in the typical CINA case. They included the judicial officer (judge, master or magistrate), the social worker, the state's assistant attorney general (who represented the Division of Family and Youth Services (DFYS) and the social worker), one or both parents, a tribal representative, the parents' attorneys (if the parents were not married, each probably had a separate attorney), and the guardian ad litem (GAL).[216] Not all of these people appeared in court for every hearing, but often most of them did.

Data showed that the assistant attorney general and the social worker appeared in nearly all of the cases that had a hearing. The guardian ad litem (GAL) appeared in court in all but a small number of cases. Mothers' attorneys also made frequent appearances, as did mothers. Fathers and their attorneys also appeared, although not as often as mothers and their attorneys did. The child appeared infrequently. Parties and their participation are discussed more in detail in Chapter 5, Section E.

Other parties may have been consulted, or may have come to court infrequently. These included grandparents, friends, the foster parents, and service providers.

7. Overall Length of Cases

Research has shown that the longer a child remains in foster care, the less likely family reunification becomes, with a particularly significant drop between the first and second years in foster care.[217] The time lapse between opening and closing of cases

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[216] The GAL is an attorney or other person appointed by the court to represent the child's best interests. AS §47.10.050(a) authorizes the court to appoint a GAL whenever in the course of a CINA proceeding it appears to the court that "the welfare of the minor will be promoted" by the appointment. Court CINA Rule 11 requires the court to appoint a GAL to represent the best interests of a child alleged to be abused or neglected. The rule requires the court to appoint a GAL "as soon as the court has notice that a child is entitled to one." The GAL is a party who must be served with pleadings and notices. CINA Rule 11(c). The Office of Public Advocacy (OPA) administers the GAL program, recruiting, screening, supervising and training GALs throughout the state. *See, e.g., R.L.R. v. State*, 487 P.2d 27 (Alaska 1971).

[217] RESOURCE GUIDELINES, *supra* note 213, at 80.

sampled in this study fell roughly into three ranges: less than six months, six months to a year and a half, and over a year and a half. About 85% of cases statewide fell into one of the first two groups. Thus, most children were in and out of the system in under eighteen months.

About 45% of the cases stayed open relatively briefly, from overnight to six months.[218] In these cases, the removal often stemmed from neglect or a family crisis. Parenting classes, substance abuse treatment, and other parts of the DFYS case plan often "worked," permitting the family to begin living together again.

In another 40% of the closed cases, six to eighteen months elapsed from the date opened until the date closed. During this period, either the DFYS case plan effectively reduced the family's problems to a manageable level, the parent(s) voluntarily relinquished rights to the child(ren), or the court ordered termination of parental rights relatively quickly, and the child(ren) were available for adoption.

The last group of closed cases, about 15% of the total, took over eighteen months from opening to closing.[219] Although this last group was a relatively small percentage of the statewide total, it represented a significant number of cases each year.

Examining the time lapse by location, the assessment found that elapsed time between opening and closing varied somewhat by court location. In Anchorage, three-quarters of the closed cases were finished within twelve months; in Sitka, 70% closed within twelve months. The figure for Bethel was 59% closed within a year and 56% for Fairbanks. Bethel and Fairbanks, however, had relatively few closed cases in the case samples.

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[218] A few months in a child's life seem like a very long time - the whole summer, an important chunk of a school year. Or major events can occur during that time, from birthdays and holidays spent away from one's family, to breakup of the child's home, and changes of residence and schools. Relative to many of the foster care placements, however, a period of up to six months in foster care counted as brief. To the extent that children stayed with other family members, the disruption may have been lessened.

[219] Of the 260 closed cases in our sample, 6.5% (N=17) took between eighteen and twenty-four months to resolve, 5.8% (N=15) took two to three years, and 2.7% (N=7) took over three years. DFYS had at one time set a goal of completing and closing cases within two years. The data showed that for cases that did close, DFYS appeared to have achieved that goal in a very high percentage of cases. For the cases that remained open, or for which the case files did not show closure, we could not find a measure of length of cases acceptable enough to a wide range of professionals to be usable.

Chapter 4
Specific Data and Findings about Stages of Court System Process

This chapter presents specific findings about how the court system handles each of the stages in a Child in Need of Aid case, from initial referral all the way through adjudication, disposition and post-disposition reviews. Contained within these findings are discussions of some of the different procedures found in each of the four court locations studied. Finally, the specific findings presented in this chapter foreshadow some of the more general findings contained in the next chapter.

A. Referrals

Case files from 1989 through 1995 showed that a case typically opened when the Division of Family and Youth Services received a report of harm to a child. The social worker taking the call decided when the report should be investigated, using a form that helped determine the immediacy and severity of the danger to the child. For example, workers designated as Priority One those cases presenting the greatest danger to the child and requiring an emergency response; intake workers responded to Priority One cases within 24 hours.

The purpose of an investigation is to assess the validity of the report of harm. If the worker's investigation validated the report of harm, the worker then decided

whether the child was a child in need of aid as that term is defined in statute.[220] Upon deciding that a child was in need of aid, federal law required the worker also to consider whether services could reasonably be offered to the family which would prevent removing the child from the home.[221] The social worker thus could intervene by taking emergency custody, or by taking some other action to ensure the child's safety.[222]

In some instances, a child was alleged to have suffered what could be characterized as criminal neglect or abuse.[223] In approximately 20% of cases statewide, one or both parents had been charged with a crime, either against the child, or a crime for which the parent was incarcerated leaving the child without an adequate legal care giver.[224] The data did not allow us to report what percentage of cases that could have been charged and handled by the criminal justice system were instead processed through the CINA system.

Interviews with several respondents suggested that social workers' responses to reports of harm varied somewhat by location.[225] For example, in the past two years social workers in Bethel have emphasized early, informal interventions that did not involve taking custody (for example, sending the child to stay with a relative, working out a "Care and Safety" plan with the parents), while those in Anchorage may have taken custody in similar situations. The social worker's decision either to take custody or intervene in some other way affected the court system directly, since the court opened a case only if the State assumed custody of a child.

When the worker decided to take custody, the most common reason was abuse (30% of case records cited abuse as the reason for removal of the children). Other

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[220] *See* AS §47.10.010(a)(2).

[221] *See* 42 USC §671(a)(15).

[222] According to DFYS policy, the worker should base the decision to take emergency custody on the "assessment that there is risk or potential for further risk to the child if left in the home without immediate action by the worker to protect the child." *DFYS Policy 2.0*, §2.3 (Intake).

[223] Occasionally, the child was alleged to have perpetrated a crime, but in investigating, DFYS decided that the child's home environment would lead to a finding of Child in Need of Aid as well as a finding of delinquency on the part of the child.

[224] This percentage varied somewhat among locations. For example, in Bethel, 31% of the cases involved criminal charges against the father, compared with 15% of cases in Sitka and Fairbanks. Cases involving criminal charges against the mother were much less frequent, only about 3% of cases statewide.

[225] DFYS policies on emergency custody (2.3) and emergency custody/decision making (2.3.1) apply to all offices statewide. However, the policies seem to leave legitimate room for interpretation and worker discretion.

reasons included abandonment (15%), neglect (14%) and parent intoxicated (13%).[226] If the worker took emergency custody but could not talk to the parents, he or she might leave a short brochure describing how DFYS had taken the child, how to reach them, and what would happen next.

Sometimes, the social worker later brought the child back to the parents. Or, the social worker took emergency custody, but let the child stay with the parents.[227] More often, the social worker took the child either to a temporary group home, or notified foster parents that a child needed care and then took the child directly to that home.[228]

B. The Temporary Custody Hearing[229]

At this hearing, required by state statute and CINA Rule 10, the court determines whether probable cause exists to believe that the child is a child in need of aid as defined by AS §47.10.010(a). If DFYS has removed the child from the home, the court also determines whether DFYS made reasonable efforts under the circumstances to prevent or eliminate the need for removal and to make it possible for the child to return home. If DFYS has removed an Indian child from the home, the court must make findings about DFYS' efforts to comply with ICWA placement preferences.[230] The temporary custody hearing must occur within forty-eight hours of taking emergency custody.[231]

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[226] Although data revealed that the reason given varied by community, further review of DFYS files would be necessary to show whether the differences were related to actual differences in the types of parental problems in each area, or simply differences in the ways that the social workers reported the reasons.

[227] When DFYS assumes emergency custody, "the Department through the social worker will exercise authority in decisions concerning the child's welfare until the matter may be presented to the court, regardless of whether there is also placement." *DFYS Policy 2.3 (Emergency Custody).*

[228] Often children were separated from siblings, at least temporarily, and had little or nothing of their own - not their clothes, toys, books, or accustomed foods; nor friends, neighbors, school, or opportunity to speak with relatives or family.

[229] Depending on the community and the circumstances of the case, this first hearing was referred to as a temporary custody hearing, an emergency hearing, or a probable cause hearing. (CINA Rule 10, and this report, refer to it as a temporary custody hearing.) If a magistrate or district court judge held a temporary custody hearing, another hearing would be set before a superior court judge at the earliest opportunity.

[230] CINA Rule 10(c)(4)(B).

[231] National guidelines call for the hearing to occur within 72 hours. RESOURCE GUIDELINES, *supra* note 213, at 30.

1. Notice of Hearing

Court rules require the state to serve notice of the petition and hearing on all parties, including the parents, the GAL and the Indian tribe, within a reasonable time before the hearing.[232] CINA Rule 10 also requires the state to make diligent efforts to locate the parties and give them actual, prior notice of the time and place of the initial hearing.

Interview and court observation data suggested that in some instances (for example, when the hearing was continued to another day) the state did not send formal notice to these parties. One assistant attorney general explained that the rules did not require notice of the date and time of the next hearing because, technically, the next hearing was merely a continuation of the earlier hearing. However, several respondents (particularly tribal representatives) pointed out that this practice made it difficult for them to participate in the case.

As discussed in detail in Chapter 6, Alaska's tribes and tribal representatives reported that assistant AGs and social workers varied in their efforts to directly and informally notify the tribe of a removal. Some DFYS offices, notably Sitka and more recently Bethel, reported good relationships with area tribes and made informal contact before formal notice was sent. Where it occurred, this one-on-one conversation permitted the state to learn whether problems might occur in getting the tribe involved, for example, whether the right person was aware of the CINA case. It also could give the state information about possible placements for the child. Direct, informal notice also set a cooperative and open tone.

Insufficient efforts by the state to locate and notify absent, uninvolved or putative fathers at this early hearing may have set the tone for efforts later in the case, too. Interviews revealed that failure to locate parents early caused serious and damaging delays later on in several cases. For example, in 1995 the Citizens' Foster Care Review Panel located and notified seven fathers who had been unaware of their child's whereabouts. Two of them had been regularly paying child support through the Alaska Child Support Enforcement Division.[233] Failure to locate and notify parents

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[232] *See* CINA Rule 7(b) and (c).

[233] CRP 1995 ANNUAL REPORT, *supra* note 187, at 18. The CRP does not review cases until they are at least six months old.

prevented reunification efforts, left children in foster homes when they could have been with a parent, and delayed termination proceedings as to the newly found parent.

2. Parties

At the temporary custody hearing, the social worker appeared in court before a judge or master, represented by an assistant attorney general specializing in children's cases. Depending on the community, the parents might appear at this hearing, sometimes without attorneys. In Anchorage, attorneys for the parents typically attended the hearing, as did the GAL.[234] The child rarely appeared.[235]

3. Delays

A common feature of these and other CINA hearings was that they did not often start on time. Waiting for one or more of the parties to arrive in the courtroom, or trouble reaching a party by phone delayed many hearings. Chapter 5, Section C discusses delay in more detail.

4. Conduct of Hearing

At the temporary custody hearing, the judge usually appointed a guardian ad litem to represent the child's interests,[236] appointed attorneys for the parents,[237] and set a time for the next hearing. Court observations revealed that the judges rarely addressed the parents directly in this or any other hearing.

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[234] Anchorage was unique in appointing GALs before the temporary custody hearing. Other communities appointed the GAL at or after the temporary custody hearing.

[235] Numerous respondents said they thought a child's presence at CINA hearings was destructive to the parent-child relationship.

[236] CINA Rule 11(a) mandates the appointment of a guardian ad litem in every case. GALs were appointed in most, but not all, cases.

[237] Typically, each parent had an attorney, rather than one attorney representing the interests of both parents. The study did not collect data about how often the judge actually appointed an attorney. A parent's attorney may not have appeared in court if the case was brief.

Most temporary custody hearings were short, uncontested proceedings.[238] A respondent from southeast Alaska explained that few parents objected to DFYS having custody of the child for 90 days longer, and the parents were permitted to state any objections to the petition on the record. A Fairbanks respondent said that parents in that community often consented to continued state custody without admitting the allegations in the petition. At this hearing, the parent's attorney might agree to a probable cause finding but ask the judge to place the child in the home, with state supervision, instead of in foster care.

Some Anchorage temporary custody hearings took from two to five months to complete.[239] Interview data suggested that these were contested temporary custody hearings.[240] Several factors seemed to cause contested hearings to take longer to complete. One cause was unavailability of court time, since the Anchorage children's court calendar was not structured to allow time for many long hearings.[241] A second cause was large caseloads which attorneys said made it difficult for them to prepare. A third cause, at least in Anchorage, was unavailability of discovery information about the case.

In all locations judges typically found probable cause to believe that the child was a "Child in Need of Aid." In some cases, the judges also made specific findings that DFYS had made "reasonable efforts" under the circumstances to keep the child in the home; however, the frequency with which judges made the "reasonable efforts" findings

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[238] In Alaska, most temporary custody hearings lasted between 5 and 15 minutes. National guidelines recommend that the court allot a minimum of 60 minutes for each emergency custody hearing. RESOURCE GUIDELINES, *supra* note 213, at 42. The Guidelines also recommend that the court make the emergency custody hearing "as thorough and meaningful as possible." *Id.* at 30. By thoroughly exploring all issues at the emergency custody hearing, the court can "resolve and dismiss some cases on the spot, move quickly on some pretrial issues, encourage early settlement of the case, encourage prompt delivery of services to the family, and monitor agency casework at a critical stage of the case." *Id.* at 31.

[239] In January of 1996 the Anchorage children's court implemented new procedures for calendaring and review of CINA proceedings designed, among other things, to reduce the number of times contested probable cause hearings must be continued. Those procedures are described in Chapter 5, Section B(2).

[240] Interviewees' estimates for the time it took to complete the typical contested probable cause hearing included two weeks, one month and six weeks after removal.

[241] Interviewees generally agreed that scheduling a hearing longer than an hour was very difficult. One respondent noted that the Anchorage children's court masters sometimes worked through the lunch hour to give the parties the time they needed. A Fairbanks respondent noted a similar lack of court calendar time for contested hearings, but said that those scheduling problems prevented her from contesting emergency hearings that she otherwise might. If the child were likely to return home within a week or so, there was little point in calendaring a contested hearing three to five days hence.

varied somewhat by community.[242] A Fairbanks respondent reported that some judges in that community did not make reasonable efforts findings at the temporary custody hearing, or only did so if the case was contested. A Bethel respondent said that the court normally did not inquire into reasonable efforts at the temporary custody hearing, because they already were laid out in the petition.

When contesting a temporary custody petition, a parent's attorney might argue that the child was not a child in need of aid as defined in the statute. GALs or parents' attorneys (particularly those in Anchorage) also might argue at this hearing that DFYS did not do enough to keep the children in the home.[243]

C. Pre-Adjudication Review Hearings

State and federal law mandate a certain level of review for child abuse and neglect cases during the court process. Reviews vary by when they occur (some occur both pre- and post-adjudication, while others typically occur post-disposition) and by which entity conducts them (the court, DFYS, the parties, or another body). Reviews not conducted by the court include Interim Case Conferences (a kind of discussion among the parties held only in Anchorage) and citizen foster care review panels (a comprehensive case review held only in Anchorage).[244] Interim case conferences are discussed in this section because they occur before adjudication; the citizen foster care panel reviews are discussed in Section G, *infra*, because they can occur both before and after adjudication.

Reviews conducted by the court include the annual review (to review the disposition order), the eighteen-month permanency planning hearing (to review the placement plan, usually post-disposition), and the ninety-day review hearing (to review an order for temporary custody). The annual review and permanency planning hearings are discussed later, in Sections F (Post-Disposition Procedures) and G, (Permanency Planning) respectively. The ninety day hearings are discussed in this section because they occur before adjudication.

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[242] See Chapter 5, Section D for more details about reasonable efforts.

[243] Parties refer to this as pursuing a "no reasonable efforts" finding. A judicial finding that DFYS did not make reasonable efforts in a case could lead to a federal denial of funds for that child's foster care, but does not deprive the court of jurisdiction.

[244] In addition, federal law requires the child protection agency to develop and case plan for each child in foster care and to review it every six months. *See* 42 USC §671(a)(16) and §675(5)(B).

1. Ninety-Day Court Review Hearings

Court rules require the court to hold a hearing to review an order for temporary custody or supervision not more than ninety days after the initial custody hearing, and every ninety days thereafter.[245] The rule does not explain the purpose of the hearing, nor does it require the judge to make any findings or take any action. The ninety-day court reviews probably were intended to resemble status hearings for the case.

As a matter of practice, however, these review hearings were the most frequent events in most cases that this project reviewed. A typical CINA court case contained an order for temporary custody, log notes from multiple ninety-day review hearings, and a dismissal, with no record of adjudication or disposition.[246] Thus, the temporary custody and ninety-day review hearings were, for most cases, the only times that the judge saw the case.

a. Notice of court review hearings — According to survey data, custodial parents received notice of review hearings most of the time, but by no means always. Non-custodial parents received notice less frequently. Foster parents and children received notice least frequently. Attorneys, CASAs and GALs thought that tribes received notice more often than non-custodial parents, but less often than custodial parents. DFYS workers believed that tribes received notice much more of the time than the attorneys and GALs believed that the tribes received notice.

b. Frequency of court review hearings — For cases that were dismissed before adjudication (the majority of cases) multiple ninety-day review hearings often occurred between the temporary custody hearing and dismissal. Similarly, cases that went to adjudication also progressed through multiple ninety-day review hearings before adjudication. An exception was Sitka, where respondents said the judge expected the parties to be prepared at the first 90 day review hearing either to stipulate to adjudication or request an adjudication hearing.

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[245] *See* CINA Rule 10(d)(1).

[246] Fairbanks cases seldom contained orders of dismissal or any other indication that a case had closed. Typically, the case contained an expired temporary custody order.

Many respondents believed that the Anchorage court held too many short, routine review hearings. They complained that even short court hearings consumed at least an hour of the parties' time, since hearings often started about 30 minutes late.[247]

c. Length of court review hearings — Case file data showed that court review hearings typically ran for about 5-10 minutes on the record, while respondents to a written survey questionnaire estimated that they lasted significantly longer.[248] The two findings are not inconsistent, however, because the court probably was on the record for less time than parties and participants actually were waiting or were in the courtroom.[249]

d. Content of court review hearings — Court observations suggested that in a typical review hearing the AG gave the status of the case, followed by the GAL, tribe (if any), and parents or parents' attorneys. The parties sometimes used these reviews to raise matters that they had not been able to resolve, such as visitation, discovery, parental signing of releases, and scheduling of future hearings. However, observations tended to confirm that parties seldom used these review hearings to discuss larger issues of case planning. A respondent in Anchorage felt that few of the court review hearings were "meaningful."

2. Interim Case Conference

A second type of pre-adjudication review, the Interim Case Conference (ICC), occurs only in Anchorage. The Anchorage children's court requires parties to meet outside the courtroom 30 days after probable cause has been established to believe that the child is in need of aid. The purpose of the review is to bring the parties together to review the case status and plan for the future. At least two respondents complained about the Anchorage court's ICC requirement. A social worker thought that repeated ICCs consume a lot of time (one and a half to two hours each). An assistant AG complained about the time required to attend the meeting and then fill out the court form.

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[247] An Anchorage GAL estimated that she spent four days a week in court and, on average, 2-3 hours a week waiting for hearings.

[248] Attorneys thought that on average, hearings lasted about 15 minutes, DFYS workers estimated 22 minutes, and GALs/CASAs thought 25 minutes.

[249] In Anchorage, parties are required by the court to arrive thirty minutes before the hearing.

D. Adjudication Hearings

The adjudication hearing is a trial to the court at which DFYS must show by a preponderance of the evidence that the child is a child in need of aid. If DFYS has removed the child from the home, it also must show that under the circumstances of the case reasonable efforts were made to prevent or eliminate the need for removal and to make it possible for the child to return home. In other words, adjudication provides the legal or jurisdictional basis for state intervention into a family.[250] The outcome of the adjudication controls whether the state may continue to intervene over the objections of the parents.[251]

This assessment analyzed the number of CINA cases that progressed to adjudication, the length of time that elapsed before the adjudication hearings, and the conduct of the adjudication hearings. Although the data revealed significant differences among communities on all these variables, they showed that less than half of the CINA cases filed statewide ever progressed to adjudication. Moreover, if a case did progress to adjudication, months often elapsed between the temporary custody hearing and the adjudication hearing. The data also showed that cases governed by the Indian Child Welfare Act (*i.e.*, cases involving Indian children) were adjudicated at significantly higher rates than cases involving non-Indian children.

1. Frequency of Adjudication Hearings

With the exception of Bethel cases, the temporary custody hearing was the last significant step in most of the CINA cases reviewed. An average of 54% of CINA cases filed statewide involved children who never were adjudicated children in need of aid.

The National Association of Juvenile and Family Court Judges' Resource Guidelines explain why early and accurate adjudicatory findings of abuse and neglect are important: "[They] should be the benchmark against which later case progress is measured. Adjudicatory findings are the basis for the case plan and later are equally important to case review. The case plan should address the real dangers or abuse or neglect which necessitated court intervention."[252] The case file data showed that only Bethel approached the Guideline's recommendation of making adjudicatory findings

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[250] RESOURCE GUIDELINES, *supra* note 213, at 46.

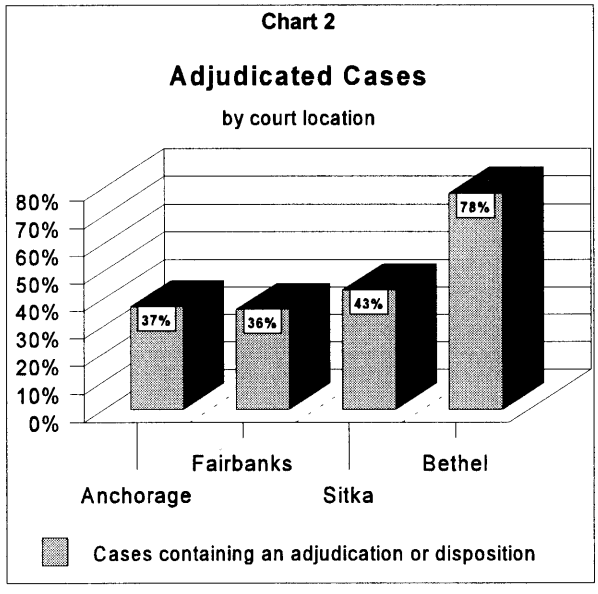
[251] *Id.*

[252] *Id.*

of abuse or neglect in each CINA case.[253] This shortcoming could have affected the quality of case review and the quality of the case plan in the other three communities.

This assessment sought to understand the factors associated with adjudication. One factor affecting likelihood of adjudication was case length. Cases that stayed open longer tended to have more adjudications than cases that were closed quickly. Nevertheless, a significant number of cases statewide (particularly in Anchorage) lasted a year or more without ever progressing to adjudication. Thirty-nine per cent (N=9) of the Anchorage cases that were closed in 12 to 18 months did not have either an adjudication or disposition, and 25% (N=2) of the Anchorage cases that were closed in 18 months to 24 months never had an adjudication of CINA or a disposition order.

Whether a case progressed to adjudication also depended to a large degree on where the case was filed. Chart 2 shows the variations by community. Excluding Bethel cases from the equation, only 38% of CINA cases filed in Anchorage, Sitka and Fairbanks involved children who were formally adjudicated children in need of aid.



Although no respondents interviewed for this study offered strong explanations for adjudication rate disparity between Bethel and the three other communities, they suggested several theories. Some said that the neglect and abuse allegations underlying Bethel CINA

[253] In many instances, the case files did not contain a distinct order of adjudication. The adjudication finding sometimes took the form of a stipulation, appeared in the disposition order, appeared in the interim disposition order, or was noted in an order terminating parental rights. Because the differing practices made it difficult to analyze the data meaningfully, staff created a new variable. The new variable examined each case to see whether the case had at least one order titled "adjudication," "interim disposition," "disposition" or "termination of parental rights." If the case had at least one of these orders, it was categorized for this analysis as a case in which formal adjudication had occurred. The assistant AG or DFYS worker may have filed a petition for adjudication in more cases, but the analysis included only cases that had a signed order of adjudication, interim disposition, disposition, or termination of parental rights.

petitions were either "worse" or easier to prove in court than those underlying Anchorage petitions.[254]

Some thought that a difference in social worker response explained the Bethel adjudication disparity. During the past two years, social workers in Bethel focused on informal, preventative work with troubled parents, tending to take custody only after previous, documented attempts to help had failed. Under this theory, cases coming before the Bethel judge involved parents who already had a track record of failure, as opposed to Anchorage or other parents who had not received similar services. Attorneys and social workers in Bethel thus might have been more willing to take cases to adjudication, and parent's attorneys might have had fewer arguments with which to oppose them than in other locations.[255] However, many of the Bethel cases reviewed had opened between 1989 and 1994, and the hypothesis does not explain adjudications in those cases.

Respondents also pointed to the Bethel court's policy of scheduling cases for adjudication within 60-90 days of the temporary custody hearing, and its habit of devoting one day a week to CINA cases, as practices that encouraged the parties to move the cases along. Yet none of these theories seems to explain such a large disparity.[256]

The Bethel adjudication disparity certainly was at least partly related to the finding that ICWA cases were significantly more likely than non-ICWA cases to contain adjudications, because Bethel was unique in having a caseload composed almost completely of ICWA cases.[257] This finding is discussed more in Chapter 6.

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[254] They thought Bethel-area CINA petitions were easier to prove in part because Native cultural values possessed by Bethel-area parents (virtually all Natives) caused them to admit parenting problems in court more often than non-Native parents. However, other data (see Chapter 6, below) cast doubt on this explanation.

[255] This theory does not necessarily explain adjudication rates in Sitka or Fairbanks.

[256] The Sitka court adjudicated most (70%) of its cases within four months, as compared to 29% for Bethel. If setting cases early explained the high rate of adjudication in Bethel, then Sitka should have had more adjudications than Bethel.

[257] Only two of Bethel's 98 cases were non-ICWA, as compared to the other three communities whose caseloads were about 70% non-ICWA.

2. Timing of Adjudication Hearings

Neither Alaska law nor Alaska court rules sets a deadline for when adjudication should occur. The National Guidelines suggest that "[c]ourt rules or guidelines need to specify a time limit within which the adjudication must be completed."[258] The Guidelines recommend, based on experience in many jurisdictions, that the adjudication occur within 60 days after removal of the child.[259]

Perhaps because state law sets no deadline, months often elapsed before a case progressed to adjudication. Chart 3 shows the percent of cases that progressed to adjudication within six months of the date the case was opened. Note the variation among communities.[260] The chart shows that all but five (17%) of the adjudication or disposition orders entered in Sitka's cases were entered within the first six months of the case, while in Anchorage only 41% were entered within that time. In Fairbanks, 58% of the cases containing an adjudication or disposition had progressed to that point within 180 days, compared to 64% in Bethel.

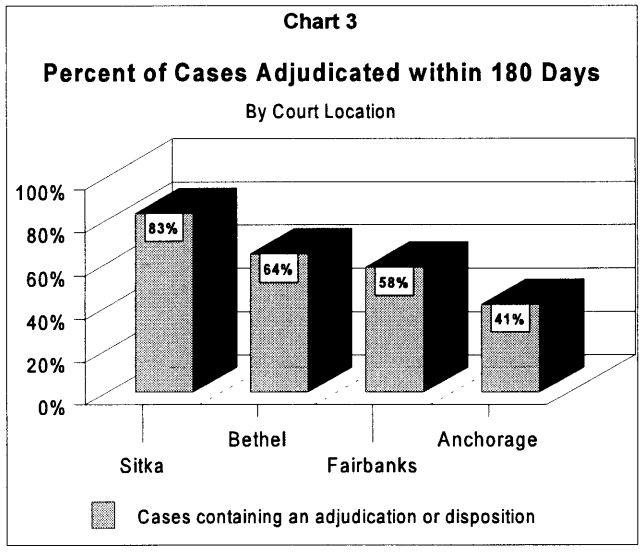


Chart 4 gives a more detailed time line for cases that contained an adjudication or disposition.[261] Again, the chart reveals significant differences among court locations in the amount of time cases took to progress to adjudication. For example, the bulk of Anchorage cases containing an adjudication took between six and twelve months to get there, while 30% of Sitka's cases progressed to adjudication in less than 60 days and 70% did so in four months or less. Chart 4 also suggests that only Sitka approached the National Resource Guidelines' goal of adjudication within 60 days after removal of the

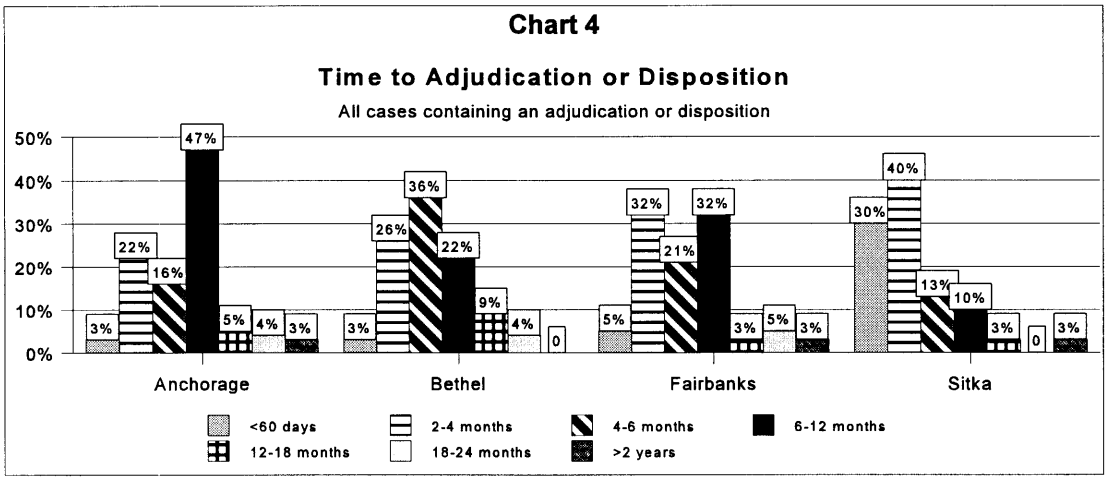
[258] RESOURCE GUIDELINES, *supra* note 213, at 47.

[259] *Id.* The Guidelines recommend against exceptions except in cases involving newly discovered evidence, unavoidable delays in the notification of parties, and unforeseen personal emergencies. *Id.*

[260] The chart shows Anchorage, Bethel, Sitka and Fairbanks cases that had an adjudication, interim disposition or disposition order, or termination of parental rights.

[261] Some percentages do not exactly total 100% due to rounding.

child, as no court except Sitka adjudicated more than a handful of cases within 60 days.



Local practice and expectation significantly affected the timing of adjudication hearings. For example, in Sitka the judge expected DFYS to be ready to adjudicate 90 days after taking custody, and in southeast Alaska, judges set the adjudication for two to four weeks from the date of the first ninety day review hearing.[262]

In Anchorage, on the other hand, attorneys and social workers estimated that adjudication typically took ten to twelve months (occasionally because the preceding stage of probable cause had so often stretched to four or five months). Although the Anchorage court recently initiated changes designed to move cases to adjudication sooner, the court still anticipates 180 days before adjudication.

In Fairbanks, DFYS routinely asked for short periods of custody (sixty to ninety days). During that time, one or more review hearings but no adjudication, occurred.[263]

In Bethel, the judge normally set cases for adjudication thirty to sixty days after the initial custody hearing, far earlier than other communities; however, hearings often were continued, with the result that very few were adjudicated within 60 days.

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[262] Sitka cases moved to adjudication far more quickly than cases in any of the other communities studied.

[263] Several Fairbanks respondents were skeptical that adjudication could or should occur any sooner than 90 days after removal. They cited the usual reasons that DFYS could not be ready any sooner, the parents would not have time to engage in the case plan, that attorneys' schedules were too complicated, and that it might set up an adversarial system that would unnecessarily prevent stipulations.

In some communities, DFYS routinely asked for six months of temporary custody, and took about that long before going to the adjudication hearing.

Many respondents reported frustration with cases' slow progress to adjudication and recommended shorter time frames. In Anchorage, respondents (but not parents' attorneys) recommended that adjudication occur within 30 or 45 days after the temporary custody hearing. Judges recommended 45-90 days; social workers, an experienced foster parent and a number of attorneys (not parents' attorneys) thought that adjudication could occur within 30 days. A Fairbanks respondent thought that adjudications should be treated less like "scheduling problems," since children were being kept out of their homes.

3. Reasons for Delayed Hearings

In cases for which adjudication was delayed, interview data suggested that the main causes were untimely notification of absent parents, attempts to get parents into treatment or better situations, attorneys' efforts to obtain information about the case, or administrative delays (e.g., transfer between social workers). A Fairbanks respondent mentioned scheduling difficulties as a factor delaying adjudication hearings, and a Bethel respondent thought that as many as half of cases set for adjudication were continued because the attorneys had been unable to contact their clients.

Another important factor affecting the timing of adjudication hearings was whether they were contested. About a third of attorneys surveyed for this project said that contested adjudication hearings "often" or "usually" had to be rescheduled for another day. Chapter 5 discusses delay from a more system-wide perspective.

4. Parties

The Resource Guidelines suggest that all parties who have been located and served attend the adjudication hearing, even if it is uncontested.[264] All parties and their attorneys should be present so they can defend the stipulation and answer the judge's questions.[265] Although adjudication hearings were relatively infrequent, the data revealed that the parents, their attorneys, the social worker, the assistant attorney

[264] RESOURCE GUIDELINES, *supra* note 213, at 49.

[265] *Id.*

general, the tribe's representative, and the guardian ad litem all might attend the adjudication hearing. In some cases, some or most of the parties spent a few minutes before the hearing discussing the case. In some instances, it may have been the only time that the attorneys talked to their clients. If other scheduled matters delayed the hearing, the participants may have had a few extra minutes in which to confer. In many courts, the meetings took place in the hallway or lobby near the courtroom.[266] Also, not every party participated in these meetings, particularly parties from outside the area, such as tribal representatives.[267]

5. Length of Hearings

The Resource Guidelines recommend that the court allot a minimum of 30 minutes for each uncontested adjudication hearing.[268] The Guidelines allot ten minutes for testimony from the caseworker, parents and other witnesses in support of the stipulation, five minutes to discuss the service plan, five minutes for troubleshooting and negotiations between parties and five minutes to issue orders and schedule subsequent hearings. As discussed in Chapter 3, many adjudication hearings lasted only 5 or 10 minutes.[269]

6. Content of Hearings

Interviews suggested that most adjudications were stipulated. Only occasionally did attorneys ask witnesses to testify, present experts, or challenge proposed agreements or actions.

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[266] E.g., Fairbanks, Bethel and Anchorage. Some parties said that the waiting time in Fairbanks could not be spent productively because the hallways did not offer enough privacy to talk about cases.

[267] In Bethel, the Assistant Attorney General sometimes spent a few minutes in the hallway between hearings conferring with the social worker, but not necessarily with the parents, their attorneys, the GAL, or the tribal representative.

[268] RESOURCE GUIDELINES, *supra* note 213, at 51.

[269] For example, in one case observed in Anchorage, the judge adjudicated a child CINA who had been in state custody over one year, and because the case lacked a permanent plan, ordered the social worker and AG supervisors to attend an interim case conference. This hearing lasted three minutes. In a ten-minute Fairbanks adjudication hearing, the attorney of a parent who had not come to the hearing requested a continuance but the judge adjudicated the child CINA after reviewing a written offer of proof from the AG.

Also at the adjudication hearing, the judge might have inquired briefly about the "reasonable efforts" made to reunite the family.[270] Data suggested, however, that the inquiry usually was not substantial. For example, judges who responded to a written survey reported that when they made written reasonable efforts findings they "often" or "usually" addressed services and help given to the family only about a third of the time. They reported "often" or "usually" addressing the sufficiency and appropriateness of the services only about 37% of the time.

On the other hand, some adjudication hearings were contested. These contested hearings lasted for a few hours or up to a week. Another interviewee said contested hearings could span three days. Because they involved so many parties, contested hearings could consume significant state resources.[271]

7. Special Finding about ICWA Cases

Further analysis of adjudication rates revealed that ICWA cases were significantly more likely than non-ICWA cases to contain an adjudication or disposition order. Statewide, 65% of all CINA cases involving an Indian child contained an adjudication or disposition, compared to 46% of cases involving non-Indian children. This disparity existed in Anchorage, Fairbanks and Sitka, and was statistically significant.[272] Thus, in Anchorage 51% of cases involving Indian children contained an adjudication, but only 31% of other cases did. In Sitka, 64% of ICWA cases contained an adjudication, compared to 34% of non-ICWA cases. In Fairbanks, 53% of ICWA cases contained an adjudication, compared to 28% of non-ICWA cases. Possible explanations for these data are discussed in Chapter 6 (ICWA Findings), *infra*.

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[270] Court observations in Anchorage suggested that discussion of reasonable (or active) efforts consumed very little court time. The AG typically summarized services the family was receiving during the initial statement to the court, and the court then made verbal reasonable efforts findings as a matter of course. In the Fairbanks adjudication hearing discussed in the previous footnote, discussion of reasonable efforts consumed no more than one minute of court time. In Bethel, however, a respondent suggested that the parent's attorney was more likely to contest the reasonable efforts finding at adjudication than at the initial custody hearing.

[271] The state pays the salaries of the judge, court employees, social worker, assistant attorney general, guardian ad litem, and usually pays for an attorney for each parent as well. In one particularly complex case, the judge estimated that the total state resources (including the foster care payments, parents' and children's treatment and counseling, attorneys, social worker salaries, and so on) devoted to the case over a period of several years exceeded one million dollars.

[272] We were unable to say whether any disparity existed in Bethel cases, because all but two CINA cases filed in Bethel involved Indian children.

E. The Disposition

After a child has been adjudicated a child in need of aid, the court holds a disposition hearing. The purpose of the hearing is to decide about the child's longer-term placement.

1. Timing of Disposition Hearings

The court rules require that the disposition hearing occur either at the same time as the adjudication or "without unreasonable delay" after the adjudication.[273] In some communities, the court held the disposition hearing at the same time as the adjudication.[274] Often the parties agreed to a disposition ahead of time, and the court approved it at the end of the adjudication hearing. In communities that did not hold these hearings at the same time, however, months often elapsed between them.

Respondents identified one source of disposition hearing delay as waiting for a psychological evaluation or other services. A Bethel respondent reported that the judge sets disposition hearings for 60 days after adjudication, and that delays rarely occurred at that stage. However, when they did occur, delays often resulted from parents who could not be located or changes in the case plan.[275]

2. Pre-Disposition Reports

Court rules require DFYS to file a pre-disposition report 10 days before the disposition hearing. The GAL also usually files a written pre-disposition report with the court, although the GAL's report is not required. Bethel and Fairbanks respondents said that in some cases reports were not timely filed, and the parties did not see them until the day of the hearing. The parent and the parent's attorney then had to discuss the report in the courtroom before the hearing, or ask to delay the hearing.

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[273] *See* CINA Rule 17(a).

[274] In Fairbanks, the adjudication and disposition hearings routinely occurred together (only 10%, or four of the 39 cases, that had an adjudication or disposition had both). In Sitka, about a third (or nine of the 30 cases) that had either an adjudication or disposition had both. In Anchorage, 31 of the 73 cases (or 42%) that had an adjudication or disposition had both. In Bethel, 45 of the 76 cases (or 59%) that had an adjudication or disposition had both. These figures again show how differently each community handles CINA cases, differences that cannot be attributed to any major factor other than local practices that have evolved over a period of years. These data do not include cases that included a termination of parental rights.

[275] This respondent cited the example of a case in which the original plan was reunification, but the parent subsequently was sentenced to an extended prison term, necessitating a new look at the case plan.

3. Disposition Options

A number of disposition options were available to the court after adjudication. If the child had not returned home by the time of disposition, the case plan often called for six to twelve months of treatment for the parent. If the treatment "worked" or the family became stable, DFYS sent the children back to the parents. Or the parent may have been incarcerated or unable to re-assume custody of the child for a long period for other reasons. In Sitka, respondents said a common disposition was a guardianship.[276] Federal law and court rules required periodic reviews, tied to different dates in the court case.[277]

Other more permanent disposition options included termination of parental rights or voluntary relinquishment of rights. To involuntarily terminate a parent's rights to a child, DFYS must prove by clear and convincing evidence that the parental conduct that caused the minor to be adjudicated a child in need of aid is likely to continue unless parental rights are terminated.[278] Terminations and voluntary relinquishments were relatively uncommon in the cases studied for this assessment.

4. Termination of Parental Rights

Termination eliminates parental rights to visit, communicate, and obtain information about the child, as well as taking away the parents' legal rights to decide about the child's education and health. It deprives the child of the chance to return home and keep in contact with parents and extended family in exchange for finding a safe and permanent home.[279] Voluntary relinquishments have the same legal effect as terminations of parental rights, but are arrived at without a contested trial.

a. Number of terminations and voluntary relinquishments — Although terminations and voluntary relinquishments were relatively uncommon dispositions, this report discusses them separately because they often were complex and consumed resources, and because they had important consequences for children and parents. Only 38 cases contained a termination of parental rights (or 19% of all cases containing

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[276] Although the state apparently treats guardianships as permanent arrangements, one respondent noted that parental rights are not terminated in a guardianship and the parent therefore can "come back" in six or seven months.

[277] These included the ninety-day review (Court Rule 10(b)), the annual review, and the eighteen-month permanency planning hearing. See Chapter Two, *infra*, for a discussion of the review requirements.

[278] *Matter of T.W.R.*, 887 P.2d at 946; *R.C. v. State*, 760 P.2d at 505.

[279] RESOURCE GUIDELINES, *supra* note 213, at 88.

an adjudication or disposition statewide). In addition, parents voluntarily relinquished rights to their children in 34 cases statewide (or 17% of all cases containing an adjudication or disposition statewide).

b. Delays associated with terminations and voluntary relinquishments — The Resource Guidelines explain that delaying or deferring termination of parental rights can create serious problems for children: "Time frames and continuances that seem reasonable to adults...are unacceptable when a child's right to permanence is at stake....When termination decisions are deferred or delayed, a child's emotional problems may worsen and the child may become more difficult to place."[280]

Data suggested that delays sometimes occurred before termination trials. Respondents told of cases in which the threat of imminent termination hearings pushed parents into treatment or otherwise taking the actions that DFYS had required all along. Then the court authorized a further extension of custody to give the parents the chance to rehabilitate themselves and the family environment. If these efforts did not work, another several months had elapsed. A second source of delay involved the need to notify absent parents,[281] or to wait for pending (criminal) court cases to move to completion.

Anchorage respondents especially complained of delays in termination cases. Respondents reported that these delays most often were caused by calendaring difficulties (one respondent said that calendar call dates for termination petitions are five months later), by delays in adopting termination as a case plan, heavy caseloads, and failure to notify absent parents.

Of particular concern were delays in termination trials caused by failure to locate and notify absent parents. While this problem did not occur with great frequency, when it did occur it created damaging and unnecessary delays for children. If the court and parties learned that one or more putative parents had not been notified after the case already had been set for termination, the termination would be delayed.

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[280] *Id.*

[281] Sometimes, the termination trial date became the focus for parental notices that perhaps should have happened years earlier. In one case reviewed, the father of a ten-year-old girl who had been paying child support since she was two, although he had no opportunity to see her, was notified when she was ten (and had been in and out of foster care for many of the intervening eight years) that the state wanted to terminate his parental rights. He had not known that she was in foster care, despite having paid child support regularly, and said that he wanted to have her live with him. Had the state notified him years earlier, she might not have been in foster care, and might have grown up in a more stable environment.

Counsel appointed to represent absent parents sometimes located them with ease. An AG said that the parties should aim for earlier permanency planning by terminating parental rights within six months of removal absent significant progress by the parents towards changing the circumstances that caused removal.

6. Post-Termination

The National Council of Juvenile and Family Court Judges' guidelines assume that the court will remain involved in a case until after the child is safely returned home, placed in a new, secure and permanent home (whether through adoption or legal custody) or reaches adulthood.[282] One interviewee said that cases got "lost" after termination. Other respondents said that months or even years typically passed between termination and adoption.[283] Although no-one has provided a proven way to avoid some of the most egregious situations, everyone would benefit if delays could be reduced or avoided.[284]

F. Post-Disposition Reviews

Court rules and state and federal law require two court reviews: the annual review (to review the disposition order), the eighteen-month permanency planning hearing (to review the placement plan, usually post-disposition). Other than these reviews, the court played little post-disposition role in the case.

1. Annual Review

The annual review, required by state law and court rule, is normally a paper review at which the judge determines whether the child continues to be a child in need of aid, and whether continued custody or supervision by DFYS is in the child's best interests.[285] Court rule and state statute require the court to make certain further

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[282] RESOURCE GUIDELINES, *supra* note 213, at 12.

[283] One judicial officer noted that private attorneys in his community routinely completed adoptions in three to four months, but the state always took a year or more. He questioned why the state could not move more quickly.

[284] The chances that a child will develop attachment and other serious emotional disorders increase as the child spends more time in impermanent care or multiple placements. *See* GOLDSTEN, FREUD & SOLNIT, *supra* note 187: "Where continuity of [important] relationships is interrupted more than once, as happens due to multiple placements in the early years, the children's emotional attachments become increasingly shallow and indiscriminate. They tend to grow up as persons who lack warmth in their contacts with fellow beings."

[285] *See* CINA Rule 19(a) and (d); A.S. §47.10.080(f).

findings if the child is not returned home.[286] Approaches to the annual review requirement varied somewhat by court location. In Sitka, DFYS requested annual review, which was combined with the eighteen-month permanency planning hearing.[287] A Sitka respondent estimated that annual reviews occurred about 14-16 months after the state had taken custody.

In Anchorage, the children's court secretary wrote the case name and number on an index card and manually filed it to be "tickled" a year later. The court did not initiate the review, but sent a monthly list to DFYS. The master read the social worker's annual review report, calendaring hearings only for those cases in which the case plan had changed or no permanent plan was in place.[288]

In Fairbanks, judges started to hold hearings at annual review in 1995. One judge who held hearings scheduled them for 15 minutes unless the parties requested more time. One respondent described the hearings as "often perfunctory" and "often uncontested based on what the social worker wrote in the report." Another agreed that they were normally not contested. A judge reported that DFYS and GAL annual review reports frequently are "never filed."[289] Another judge agreed but described lack of reports as an "irritation" that did not significantly affect case progress. A public defender said that the reports began coming in late a few years ago and were becoming less and less timely.

In Bethel, the court recently began to set annual reviews at the disposition hearing. Until recently, DFYS seldom filed annual review reports.

G. Permanency Planning

In an effort to promote the goal of permanence for abused and neglected children, state and federal law contain requirements that encourage social workers and

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[286] *See* CINA Rule 19(d), applying AS §47.10.080(c), (f) and 42 U.S.C. §671(a)(15), (16). The further findings concern whether reasonable efforts have been made to return the child to the home, what services the parents have used and what other services they need, what services a child reaching age sixteen needs for a transition to independent living, and whether there is a case plan in effect either to return the child home, place the child for adoption or guardianship, or continue in foster care on a long-term basis. *See* CINA Rule 19(d).

[287] AS §47.10.080(f) permits the court to postpone the annual review until the time set for the permanency planning review if the two hearings would arise ninety days apart.

[288] The master noted that previous attempts to hold hearings in every case at annual review time "overwhelmed" the system.

[289] Social workers, but not GALs, are required to file annual review reports. *See* CINA Rule 19(a).

other parties periodically to step back and make longer-term plans for children in CINA cases. The permanency planning hearing anticipates that the court will determine the child's future status. Another permanency review mechanism is the citizens' foster care review panel. The foster care review panel can not make decisions in a case (indeed, it is not even a party to the CINA cases it reviews), but its reviews are thorough and include notice to all parties.

1. Eighteen-Month Permanency Planning Review

State and federal law require that within eighteen months after the child is taken into emergency custody or adjudicated a child in need of aid, the court must hold a hearing to review the placement and services provided, and to determine the child's future status. The court's choices include returning the child to the parent, keeping the child out of the home for a specified period, or on a permanent or long-term basis, or letting DFYS place the child for adoption or legal guardianship.[290] The court must make written findings.[291]

The Adoption Assistance Act schedules this hearing eighteen months after the child is first placed outside the home. State law schedules it eighteen months after placement *or* after disposition or termination of parental rights.[292] Until recently, Alaska courts rarely scheduled permanency planning hearings, possibly because the CINA rules do not mention them.

As with other reviews, courts that did hold permanency planning hearings approached them in different ways. In Bethel, the judge began permanency planning hearings about two years ago. At these reviews, the Bethel judge identified a general permanency plan, although one respondent said that the judge did not set deadlines for carrying out the plan.

In Fairbanks, most judges combined the eighteen-month review with the annual review.[293] One judge said that when the court had them, the permanency planning reviews lasted an average of five minutes. In Sitka, social workers initiated the

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[290] AS §47.10.080(l)(1)-(4).

[291] AS §47.10.080(l).

[292] *See* AS §47.10.080(l), applying 42 USC §675(5)(C) and AS §47.10.142(h). Note that AS §47.10.080(l) is somewhat inconsistent with 42 U.S.C. §675(5)(C) as to the timing of the permanency planning hearing.

[293] One Fairbanks judge interviewed for this assessment had never seen an eighteen-month review and had never heard of one being requested.

permanency planning review, filing the eighteen-month information, along with annual review material. The court held a hearing on the record, after which all parties negotiated a permanency plan. The meetings took one to two hours.

At least two respondents thought that more emphasis on permanency planning would benefit cases. One thought that court hearings would force DFYS to plan for permanency earlier. A judge remarked that the judge "only sees pieces" of the permanency plan.

2. Citizens' Foster Care Review Panel

The Legislature created Citizens' Foster Care Review Panels in 1990. The structure and duties of the panels are discussed in Chapter 2.

A local citizens' review panel exists in Anchorage but nowhere else (the legislature never funded any other local panels). The Anchorage panel began work in 1993 by reviewing all Anchorage DFYS cases filed six months earlier. The panel now reviews those same cases every six months; however budget and staff cuts have prevented the panel from reviewing many new cases.[294]

The local Anchorage panel holds hearings to review its cases.[295] State law requires the panel to notice all interested parties (foster parents, parents, attorneys, social workers and tribes) of upcoming reviews. Through its notice practices, the panel has successfully located fathers that DFYS had listed as "unknown." Some of the fathers were paying child support through the state child support system or were in prison. According to staff, DFYS has "a very poor record of looking for absent parents."

The Anchorage panel's staff mentioned months-long delays caused by social worker turnover, and DFYS' failures to initiate relative searches until late in the case. "Eleventh hour conversions," by parents who began treatment at the "last minute," also caused problems in some of the cases reviewed by the panel. These parents, according to panel staff, could have benefitted from a clear deadline with clear consequences delivered early in the case, and DFYS follow up to help them comply.

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[294] In 1995, the Anchorage panel held 104 reviews involving 76 families and 183 children. CRP 1995 Annual Report, *supra* note 187, at 4.

[295] The panel submits detailed, written reports to the people involved in the case, but typically does not submit reports to the court.

Some parents' attorneys expressed concern about the citizen review process. First, they perceived it as duplicating other reviews without adding new information or otherwise improving case progress. They said that requiring workers to attend one more review consumed time that could better be spent delivering services. Second, they said because they often did not have time to attend the citizens' panel hearings, their clients' perspectives were not adequately represented, resulting in biased reports. Third, they did not think judges should receive a copy of the Citizens' Panel report, because they were concerned about the reliability of information received by the panel.[296]

[296] In contrast, a majority of attorneys, GALs and CASAs who responded to a written survey thought that sending the judge a copy of the Citizen's Foster Care Review report would help the judge's decision-making.

Chapter 5
General Findings and Conclusions

Many of the findings and conclusions from the data did not fit comfortably into a framework structured by the chronology of a CINA case. Roles played by the many participants, management of cases, and reduction of delay all benefitted from a separate statement of the issues raised by the interviews, case file data and survey responses. This chapter sets out the findings related to those issues.

The chapter first examines the judge's role, because the judge's approach to CINA cases in general affected many aspects of how a particular case might progress. This chapter also discusses case management, case delay, reasonable efforts, and how other participants affected the court's handling of CINA cases.

A. Judicial Review and the Proper Role for Judges

As discussed in Chapter 2, the 1980 federal legislation requires judges to oversee child in need of aid cases to assure permanency for children. National guidelines suggest that "the court must demonstrate an unmistakably strong commitment to timely decisions in child abuse and neglect cases. It must communicate to its own employees, the attorneys practicing before it, and the child welfare agency that timely

decisions are a top priority."[297] Barriers to achieving this commitment in Alaska include state appellate decisions setting a high standard for court oversight of DFYS placement and treatment decisions,[298] a general attitude among many judges that they should take a passive role, and lack of time for meaningful review hearings.

1. Judicial Philosophy

Most judges thought that CINA cases should be treated the same as other civil litigation in an adversarial system. An Anchorage judge said, "In the adversary system, it is not the court's responsibility to move the case along. The judge in the adversary system is passive. The contestants develop the facts and the judge makes a decision." Thus, most judges relied on the lawyers to control the pace of the litigation, to bring to their attention any issues needing resolution, and to draft orders.[299] They added that overcrowded calendars necessarily limited the amount of time they could devote to hearings.

A few judges did see a more active role for the court. One said that he believed that the court had the ultimate authority to approve the adequacy of the case plan. He thought that the court, in particular, ought to ensure that case plans were realistic and did not impose so many conditions that parents could not comply. Others believed that while DFYS had substantial experience in designing case plans, it had little in court case management, making it imperative that the court more actively manage its cases.

Numerous respondents (including social workers, parents' attorneys, AGs, GALs and staff for the Citizens' Foster Care Review Panel) said they wanted judges to hold the other parties more accountable, follow up on recommendations, engage in meaningful review, and otherwise participate more actively in CINA cases. Social workers and AGs complained that parents suffered no consequences for failing to follow

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[297] RESOURCE GUIDELINES, *supra* note 213, at 20. Participants in a national discussion on the court's role in CINA cases agreed that federal law does not bar a state court from ordering specific services and/or placements, although state law might. ABA Center on Children and the Law & University of Southern Maine National Child Welfare Resource Center for Organizational Improvement, *Reasonable Efforts Advisory Panel Meeting* 14-15 (National Resource Center for Legal and Court Issues April 21, 1995) (hereinafter *Reasonable Efforts*). Because "federal law does not prohibit such activity by juvenile courts . . . the matter is one for resolution by the states themselves." *Id.* at 15.

[298] Chapter 2 describes the superior court's authority to make placement and treatment decisions.

[299] Judges prepared about one-quarter (26%) of all temporary custody orders and 29% of the orders of release from custody, but only a handful of other types of orders. The practice varied by location with judges in Anchorage, Sitka and Bethel preparing some orders, but judges in Fairbanks preparing very few (a total of 14, as compared to 78 for Anchorage, 73 for Sitka, and 80 in Bethel).

the case plan, while parents' attorneys complained that DFYS suffered no consequences for failure to help parents more. GALs complained that judges did very little to set and enforce deadlines against any parties. A typical comment, voiced by one respondent, was that she believed many people in the system wanted judges "to take more responsibility to move cases along." A GAL believed that the court should be "willing to hold DFYS' and the parents' feet to the fire" in order to get things done.

A DFYS staffer with extensive experience believed that attorneys manage CINA cases, in part because the court permitted them to do so, and in part because the social worker (who might have more impetus to encourage promptness) did not have the information needed to push for permanency planning. He believed that in Bethel, DFYS and the court controlled the case flow, with the result that many more cases had formal adjudications and dispositions.

2. Appellate Decisions

Even those judges inclined to take a more active role felt constrained to varying degrees by supreme court decisions limiting trial courts' authority to make placement and treatment decisions. Judges correctly noted that they lack expertise in child welfare matters and therefore should not be expected to second-guess DFYS and other experts. One judge said, "the court's oversight function is limited," adding that the court should not supervise DFYS. A Fairbanks judge said that the court had "little authority" in CINA cases, and added that the extent of the authority was not clear. Another questioned the statutory requirement of an eighteen-month permanency planning review because it was "not the judge's job to be looking at placement."

Alaska courts review DFYS decisions regarding placement and treatment for whether the agency abused its discretion.[300] One judge said that parties did not file abuse of discretion motions unless "something outrageous is going on;" he said he had heard only three abuse of discretion motions in the past seven years. All parties agreed that the abuse of discretion standard, as interpreted by Alaska judges and masters, left few opportunities for challenging agency decisions.

National guidelines and the federal legislation seemed to anticipate a more active role for judges to review agency case plans and services provided to families. Also, a few respondents believed that judges had more authority than they thought to

[300] *In the Matter of B.L.J.*, 717 P.2d at 380-81.

review agency decisions. A defense attorney said that judges should not interpret the abuse of discretion standard to mean "hands off," and another said that the standard was being interpreted in an "overly simplistic" way.[301] The defense attorney thought that even if the court could not order specific placements or services, it could order DFYS to provide services, and could ask about delays in parents' obtaining services. A GAL cited an Arizona case that held that the judge had an obligation to independently review the child protection agency's decisions.[302]

3. Lack of Time for Meaningful Review

As discussed earlier, court observations and case file log notes showed that judges tended to hold abbreviated or fairly short hearings in CINA cases, especially in Anchorage and Fairbanks.[303] The brevity of hearings suggested that judges did not have much opportunity to ask detailed questions (see Reasonable Efforts, *infra*) or provide oversight in many cases. However, court observations showed that judges did occasionally take time, for example, to ask for questions, explain how tribes should intervene to a tribal court representative, or explain the GAL's role to a parent.

B. Case Management

The techniques the court used to manage cases — from technical matters such as case numbering systems, to facilities, to who heard the case — affected timeliness and the outcome of the case. The court's present move to computerize much of its case management will significantly affect a number of case management issues; however, under current plans the children's module will not be installed until 1997 at the very earliest. Nevertheless, issues related to computerization will be important within the next few years.

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[301] She said the standard of review should be changed "to reflect a more careful balancing between parental rights and the state's authority to intervene in the family." She added that the standard of review should "be interpreted in conjunction with the federal law mandates for review of case plans and reasonable efforts. Those federal laws may temper the broad discretionary review standard." She added that *B.L.J.* (*supra*) should be interpreted only to address placement decisions by DFYS, and that other decisions should be reviewed under different standards, for example, visitation decisions should be reviewed under AS §47.10.084.

[302] In some states, statutes provide that a child in need of aid is a ward of the court. In contrast, Alaska's statute commits the child to the custody of the Department of Health and Social Services.

[303] See Section D in Chapter 3 for details.

Other issues stemmed from local courts' ways of conducting business that affected civil and criminal cases as well as CINA cases. Because the decisions about these case management issues came not from thinking about CINA cases, but from thinking about other aspects of court management, the courts could find it more difficult to change the policies that affect CINA cases.

1. Issues Affected by Computerization

Computer issues include case numbering, hearing names, case closure, and computerized case management. Each of the court locations studied handled these aspects of case management differently, to a greater or lesser extent. Computer issues affected both how the court handled the cases and how possible it was to find out about the actions in each case.

a. Case numbering – As discussed in Chapter 3, Fairbanks numbered CINA cases differently from other locations. Differences in case numbering practices could have made tracking cases between communities more difficult.

b. Case closing – As discussed in Chapter 3, Fairbanks and Bethel had a high percentage of cases in which a closing document appeared to be absent. The resulting inability to determine whether a case was open or closed made it difficult to get information about the case processing time. Case processing times are important, given this assessment's findings about the harmful effects of delay on children in need of aid.

c. Hearing names – The different communities often referred to what appeared to be the same hearing by different names. This practice made it impossible to accurately collect data about the numbers of various types of hearings and about other aspects of court proceedings. It also greatly increased the difficulty of comparing practices using objective data. The practice created difficulties for attorneys or judges who traveled to other communities to handle cases, and for clerks, when the court transferred a case from one location to another.

Court clerks also titled hearings differently, especially if more than one action occurred at a given hearing. Additional problems arose when the court continued a hearing. In those cases, the hearing might have been titled, "continuation of probable cause hearing," or it might have been titled, "continuation," or it might have been called, "review." Clerks might title the hearing, "adjudication," if that was what had

been scheduled to happen at the hearing, but if the hearing was continued and the adjudication did not occur, the clerk did not change the name of the hearing to reflect the lack of that action. Or, if the hearing was calendared as a review, and an adjudication did occur, again, the title of the hearing did not change to reflect the new event.

d. Case opening document – The Attorney General's office and DFYS offices in different locations followed different practices when they filed cases in court. In Anchorage, Bethel and Sitka, the state usually filed a petition for adjudication to open the case. In Fairbanks, the state more often filed a petition for temporary custody. The Fairbanks AG would not file the petition for adjudication of CINA until later in the case, if at all.

e. Scheduling adjudication and disposition – Another practice that differed by location was adjudication and disposition. In Fairbanks, these events usually occurred together, often in a document stipulated to by all the parties before going to court. In Anchorage and Bethel, the court was more likely to handle disposition as a separate event, scheduled for another hearing some weeks later.

f. Computerized case management – At present, each court location in the state follows somewhat individualized policies for entering data about its cases onto computer, and for sharing that data with the statewide court administration. Some of those differences have been highlighted above. The differences, for the most part, did not arise from differences among the CINA cases themselves, but grew instead from individual preferences among the courts' administrators and clerical staff.

The courts could not consistently track all cases belonging to a single child and to all of its family members. Although we did not hear that this was a major problem, judges should have been able to easily locate divorce and child custody cases, criminal cases, and any civil cases in which a child's parents were involved, that would have been relevant to the CINA case.

In general, as the court moves to a statewide computer system, some of the differences among the communities will disappear simply because every court will have to enter information into the system the same way. A statewide computerized case management system will give users only limited choices about the names for hearings, about whether the case was closed or open, and about how to number cases. The uniformity created by a single computer system will permit court staff to handle cases

from different locations more easily, whether it is the child moving to a different community, or the judge or court staff traveling to work in another court.

2. Case Assignment and Calendaring

This section discusses the courts' case management practices, other than those related to the computer system. Assignment of cases to judges, use of masters, scheduling practices, and requirements of parties all affected the speed with which cases progressed, and to some extent the outcome.

The courts' case assignment policies interacted with their calendaring procedures to help determine how promptly cases could be heard, the policies for continuances, and the delays that parties might experience while waiting for a hearing to start. Each of the four courts reviewed calendared cases differently, with different combinations of personnel, standards, and local practices.

Fairbanks' five superior court judges heard virtually all children's matters, dividing the caseload equally among themselves. In Fairbanks, few judicial officers outside the superior court became involved. The Fairbanks judges said that this "practice require[d] the judicial system to keep these cases on the forefront and say they're just as important as torts and contracts and property deeds." The judges emphasized the advantages of the system, including the judge's familiarity with the case over its lifetime, and the ability to schedule cases more efficiently because the judge knew whether the case was likely to settle.

In Anchorage, two masters performed the bulk of the CINA work, with assistance from varying numbers of superior court judges. In October, 1995, the Anchorage court started assigning CINA cases to two judges, assisted by a master.[304] Eight of the remaining eleven Anchorage superior court judges can volunteer to handle trials or other contested matters; however, the eight are not routinely available.

Under the former system, attorneys said that the calendar call judge did not like to give CINA cases time on the calendar.[305] Under the new system, attorneys continued

[304] *See* Administrative order 3AN-AO-95-7 (amended), dated October 13, 1995. Other masters also handle some of the children's hearings, but carry specialized caseloads in probate and domestic relations as well.

[305] Nearly all of the cases collected in the project's case file review were calendared under the former system, so data from those cases should be viewed in that light.

to report great difficulty getting on a judge's calendar.[306] They also reported that it was no longer possible to get trials set for a definite day, or even a specific month. Rescheduling cases apparently became even more difficult under the new system because of attorneys' conflicting calendars, lack of available court time, and continued discovery problems that caused delays.

The complaints about scheduling in Anchorage were particularly interesting in light of case file data showing how few hearings in Anchorage exceeded twenty minutes.[307] One master said that the children's court calendar was not structured to allow time for many long hearings.

The case file data were unclear on the frequency of contested hearings in Anchorage.[308] Interview data strongly suggested, however, that parents' attorneys contested matters more often in Anchorage (and Fairbanks) than in Sitka or Bethel.[309] The Anchorage court thus may have been realistic trying to calendar large blocks of time, with the result that cases were delayed when it could not find the needed time quickly. Or, attorneys may have been underestimating the chances that the case would settle by the time it actually was supposed to go to a hearing. The lack of agreement between the interview data and the case file data suggested that this was an important topic that warranted further attention by the court.

A court order issued in January, 1996, changed the procedures that the Anchorage children's court uses to calendar and review cases.[310] The order sets a

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[306] A judge familiar with the calendar call system disagreed; he reported unused calendar time on a weekly basis. Further investigation revealed that the reports were not necessarily inconsistent. Apparently, the parties routinely filed peremptory challenges against one of the two superior court judges who routinely volunteered time, and the other Anchorage superior court judges rarely volunteered calendar time. Thus, the judge offered at calendar call was not being used, and the parties had no judge to hear their cases.

[307] Only 8% of the 801 hearings in the 197 case files reviewed for Anchorage lasted over 20 minutes.

[308] Time did not permit the close reading of case files and the considered judgments that would have been necessary to determine whether the hearing should have been termed "contested."

[309] While the case file data did not permit verification of this point, one piece of data did support a conclusion that Anchorage had more contested cases. Anchorage cases apparently took longer to get to adjudication than cases in any other community. As discussed in Chapter 4, 83% of Sitka's adjudications were obtained in less than six months, while only 41% of Anchorage adjudications took that short a time. Fairbanks had 58% of its adjudications completed in less than six months, and Bethel had 64%.

[310] Under the new order, the parties may agree to continue initial proceedings for one week for the purpose of obtaining counsel. If the parties cannot agree on probable cause, and need more than a half-hour of evidentiary time for the temporary custody hearing, the court will set the case for the next available time or, if time is not available within ten days, the court will set the case for superior court calendar call. The children's court will schedule the first review hearing for 60-65 days from the temporary custody hearing. At the review hearing, the court will schedule the case for

specific time frame for hearings in CINA cases, and creates a requirement for an "interim case conference" thirty days after the probable cause determination.[311] The court observer thought that in hearings after the order went into effect, the master was more likely to set a specific time for the next hearing.

Sitka and Bethel were single-judge superior courts in small communities. Yet their scheduling practices differed nearly as much as did the larger courts. Each judge in Bethel and Sitka officially handled most of the CINA cases, since each was the only superior court judge. The Bethel superior court judge only assigned the magistrate to hear emergency matters and conduct some village hearings; the magistrate otherwise had little contact with CINA cases.[312] The Bethel court has set all of its children's cases on Thursday during the past several years, because until recently the assistant AG representing DFYS flew out from Anchorage on that day.

The Sitka court worked with the Sitka Tribal Court to handle CINA cases. The Sitka court split its caseload about evenly between the magistrate sitting as a children's master and the superior court judge.

C. Case Delay

A major concern of Congress in passing the 1980 Act was the need to reduce the amount of time that children spent in foster care outside their homes. Foster care costs the state substantial sums for placement of children and services to parents. It disrupts families, and creates difficulties for children growing up in unstable environments. To the extent that court processes contributed to delays in finding permanent placements for children, the court processes fostered these problems.[313]

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pre-trial conference, settlement conference or adjudication to occur within 90 days. The court will permit continuances for specified reasons. Initial court observation after implementation of the new order suggested that the number of review hearings remained high (suggesting that cases are not yet progressing towards adjudication).

[311] At the interim case conference, the parties meet outside the courtroom to review the case status and plan for the future.

[312] The hearing database showed that the Bethel magistrate conducted fifteen hearings as compared to 557 for the Bethel judge. In Sitka, the magistrate conducted 81 hearings, compared to 40 that the judge conducted.

[313] Some judges and attorneys argued that the delays permit the parents to "grow up," "work out their problems," or otherwise create a stable enough home for the children to return. Others, however, respond that delay harms children so much that the parents' needs should not outweigh the children's.

The Court Assessment examined whether delays in Alaska courts occurred, at what points, and whether the delays could be reduced or eliminated. This section briefly reviews the sources of delay, and related issues.

1. Actions in Other Agencies

Sometimes other agencies did not process cases quickly. Interviewees told us that other agencies sometimes delayed sending out discovery, took too long to transfer a case from the DFYS intake social worker to the on-going social worker, deferred or forgot notice to various parties, or submitted untimely written work.

a. Notice – DFYS must notify all parties at the beginning of a case and before all subsequent hearings. Usually, the assistant attorney general responsible for the case also was responsible for notifying the parties. Although the most commonly mentioned problems with notice occurred in ICWA cases,[314] the survey data and interviews suggested that lack of notice caused delays in other cases as well. A question on the survey forms asked various respondents about notice of reviews. Forty-two percent of the attorneys said custodial parents "always" received notice, and 25% said that non-custodial parents "always" received notice. Social workers believed notice occurred more often, with 53% saying that custodial parents always got notice, and 29% saying that non-custodial parents always got notice.

Parents' failure to receive notice of hearings could delay the case in later stages. One of the more frequent recommendations was that putative fathers should be notified as early in the process as possible, to protect their rights, and to reduce the chance of delays later. Other interviewees noted that relatives also might provide placements or prove critical to the resolution of a case, and so should be notified early.

b. Transfer between social workers – Interviews suggested that the practice of transferring cases between intake and on-going social workers caused delays in Anchorage cases. The intake social workers took the child into custody, made the initial contact with the parent(s), and made reasonable efforts either before taking the child into custody or after to provide services that would enable the family to reunify. After the temporary custody hearing, the intake worker transferred the case to an on-going social worker, who managed the case for its duration. In Anchorage, some DFYS workers estimated that case transfer took two to three days. Most others, including

[314] See Chapter 6 for more discussion.

other DFYS workers, said that the case rarely, if ever, transferred in less than a week, and could take several weeks. During that time, the family effectively went without a caseworker, and DFYS did not provide services. In the next few months, DFYS may work to make the transfer more quickly, and to have the intake social worker introduce the family to the ongoing social worker whenever possible.[315]

c. Discovery – Attorneys in Anchorage raised discovery delay issues more often than those in other communities. They contended that waiting for information from DFYS slowed cases by days, and sometimes, weeks. DFYS staff needed extra time to remove privileged attorney/client information from the materials requested in discovery motions; the process of sorting out papers took, in one assistant attorney general's estimation, two days to two weeks. Parents' attorneys also commented that they could not proceed without information about the family and that this often took several days or more to get.

Attorneys recommended that DFYS either record privileged conversations on separate, colored paper to make them easy to identify, or that DFYS keep privileged materials together in a separate section of the file. A new Anchorage procedure required the social worker to bring materials for discovery to the temporary custody (probable cause) hearing. Although attorneys in other communities mentioned delays in discovery, those delays did not seem as important as other problems.

d. Delays in preparing papers – Interviewees said that delays often resulted from participants not preparing papers timely. In Anchorage, GALs, defense attorneys and social workers all independently mentioned problems caused by the attorney general's office not completing draft dismissal orders within a few days after the case ended. Other agencies sometimes waited weeks or months to receive a signed dismissal order from the court, with some of the delay apparently caused by the AG and some caused by the court.

In Bethel, interviewees mentioned delays earlier in the process, noting that an untimely social worker or GAL report could delay disposition of cases. Fairbanks DFYS staff said that late pre-disposition reports caused problems "all the way down the line," leaving the court without enough information for disposition, and delaying permanency planning or termination of parental rights. Few Sitka interviewees mentioned delay, in general, as a problem.

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[315] *See* DFYS, ADMINISTRATIVE REVIEW, ANCHORAGE OFFICE 7 (July, 1996).

2. Parties and Their Needs

Parties often caused delays because they could not be located, missed hearings or appointments, could not (or did not) obtain treatment or services recommended in the case plan, or were absent from the community or state. Delays also occurred because parties contested the facts or findings at various points in the case. Most frequently, issues arose from the parents' willingness or ability to attend hearings or get services. In a general sense, delay related to parents' needs flowed from the legal principles that control CINA cases.

The child in need of aid process often focuses, in fact, upon the parent in need of aid. While courts generally recognize that parent's rights to the child are fundamental, they do not give the same importance to the child's right to an adequate, permanent home.[316] One reason that the law accords such importance to parental rights, and imposes obligations on child welfare agencies to provide services to parents, is because society believes that children are as a general rule better off with their own parents than with the state as a parent. In practice, however, this principle often translates into a simple hierarchy of rights, in which a parent's right to services and time trumps the child's need for permanence.

Yet not all participants thought delay caused by parents' needs was a bad thing. One judge said, "It takes time to repair families; bad habits weren't changed in a day." A parents' attorney said that delay might be bad for children, but not for parents who need long-term services. Another parent's attorney said that sometimes the parent "needs some time" to accept that she has a problem and to accept treatment. Because this fundamental tension between the needs and perceived rights of parents and the needs of the children often was a factor in CINA cases, delay was far more difficult to manage effectively.

3. Delays Related to Contested Cases

Whether a case was contested seemed to influence the likelihood of delay. One reason was the court's difficulties in scheduling contested hearings, and another was the attorneys' difficulties in being prepared for contested hearings. A third reason was that the social worker and assistant AG might delay in order to gather more evidence

[316] *See Nada A.*, 660 P. 2d at 441 n.5. The court said, "The state bases its constitutional argument on [the child's] right to a permanent, adequate home. . . . Since this right has not been recognized as 'fundamental' . . . ." *Id.*

if the parents' attorneys were challenging DFYS. The state sometimes challenged a tribe's participation.

While rare, contested cases seemed to occur more frequently in Anchorage, and to a lesser degree in Fairbanks. They happened even more infrequently in Bethel and Sitka. In general, several factors appeared to contribute to the likelihood that parties would contest any part of a case. The most important factors were local legal culture, parents' attorneys' resources and approach to the case, and DFYS standards for taking custody of children.

a. Local legal culture – This term is defined in Chapter 3. Attorneys and others who had handled CINA cases in more than one community emphasized its importance. A respondent described how a recent change in the way the Public Defender Agency assigned caseloads had resulted in "importing the Anchorage style of handling cases to Bethel. Now, the parents' attorney always wants some kind of concession, on the facts or some other aspect of the case. Parents' attorneys in Bethel used to stipulate or agree to orders much more readily." On the other hand, an interviewee in southeast Alaska where relatively few cases were contested, said that judges and attorneys expected to resolve cases by consensus. Another respondent from southeast said that the attorneys were reasonable people, and worked as a team with GALs. Interviewees in Anchorage characterized the Anchorage culture as litigating aggressively in some cases. Fairbanks interviewees perceived themselves as looking for consensus in the past, but thought that some parents' attorneys had become more aggressive, taking a "criminal defense approach."[317]

b. Parents' attorneys – Many evaluations of local legal culture appeared to revolve around approaches taken by the parents' attorneys.[318] In Sitka, parents had attorneys less frequently than elsewhere. A respondent thought that Sitka parents did not want to share family matters with others (but added that judges appointed parents' attorneys when needed). An Anchorage parent's attorney wondered whether cases progressed to adjudication more quickly in Sitka than other communities because

[317] At least one respondent attributed the style change to the Fairbanks Public Defender Agency's decision to divide up CINA cases among all the attorneys in the office, instead of assigning them only to one or two attorneys. Rather than one or two specialized attorneys who had developed close relationships with other CINA professionals, the cases are assigned to attorneys with a variety of practice styles, including more adversarial approaches.

[318] Elsewhere, the report explains that attorneys largely controlled the CINA process, with assistant attorney generals in conjunction with social workers initiating and pushing the process forward, and parents' attorneys either cooperating or delaying. The amount of judicial control over cases varied by community, but in general, judges perceived themselves as "passive," or as relying on attorneys to move the cases.

parents did not as often have attorneys in Sitka. In Bethel, most parents had attorneys, but the attorneys had to contend with language barriers, distances, and until recently, very large caseloads.[319] In Anchorage and Fairbanks, most parents had attorneys.

One reason why others may have seen parents' attorneys as taking a criminal defense approach was that, in fact, most of them were presently or in the past employed by the Public Defender Agency or the Office of Public Advocacy. A Fairbanks judge said that the availability of parents' attorneys and their level of preparedness as compared to that of the assistant attorneys general determined whether cases were contested. He observed that if the AG was unprepared, the parent's attorney was more likely to contest the case.

c. DFYS standards for custody – Several respondents said that DFYS had, in effect, different standards for taking custody of children in different communities. The subject is difficult and deserves a more careful analysis than time has permitted in this report. One respondent gave an example of a home in which the mother has an alcohol problem, and the home itself is unsafe because of exposed wiring and other structural problems. In his view, in Anchorage, DFYS would take custody of the child, remove the child from the home, and require that the mother obtain alcohol treatment. In Bethel, (this respondent hypothesized) DFYS would encourage the mother to send the child to the grandmother, get alcohol treatment and work with the local Native corporation to fix the structural problems in the home. The respondent thought that if these informal interventions worked, the child would be out of the home for a period, but not in DFYS custody in Bethel. In Anchorage, the child would have been in DFYS custody (perhaps in a relative's home, but under formal DFYS supervision).

An experienced DFYS staffer agreed that the Anchorage DFYS might use custody "as an intervention" in ways that it did not in Bethel. He noted that social workers took into account the community standards as well as the agency's standards. Other interviewees said that they believed that fact situations were typically "worse" in Bethel and villages before DFYS took custody than in Anchorage. If these differences existed (the project did not collect data on this subject other than interviews with a number of experienced social workers, attorneys, judges and GALs), they suggest at least one reason why parents' attorneys in Anchorage might have contested probable

[319] Nearly two-thirds of Bethel cases came from communities outside Bethel (65%), as compared to about 14% of Fairbanks cases, and a handful of Sitka cases.

cause and adjudication more often than in other communities. Parents' attorneys legitimately could have perceived that DFYS would not have taken this child into custody in a different community. Differing DFYS standards among communities could not have been the only reason for more perceived litigiousness in Anchorage, however, since changes in staffing patterns in Fairbanks and Bethel Public Defender agencies led to an impression among other respondents that parents' attorneys had begun to contest cases more in the past year or two.

4. Court-related Delays

Court-related delays came about in several ways. The three primary problems related to difficulties that the court experienced in calendaring hearings, difficulties that attorneys had fitting hearings into their schedules, and continuances of scheduled hearings.[320]

a. Calendaring — Calendaring delays occurred because most judges and masters had heavy caseloads, and scheduled CINA cases on the same calendar that also had to accommodate criminal cases (which, in most instances, had first priority), emergency hearings on various issues, and other domestic and civil cases. Attorneys surveyed said that an emergency request for a hearing typically was calendared within two (the median) to five (the mean) days. For non-emergency hearings, attorneys estimated a mean time of seventeen days until it could be calendared, with a median time estimated at fifteen days.

In calendaring cases, judges often relied on attorneys' requests for hearing time, looking for that amount of time on the calendar. Interviewees suggested that many cases were calendared for thirty to sixty minutes, and often longer; while the data showed that in fact, a majority of hearings lasted less than twenty minutes.[321] As a result, judges often had to look weeks or months into the future to find a suitable chunk of time for a hearing that, when it finally happened, was likely to last only a few minutes.

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[320] Some attorneys and judges suggested at the beginning of the assessment that companion cases in other courts, or participation by other states, were major sources of delay. The project found little evidence that these circumstances caused nearly as many problems as did judges' and attorneys' calendars, local scheduling expectations and practices, and delays caused by the needs of parties such as treatment. One respondent did note that a companion criminal case could cause trouble if the parent charged with a crime refused to testify in the CINA case on Fifth Amendment grounds related to the criminal case.

[321] Chapter 3 contains detailed information about hearing times.

In Bethel, no interviewees mentioned major problems with the court method of calendaring all hearings for one day a week, instead attributing delays to causes outside the court.[322] In fact, that practice, interviewees said, may have minimized delay by letting all parties focus on a specific time, and by preventing cases from being continued as long into the future as they might have been in another court.

The Fairbanks practice of individual calendaring created problems both for the judges and for other parties in calendaring hearings and trials. A social worker said that "a great many" hearings were rescheduled. One assistant AG said that finding trial time depended on the time of the year and judges' tolerances for stacking cases,[323] with waits of from three to six months or more to schedule trials. A judge said that the courts' efforts to accommodate the schedules of adults was "particularly frustrating in cases with very young children because the child's in limbo."

The Sitka cases reached adjudication far more quickly than did cases in the other courts. Interviewees said that the Sitka court did not often grant continuances, and required DFYS to be ready for adjudication within ninety days after taking custody. The Sitka court also routinely issued a court form at the temporary custody hearing giving attorneys access to the DFYS files, a procedure that apparently eliminated most disputes over discovery.[324] Few interviewees mentioned delays in Sitka cases.

b. Continuances and continued hearings — A second problem, that parties arrived for scheduled hearings only to have the hearing re-scheduled also delayed cases. Re-scheduling happened because a needed report was not ready, because the court got behind schedule, or because attorneys were unprepared. Bethel interviewees also noted that the judge rescheduled when parents did not appear at hearings. Attorneys said on their surveys that re-scheduling of contested adjudications and

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[322] Causes included absence of a needed party (65% of the cases came from villages outside Bethel, and even telephonic participation often was difficult to arrange), late or absent discovery or reports, and lack of opportunity for the attorney to talk to the client.

[323] "Stacking" is the calendaring practice of setting several hearings for the same time, e.g., 2:00 p.m. The judge takes the first matter scheduled, and as soon as is finished, hears the next. The practice maximizes efficiency for judges, who always have something ready to act on, but causes conflicts for attorneys who have cases scheduled in more than one courtroom at the same time. It also requires parties, social workers, GALs and others to wait, for up to two hours. As noted elsewhere, since most hearings lasted twenty minutes or less, many people waited a long time for a short hearing.

[324] The form, CP-309, did not give parents' attorneys access to attorney work products.

termination hearings happened more frequently than did continuations of hearings because the court ran out of time.[325]

Another problem — that of too little time scheduled, with the result that the parties had to return to court at a later time to finish a hearing — also occurred, although not too frequently. Attorneys surveyed about their experience with contested adjudication and termination hearings said that the hearings were interrupted rarely (less than 5% of the time) or occasionally (5% to 25% of the time). Only a few said that hearings were interrupted often (26% to 50% of the time).

c. Late hearings — Delay also occurred at the hearings themselves. Social workers estimated on the surveys that they spent ten minutes or more waiting for uncontested adjudication hearings.[326] They believed that they waited less time for uncontested review hearings, estimating only nineteen minutes mean wait, with a median of less than ten minutes wait. Interviewees in Fairbanks estimated that waiting for hearings took longer, with some saying that they waited as long as two hours because the judges scheduled several hearings to begin at the same time.

A second source of information about delay at hearings came from comparing case file data to survey data. Although sixty percent of hearings finished in 10 minutes or less, DFYS workers thought that the average was twenty-two minutes for review hearings, and GALs and CASAs thought they lasted 25 minutes on average. Attorneys, however, perceived them as lasting about fifteen minutes. The gaps between the perceived lengths of hearings for DFYS workers and GALs, contrasted with the attorneys' more accurate perceptions, suggested that DFYS workers and GALs may have waited longer for hearings to start than did attorneys.

d. Attorneys' schedules — Attorneys' own schedules also resulted in delays. Several respondents emphasized the fact that attorneys controlled the pace of the litigation in most parts of the state. A Fairbanks social worker said that judges "let lawyers do what they want." Fairbanks interviewees thought that parents' attorneys were more likely to have conflicts because the great majority of them were employees of the Public Defender Agency or Office of Public Advocacy and had to juggle criminal

[325] Chapter 4, Section E gives details of factors that delayed termination of parental rights cases.

[326] The mean time estimated for uncontested adjudication hearings was 27 minutes; the median was fifteen minutes.

cases along with their CINA cases. Assistant AGs in Fairbanks were seen as having more flexible schedules.

D. Reasonable Efforts

One of the Adoption Assistance Act's most basic premises was to require the state court judicial officer hearing the CINA case to decide whether the child protection agency (DFYS) had made "reasonable efforts" to provide social services to the family, both before taking custody (to prevent removal of the child, if possible), and during the period of custody (to reunite the family as quickly as possible).[327] In Alaska, the judicial officer is required to make reasonable efforts findings at the temporary custody hearing,[328] at pre-disposition reviews,[329] at adjudication,[330] disposition,[331] and post-disposition reviews.[332] A reasonable efforts finding necessarily depends upon resources available in a community, and other variables that militate against a universal standard for the findings.[333]

Court observation and interviews combined gave a picture of Alaska practice in which judges routinely touched upon reasonable efforts at each of these points, but typically very briefly. Most hearings lasted only a few minutes, and the judge's attention often focused on a specific action or agreement. Usually, judges adopted orders that the social worker or assistant attorney general prepared before the hearing.[334] Often, all parties agreed to the order before entering the courtroom.

Judges generally did not believe that their role required or permitted extensive review of stipulations about reasonable efforts. The Alaska Supreme Court recently

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[327] *See* 42 U.S.C. §671(a)(15), (16); *see also* Chapter 2, Section A(1).

[328] 42 U.S.C. §671(a)(15); CINA Rule 10(c)(4)(A).

[329] 42 U.S.C. §671(a)(15); CINA Rule 15(g).

[330] 42 U.S.C. §671(a)(15); CINA Rule 15(g).

[331] 42 U.S.C. §671(a)(15); CINA Rule 17(c)(3).

[332] CINA Rule 19(d)(1)-(4).

[333] L. Edwards, *supra* note 10, at 3. Judge Edwards notes that efforts that are reasonable in one jurisdiction, such as requiring certain types of housing, might not be reasonable in another community without those resources.

[334] Judges prepared about 10% of the orders filed in cases reviewed for the report; of those, 62% were orders for temporary custody.

upheld the sufficiency of a judge's finding of reasonable efforts when the judge in two separate statements referred to reasonable efforts.[335] The court said:

> Since all that the rule or our cases require, however, is that the trial court make a finding that the treatment plan was reasonable, and since the superior court in this case made such a finding, we conclude that R.R.'s claim is without merit. . . . CINA Rule 15(g) does not require that each element of the 'reasonable efforts' be discussed individually and in detail.[336]

National interpretations of standards for reasonable efforts findings also recognize that judges had very limited resources and time to make the findings. At a 1995 meeting, national experts on permanency planning issues prepared a pamphlet on reasonable efforts.[337] The participants noted that while courts should oversee reasonable efforts,[338] full findings of fact were not practical in many courts.[339] They concurred that a pre-printed check-off box on court orders accompanied by a social worker affidavit that detailed the agency's activities would be acceptable for many cases.[340]

The level of judicial inquiry about reasonable efforts was important because it stood as a proxy for the level of judicial understanding about the family's problems and the efforts made by DFYS to resolve them. Court case file data suggested that in Anchorage, Sitka and Fairbanks, the court either checked a pre-printed box or made a very brief statement about reasonable efforts.[341] In all four of the communities, the temporary custody order was more likely than the other types of orders to contain this brief form of reasonable efforts finding.[342]

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[335] *R.R. v. State of Alaska,* 919 P.2d at 756.

[336] *Id.*

[337] *Reasonable Efforts, supra* note 297.

[338] *Id.* at 10.

[339] *Id.* at 12.

[340] *Id.* at 12-13.

[341] In Bethel, the reasonable efforts finding was this brief in about a quarter of the cases (28%).

[342] Statewide, 60% of the temporary custody orders had a brief reasonable efforts finding, as compared to 13% of review orders, 7% of adjudication orders, and 13% of disposition orders. The orders that did not have the brief reasonable efforts findings may have had lengthier findings, or may have had none; data collection procedures did not allow the analysis to distinguish.

Judicial officers responding to the surveys sent out for this project said that they rarely or occasionally[343] made written findings about reasonable efforts rather than simply checking boxes on a form. Social workers believed that judges made written findings fairly often, but attorneys perceived the frequency to be closer to the judges' view. Responses to follow-up survey questions and interview questions indicated that attorneys and social workers usually prepared the written findings or orders that incorporated reasonable efforts findings.[344]

Court observations and interviews supported a view that when judges inquired into reasonable efforts, the context often was a more formal hearing, such as a disposition or termination. The attorney and DFYS respondents to the survey said that lengthier judicial inquiry into reasonable efforts occurred more often at adjudication and termination hearings. Judges perceived the inquiry as more likely to occur at the initial temporary custody hearing rather than the later hearings.

Attorneys thought that judges often relied on DFYS reports for the information on which to base a reasonable efforts finding. DFYS workers were less certain that judges used their reports. The judges said that they believed that examining the help DFYS had provided to the family was more important than examining the caseworker's diligence or the prompt availability of services to the family.

Practitioners interviewed for this study agreed that a judicial finding of "no reasonable efforts" was uncommon. The case files confirmed the interviewees' impressions: only four cases out of the 473 reviewed had a "no reasonable efforts" finding at any point in the case. On the survey, 80% of the judicial officers said that they rarely made "no reasonable efforts" findings.[345] Nothing in the interviews or any other data indicated that any parties encouraged judges to make "no reasonable efforts" findings more frequently, although some Anchorage practitioners had recently noticed that the issue was coming up more often, usually at the beginning of a case.

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[343] "Rarely" and "occasionally" were defined for purposes of the survey as rarely = less than 5% of the time, and occasionally = 5%-25% of the time. Other categories of response were "often" (26% to 50%), and usually (more than 50%). When these terms appear in this report in the context of survey data, they have those specific meanings.

[344] Data from the case files showed that the Department of Law prepared 57% of all petitions and orders, and DFYS prepared 30% of them.

[345] Eight percent did not answer, and the remainder said that they "occasionally" made "no reasonable efforts" findings.

The overall picture of reasonable efforts findings that emerged in the assessment of Alaska's courts was one in which the court complied with the requirement of making the reasonable efforts findings at the various points required by law and court rule. The findings often had been prepared by the assistant attorney general or social worker as part of a stipulated order presented at a brief hearing during which the judicial officer made a minimal inquiry on the record. Judges very rarely made "no reasonable efforts" findings, and parties rarely encouraged them to do so.

E. Parties and Participation

One of the important ways in which CINA cases differed from other civil and criminal cases is the number of parties. Most CINA cases involved numerous people including one or more parents, one or more children, the state (DFYS), attorneys or representatives for each of these persons, in addition to the judge, and tribal representatives if the case involved an Indian child. Other people often had an interest or ability to affect the outcome of the case, including service providers, foster parents, court appointed special advocate volunteers, and relatives. This section details the roles and responsibilities of the persons typically involved in the cases reviewed for this report.

1. Parties and Their Roles

a. The State: DFYS and the Attorney General's office – The State of Alaska acts through the Department of Health and Social Services, Division of Family and Youth Services (DFYS)[346] to decide when a child is at such risk in the family situation that safety requires intervention. DFYS social workers initiated contact with the family, took children into custody when circumstances warranted that action, found another living situation for the child, and worked to reunify the family or to find another permanent, appropriate place for the child. This report only examines the DFYS role in court proceedings, and does not assess DFYS performance otherwise.[347]

Because social workers did not have legal training, the Attorney General provided legal assistance to advise them about the legal consequences of their

[346] Social workers with the department's Division of Family and Youth Services (DFYS) responsible for making the decisions in individual cases must meet the hiring standards of the Division and work in the state's civil service system.

[347] Other projects and federal programs are underway to evaluate the DFYS role in permanency planning.

substantive decisions. However, the DFYS social workers often drafted and filed legal documents, most commonly the petition for emergency or temporary custody filed at the beginning of the case.[348] Social workers also drafted many of the other legal documents in the cases.[349] While the practice of having social workers draft legal documents was common throughout the state, the frequency varied to some degree among communities, with the Fairbanks AGs relying most heavily on the social workers for that function.[350]

The social worker appeared in court at most hearings,[351] and appeared at least once in court for most cases.[352] However, the social worker spoke on the record at only about 27% of the hearings.

Assistant attorneys general represented DFYS at most hearings, and presented the state's case.[353] They prepared many of the orders in the court files, depending on the community.[354] Survey respondents, particularly attorneys, thought that the assistant AG attended most hearings, except the temporary custody hearing at the beginning of the case.

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[348] DFYS workers prepared 95% of the petitions for adjudication in the cases examined for this assessment, and 98% of the petitions for temporary custody. The practice of having social workers instead of attorneys draft petitions caused a problem in at least one case observed by assessment staff. The assistant attorney general had to ask for a continuance to amend the petition because the document as drafted by the social worker obviously was legally insufficient.

[349] Statewide, social workers had submitted 79% of the petitions to extend custody, 43% of the petitions for termination of parental rights, and 10% of the orders for temporary custody in the cases reviewed for this assessment.

[350] DFYS prepared 25% of the documents submitted to the court in Anchorage and Bethel, 33% of the Sitka documents, and 42% of the Fairbanks documents. The assessment also showed differences among communities in the types of documents drafted by social workers. In Anchorage, DFYS drafted 95% of the petitions for adjudication (the document DFYS in Anchorage used to initiate CINA cases) and a few other documents. In Bethel, DFYS submitted 94% of the petitions for adjudication and 83% of the petitions to extend custody (again, a petition for adjudication appeared to be the preferred document for initiating a case). DFYS in Sitka did 98% of the petitions for adjudication, all of the petitions to terminate parental rights (N=3), 64% of the petitions extending custody, and a variety of other petitions and orders. In Fairbanks, DFYS did all of the petitions for temporary custody (a document that DFYS used very infrequently in other parts of the state), for adjudication, and for termination of parental rights, and 85% of the petitions to extend custody. In Fairbanks, unlike the other communities, DFYS also prepared a substantial percentage of the orders for temporary custody (32%).

[351] Case file data showed that a social worker appeared in court at 93% of all hearings. In most of the remaining cases, the file showed no hearings or very minimal court action.

[352] Social workers appeared at court at least once in 91% of all cases.

[353] The assistant AG spoke on the record at 84% of all hearings in the cases reviewed.

[354] Assistant AGs had prepared 62% of the orders for temporary custody, 93% each of the orders for adjudication and for disposition, and substantial percentages of most of the other orders in case files. They also prepared 57% of the petitions for termination of parental rights, but very few other petitions.

Some of the assistant attorneys general appeared to be more heavily overloaded with cases than others.[355] Excessive caseloads affected the AGs' abilities to prepare for hearings, and to timely submit documents (such as draft orders) to the court.[356] Because the assistant attorney general largely controlled the pace of litigation, their workloads affected everyone in the case.

b. The parents and parents' attorneys – Parents could have accounted for anywhere from one to five or six persons at a given hearing. Sometimes a parent appeared without an attorney, particularly in the early hearings before the court had appointed an attorney. More often, the parent came with an attorney, or at least had been advised by one.

The mother of the child was the parent most often present;[357] but a father appeared at 35% of the hearings.[358] In addition, if the case involved more than one child with different fathers, more than one father might have attended the hearing. Parents appeared most likely to come to hearings in Bethel, followed by Anchorage. They came noticeably less often in Sitka and Fairbanks. If a parent came to the hearing, the parent spoke on the record about one-third of the time.[359]

The parents' attorneys were among the most important people in the case because they, along with the assistant AG, controlled the progress of most cases.[360] The parents' attorneys' caseloads differed significantly based on the community and

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[355] Typically, the assistant attorneys general had caseloads ranging from 70 to 80 per attorney in Fairbanks to 160 to 230 in Southcentral Alaska (in making comparisons, it should be remembered that, depending on the office, the assistant AGs often were responsible for other types of cases as well). National standards recommend 40 cases per attorney representing the Department of Health and Social Services. CAHN & JOHNSON, EDS., CHILDREN CAN'T WAIT: REDUCING DELAYS IN OUT-OF-HOME CARE 140 (1993).

[356] For example, Anchorage social workers, parents' attorneys and GALs all cited instances in which the assistant AGs took two or more months to submit draft orders to the court. Bethel respondents noted similar delays. In contrast, no interviewees in either Sitka or Fairbanks attributed any delay to orders drafted by assistant AGs.

[357] The child's mother appeared at 52% of the hearings, and came to at least one hearing in 80% of the cases. The mother appeared at least once in 93% of the Bethel cases, 89% of the Anchorage cases, 71% of the Sitka cases and 61% of the Fairbanks cases.

[358] A father came to court at least once in 274 cases. A father appeared at least once in 79% of the Bethel cases, 63% of the Anchorage cases, 43% of the Fairbanks cases, and 38% of the Sitka cases.

[359] Interviewees confirmed the finding from case file data, saying that parents rarely spoke in court, and judges rarely spoke directly to parent(s).

[360] The court appointed the attorney for the parents if the parents could not afford to hire one. Interviewees noted that throughout the state, the Public Defender Agency or the Office of Public Advocacy represented most of the parents who had attorneys. That observation suggested that most parents whose children DFYS had taken into custody met the courts' criteria for indigence.

whether they worked for the Public Defender Agency or contracted with the Office of Public Advocacy.[361]

Fathers had attorneys who appeared at least once in 47% of the cases,[362] and mothers had attorneys who appeared at least once in 65% of the cases.[363] There may have been hearings at which the parent appeared without an attorney, and other hearings in the same case in which the attorney appeared without the parent, so that the parent was represented at most hearings.[364] Interviewees suggested that parents' attorneys appeared at many hearings. Again, the data suggested that different practices occurred in each of the four communities.

As discussed earlier in this chapter, the parents' attorneys' approaches helped shape the local legal culture in each of the four communities studied. Interviewees (including parents' attorneys themselves) characterized CINA litigation as more or less adversarial, based in significant part on the parents' attorneys' approaches. In Bethel, an interviewee reported noticing a more litigious approach since the arrival of an Anchorage-trained assistant public defender. Anchorage attorneys may have contested probable cause at the temporary custody hearing more than defense attorneys in other communities. Anchorage defense attorneys also emphasized parents' needs for time: to get treatment, learn parenting skills and to improve their situations. In fact, most parents' attorneys thought it was demoralizing for a parent who was doing well in treatment to have the case move to adjudication; they argued that adjudication should be deferred if the parent was making progress. Other parties agreed that defense attorneys, at least in Anchorage, used delay as a strategy to help parents improve their position, and saw aggressive parents' attorneys as extreme.

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[361] Parents' attorneys who worked for the Public Defender Agency and who contracted with the Office of Public Advocacy to represent parents had varying caseloads, ranging from ten or twelve cases per attorney in the Fairbanks Public Defender's office (which split the children's caseload evenly among the office's attorneys), to 85 to 100 cases for the Anchorage assistant public defenders who specialized in CINA cases. One Anchorage private attorney who could control her own caseload carried about 50 to 60 cases at any one time, in 75% of which she represented parents under a contract with the Office of Public Advocacy, and the remainder of which she represented children, as a guardian ad litem, or handling other matters. She believed that this caseload gave her the time needed to represent her clients well, while leaving sufficient time for other non-work activities.

[362] In 222 cases, an attorney for a father appeared in the case (suggesting that the father had an attorney in about 81% of the cases). The rates varied by location, with an attorney for the father appearing at least once in 71% of the Anchorage cases that had a father who appeared in court himself. For Sitka, the comparable rate was 81% of the cases in which a father appeared; for Bethel, the rate was 87%; and for Fairbanks, the rate was 98%.

[363] In 79% of the Anchorage cases in which the mother came to court at least once, an attorney for the mother came to court at least once. In Sitka, the rate for mothers' attorneys' appearances by case was 49%, in Bethel, the rate was 93%, and in Fairbanks, it was 95%.

[364] We did not undertake this particular analysis.

Parents' attorneys, particularly in Anchorage, reported that DFYS and AG actions structured their decisions to litigate. Although recognizing that DFYS standards for removal apply equally to all locations, some believed that in practice DFYS in Anchorage took children out of homes more often than in Bethel or other communities. A DFYS staffer agreed, saying that DFYS in Anchorage took custody for cases that in Bethel would have been handled less formally.

Other defense attorneys cited difficulties getting discovery in Anchorage as an argument for delaying the case. Their counterpart parents' attorneys in other communities either did not mention discovery as a problem, or pointed out ways in which the state or court routinely made information about the case easily available.

In contrast to Anchorage, other communities for the most part saw parents' attorneys as somewhat more cooperative. In Sitka, a parents' attorney said that parents often chose to go to court without an attorney, and that cases were very rarely contested. In Fairbanks, perceptions were more mixed. An assistant AG thought that some of the public defender attorneys who had recently started taking CINA cases had a more "criminal defense approach, even going so far as to tell clients not to talk to the social workers."[365] A Fairbanks interviewee who thought that more cases were contested than in the past attributed the change, not to a change in the parents' attorneys but to changes in the nature of cases and public attitudes about DFYS.[366]

c. Children and guardians ad litem (GALs) —[367] Children had little voice in their cases.[368] They were young (20% in the cases reviewed were under one year old, and 31% were one to five years old), and interviewees believed strongly that it was usually damaging to the parent-child relationship to have children in court. On the other hand, almost a quarter (22%) were 13 years and older, and may have been the subject of a

[365] An Anchorage public defender said that parents particularly needed attorneys at intake so that they would not reveal to the social worker things that DFYS would hold against them later. A Fairbanks assistant AG said, however, that they tried to convey to parents' attorneys in Fairbanks the fact that DFYS would not hold stipulated facts against the parents. Another public defender said that if criminal charges were possible, parents had to be concerned about incriminating themselves.

[366] Specifically, the person said that cases seemed to involve more drug use and serious family dysfunction, that some groups have encouraged their members not to cooperate with DFYS, and that higher turnover rates among social workers were impeding the establishment of trusting relationships between workers and families.

[367] The Guardian ad litem is described in note 216.

[368] A child appeared at least once in court in 13% of the cases. Children were present at 4% of the hearings, and spoke at 1%.

CINA action because they were running away from their homes. These teenagers potentially could have been consulted in the case outcome.[369]

The court rules require the judge to appoint a guardian ad litem for every child taken into custody by DFYS.[370] Guardians worked for the Office of Public Advocacy, either on staff or on contract, carrying caseloads involving up to about 180 children each.[371] GALs are the only parties specifically designated to represent the child's interests. Most were non-attorneys; a handful had legal training. To prepare their cases, they expected to talk with the child and the caseworker, visit the child in the home, talk with service providers, investigate alternative services, and generally monitor the case.

GALs appeared at least once in court in 94% of the Anchorage and Bethel cases, 72% of the Fairbanks cases, and 39% of the Sitka cases. A careful review of Sitka files after the initial data collection was complete indicated that GALs were appointed in most cases, but did not always appear in court.[372] GALs spoke at about 50% of the hearings held in the 473 cases reviewed.[373] About half of the GALs responding to the survey said that the judge permitted them to make opening statements, cross-examine witnesses, and make arguments. A smaller number said that judges permitted them to make motions or file pleadings.

CASA volunteers,[374] who worked mainly in Anchorage, appeared in court at least once in 13% of the cases reviewed.[375] They spoke on the record at only 1% of the

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[369] Some interviewees did say that older children were more likely to comment on the disposition of their cases.

[370] *See* CINA Rule 11.

[371] Caseloads varied depending on the community and amount of travel needed. For example, the guardians ad litem in Fairbanks divided their caseload by "river" cases (the communities were only accessible by river or plane) and "road" cases (the communities could be reached by a road). The guardian who handled the river cases had about half the number carried by the road guardian because of the great difficulties in getting to the river communities.

[372] GALs may not have appeared in court for brief cases. Some may have had difficulty in traveling to Sitka. In some cases, the GAL had filed a report but did not appear personally. In other cases, a GAL had not been appointed; the case files did not explain why.

[373] The frequency with which the GAL spoke on the record depended upon the community and type of hearing. Anchorage GALs spoke at 82% of all Anchorage hearings. In Fairbanks, GALs spoke at 29% of all hearings, and in Bethel, the percentage was 33%. In Sitka, a GAL spoke at 21% of the hearings. Except in Anchorage, GALs were not appointed until after the first hearing, so they would not have appeared until the second hearing. GAL appointments often ended after disposition, so the case may have had additional hearings at which the GAL did not appear.

[374] CASAs are described in note 203.

[375] Nearly all of the appearances were in Anchorage cases. Sitka and Bethel had one case each with a CASA appearance in court, and Fairbanks had two.

hearings held statewide. Because CASAs did not play a major role in the formal court process, the report did not collect much data about their work.[376]

d. Judicial officer – The role of the judge, master or magistrate who handled the case is considered in detail earlier in this chapter.

e. Tribe – About 45% of the cases reviewed in the case files involved Alaska Native or Indian children. The tribes' roles in these cases is discussed in Chapter 6 of this report.

f. Foster parents – This report did not assess the methods by which DFYS selected, licensed, trained or disqualified foster parents. The foster parents played little role in the court's decision-making, being rarely consulted by the social worker, guardian, judge or any other party.[377] DFYS licensed and paid some foster parents to be care providers. Other foster parents who had temporary approval[378] or who were relatives may have received payment through the public assistance program Aid to Families with Dependent Children (AFDC).[379] On average, foster parents paid through the Division received $17 per day, per child, or about $500 per month for food, clothing, and other expenses. Medicaid covered medical care. If the child had documented special needs, the parents might receive larger payments from the state. Licensing rules

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[376] Another type of assistant to the child was a surrogate parent, appointed under federal law for children who were both in foster care and had special education needs. Although the surrogate parents emphasized the child's educational needs, they often found themselves asking for action on related needs, such as medical care or counseling needed to help the child in school. They, like the CASA, had direct contact with the child, and therefore may have assessed the child's needs differently than did the participants, who worked primarily with the parents.

[377] At least two CASAs said they often felt torn because they could not decide whether the child's family home was any worse than the foster care situation. Sometimes, even if the family home was worse, they recommended that the child return because that was where the child wanted to be.

[378] DFYS has a number of licensing options for foster care, including emergency (one or two nights) and short-term (up to 30 days) licenses. Other options include working with tribally licensed foster care providers (tribally licensed foster homes are discussed in Chapter 6).

[379] The report did not compile detailed information about the conditions under which parents or children qualified for AFDC rather than payment through the foster care system. Blood relatives had a statutory preference for foster care placement under AS §47.10.230(e); however, some relatives did not meet DFYS licensing criteria. Such things as inadequate placement of windows for fire escape, past criminal convictions or a history of substance abuse problems could disqualify the relatives for licensing. Some families may have been able to meet licensing standards but did not apply. Families could receive benefits for a needy relative, meaning the household itself did not qualify for public assistance but the child did. In other cases, the child was added to the family's existing AFDC grant. Sometimes the increased costs associated with fostering one or more related children would make it necessary for an economically marginal family to go on public assistance for the first time. Some interviewees and persons who called the Judicial Council to offer information said that AFDC paid substantially less and was harder to get than foster care payments.

prohibited more than three foster children[380] or more than a total of six children in any one home.

g. Citizens' Foster Care Review Panel – State law established Citizen Foster Care Review Panels in 1993. The panels are described in Chapter 2 and their review function is discussed in Chapter 4.

h. Other participants – Depending on the community, other persons might participate in the court process. These persons, whose presence in court at a hearing was recorded on the court's notes for each hearing, included grandparents or other relatives, service providers, expert witnesses, and friends. In Anchorage, Fairbanks and Bethel, other persons came to about 13% to 16% of the court hearings. In Sitka, they came to 52% of the hearings. This, combined with the fact that attorneys and GALs appeared at Sitka hearings less often than in the other communities, suggested that Sitka conducted its hearings somewhat differently than the other communities.[381]

2. Issues Related to Parties in CINA Cases

The large number of parties present in CINA cases created problems that did not occur as routinely in other types of civil cases. Because a CINA case might involve many parties (the judicial officer, two attorneys, a social worker, at least one parent, and often a GAL or other persons), scheduling the hearing was difficult. In contrast, a typical civil or criminal case might involve only the judicial officer, two attorneys, and perhaps one or two other parties.

Another complicating factor, differences in location, meant that some of the parties participated by telephone or traveled from another town to the court hearings. Over half of the DFYS respondents to surveys, and about one-third of the attorneys said that they often or usually participated by telephone. About half of the attorneys believed families often or usually traveled away from their homes to attend hearings.[382]

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[380] Different standards may have applied to foster care tied to children adjudicated delinquent, rather than those adjudicated CINA.

[381] No hearings had been set for the week during which project staff was working in Sitka, so no observations were available to compare to the hearings observed in Anchorage, Fairbanks, and Bethel.

[382] Fewer DFYS workers thought that families traveled, but more DFYS staff thought that they themselves participated telephonically. The data were consistent with the view that DFYS workers were less often in the communities with the families than were the assistant AGs.

About two-thirds (65%) of the Bethel cases came from communities outside of Bethel, and about 14% of the Fairbanks cases.

The large number of parties complicated the disposition of cases. In order to reunite the family, DFYS had to locate family members, and then consider the needs of one or both parents, the child, and siblings. The most complicated cases tended to be those in which DFYS' failure to identify a parent early in the process delayed cases for months or years to accommodate that parent's rights when the person was finally identified. In addition, the parents' attorneys, GALs, service providers, tribes, and other experts might have conflicting ideas about appropriate dispositions. Sorting out the possible dispositions, the availability of services and resources needed to make them happen, and obtaining agreements on a single disposition delayed many cases.

F. Court Facilities

The facilities that the court had available often affected the quality of the hearings and what could be accomplished at them.

1. Meeting Rooms

In theory, attorneys should meet with their clients well before a hearing to review information, consider reports and make decisions. In practice, attorneys often met with their clients, and sometimes witnesses, in the courthouse minutes before the hearing. Attorneys also used time available before a hearing (or made time) to talk with other attorneys and parties in the case, and often reached agreements that they then asked the judge to approve. When the court could, it let parties meet in attorney conference rooms, jury rooms, law libraries and other private or semi-private spaces. To the extent that the court could facilitate this process by making space available, the process benefitted by having decisions made under less-adversarial circumstances.

Whether the court had the facilities available or not, the process went on. Most interviewees referred to pre-hearing conferences or out-of-court meetings at which most of the discussion about the issues in the case and their disposition took place. The brevity of many court hearings testified to the fact that major discussions seldom occurred in the court in most cases.

Interviewees said that they didn't like to use the hallway in the Fairbanks courthouse because it had so little privacy; but Bethel interviewees said that they met

in the hall often. Bethel court observations showed that some parties discussed the case in the courtroom before the hearing was to start, and others used a nearby coat closet. Sitka interviewees did not mention the facilities for meetings, which suggested that they were adequate.

In Anchorage, attorneys and other interviewees said that although the court had some spaces available (jury rooms, for example), they often were too small to comfortably include all of the parties (social worker, attorneys, parents, GAL, and perhaps others).[383] Meeting in jury rooms also creates security problems.

Respondents to the survey forms came from around the state, and answered questions about private meeting rooms differently. GALs and CASAs nearly all said that the court did have private meeting rooms for attorneys and their clients. About one-third of the attorneys and a third of the social workers said that the courts did not. The difference in perceptions may have stemmed from the fact that most GALs and CASAs worked in urban areas, where the court, judging by interviews, was more likely to have had some meeting space. One-third of the social workers said that the court did provide work space for social workers who were waiting for hearings.

2. Telephonic Participation

A second major facility issue potentially affecting the quality CINA cases was whether anyone participated telephonically. Statewide survey data suggested that about half the time, one or more of the parties might be participating by telephone. Social workers saw themselves as doing telephonic hearings somewhat more frequently than did attorneys. About a third of the attorneys and DFYS workers said that they often or usually had difficulty hearing and being heard at telephonic hearings. Although telephone participation in which parties could not hear well might in theory reduce the quality of the hearing, it was a widely accepted practice in Alaska courts and did not generate many complaints or comments from interviewees, with the exception of tribal representatives discussed in Chapter 6.[384]

[383] The Anchorage children's court recently lost its conference rooms to office expansion for the probate court.

[384] Bethel may have had more telephonic hearings than the other communities because so many of the cases came from communities outside Bethel. The project did not compile data on this particular variable.

Chapter 6
Findings Concerning Indian Child Welfare Act Cases

We present our findings concerning Indian Child Welfare Act cases separately in this chapter because the Act provides for extra, and in some cases, more stringent legal requirements.[385] Also, many observers have expressed concern about whether the state is adequately addressing the needs of Alaska Native and Indian children[386] and is complying with the requirements of ICWA.

In order to focus specifically on ICWA cases, the Council designed and disseminated a special ICWA questionnaire. The Council formed a small ICWA working group to design the questionnaire and identify appropriate recipients. The questionnaire went out to twenty-four tribal ICWA workers and representatives. To improve an initially low response rate from tribal workers and representatives, staff made follow-up phone calls. In the end, eighteen of the twenty-four (75%) tribal workers responded to the questionnaire (by far the highest response rate of any group surveyed for this study). The findings in this chapter are based on the responses to these ICWA surveys, other survey data, interviews, and case file data.

[385] Chapter 2 discusses the Indian Child Welfare Act of 1978.

[386] We will refer to "Indian children" for the rest of this chapter as including Alaska Native children.

The chapter begins with a general description of ICWA cases and the children they involve. It then examines the various special legal issues which apply to ICWA cases such as notice, intervention and required findings.

A. Demographics

1. Overall Number of Cases

ICWA cases are a major part of CINA cases in Alaska. Overall, nearly half (213 of 473, or 45%) of the children reviewed for this project were Indian under ICWA.[387] This figure ranged from 98% for Bethel to about 31% for Anchorage, Fairbanks and Sitka. The attorneys, judges, guardians ad litem, and social workers interviewed agreed that many of the children from small communities not included in this report also are Indian children. Thus, the 45% figure which we report may be lower than the overall percentage for all Alaska cases.

2. Age Comparisons

Overall, the differences in the age between Indian and non-Indian children in our sample did not appear significant. However, the data analysis did show that Anchorage CINA cases involved more Indian children between the ages of one and five years than non-Native children, and more non-Native teenagers than Indian teenagers. Sitka CINA cases involved a few more non-Native infants under one year, and a few more Indian toddlers (one to five years old). Bethel CINA cases involved noticeably fewer teenagers than other communities (only 6% of all CINA cases, as compared to 36% of the Sitka children and about 21% in Anchorage and Fairbanks). Fairbanks CINA cases involved more Indian infants (under one year) and fewer Indian teenagers than non-Natives in each of these groups. The pattern in all communities appeared to be more Indian very young children, with no difference in the six to twelve years old group, and fewer Indian teenagers. The patterns may suggest that DFYS was more likely to remove younger Indian children from parents' homes, but less likely to assert custody over teenagers.

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[387] Recall that Natives constitute about 17% of the state's population. Native children constitute about 21% of all the children under 19 years old in Alaska. *See* ALASKA DEPARTMENT OF LABOR, ALASKA POPULATION OVERVIEW, 1995 ESTIMATES 30-31, Table 12 (1996). Draft legislation by Congressman Don Young in October, 1996 said that "As of March 1, 1996, 1,222 Alaska Native children were in the custody of the State Division of Family and Youth Services, or 46 percent of the State total." (Sec. 201. Findings. (8))

3. Number of Siblings Comparisons

Another factor reviewed because interviewees suggested that it was important was the number of siblings. Interviewees consistently said that the more children involved in a family situation, the more difficult to satisfactorily resolve the issues that led to the state taking custody.[388] While data confirmed, overall, interviewees' perceptions of somewhat smaller families for non-Natives, the finding was not statistically significant except in Sitka. In Anchorage, the data showed little difference in the percentages of Indian children and non-Native children who did not have any siblings,[389] and no statistically significant differences in the numbers of siblings for those children who had them. In Sitka, 32% of the Indian children had no siblings, as compared to 87% of the non-Native children. For the children who did have siblings, the Indian children were likely to have a higher number.[390] Bethel children appeared more likely to have siblings than those in other communities: only 26% had no siblings, and 60% had two or more siblings. In Fairbanks, a slightly higher percentage of non-Native children had no siblings, but the differences did not show statistical significance.

4. Male/Female Comparisons

Overall, the data did not show any statistically significant differences between Indian and non-Indian children for the sex of the children. More Sitka children were female than male, and difference was much more pronounced for Indian children than for non-Natives. Fairbanks also had more female than male children, but the differences were more noticeable for non-Natives, and were not statistically significant.

B. Notice to Tribes

The Indian Child Welfare Act and Alaska statutes require the state to notify tribes of all major events in the case.[391] The assistant attorneys general and their staffs

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[388] Sometimes the state took custody of one or some children in a family, but not all of the children. The project did not compile those data. If the children had different parents (a fairly common situation, according to interviewees), the situation became more complex because all parents had to receive notice, especially for termination of parental rights.

[389] Nearly half (45%) of all Anchorage children in the case files reviewed had no siblings.

[390] Statistical tests showed that the differences in Sitka were significant at the p›.000 level.

[391] Chapter 2 discusses the ICWA's notice requirements. Typically, major events include the temporary custody proceeding, review hearings, adjudication and disposition hearings, termination of parental rights, and adoption.

responsible for CINA cases were the persons who actually notified the tribes in some communities; in others, DFYS sent the notices.[392] The Anchorage court expects DFYS to give notice, but in fact, the Anchorage AG's office does it.[393] Court case files typically contained copies of at least some of the documents sent out, permitting that data to be included in the analysis of case file information. The project also used interviews and questions on the surveys to assess the amount and timing of notice given to tribes.

1. Who Gave and Received Notice

The DFYS social worker who took custody of the child typically made the first decision in the case about whether the child might be Alaska Native or Indian and whether a tribe or tribes should be notified of hearings. Notice typically was sent to the individual tribe or tribes of which the child might be a member, and in some cases, a regional corporation, Native non-profit corporation or other entity that the tribe had designated to receive notice, or the Bureau of Indian Affairs in Juneau.

Some evidence of notice appeared in 91% of the 213 ICWA court cases reviewed.[394] If the Attorney General's office did not agree that the provisions of ICWA might apply, it would contest the matter in court. Interviewees discussed situations in which it was difficult to determine which of several tribes might need to be notified, and issues related to various methods of showing membership that would affect who received notice.

2. Informal Notice

Interviewees said that tribes often received informal information that an Alaska Native or Indian child was involved in CINA proceedings. Depending upon the relationships among the social workers, the tribes, and other participants, tribes often found out about CINA proceedings long before receiving official notice from the Attorney General's office.[395] Although tribes apparently often heard that a case had opened, they were far less likely to routinely learn that hearings had been continued

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[392] Judges in Fairbanks saw DFYS as having the primary responsibility there.

[393] Sept. 6, 1994 memo from Master Bill Hitchcock.

[394] Some of the cases were very brief, and did not involve a court hearing. A 1994 study of notice in DFYS files found evidence of notice being sent to tribes in about 47% of petitions filed in ICWA CINA cases. L. RIEGER, NOTICE AND INTERVENTION IN ICWA CINA CASES 1992, at 4 (1994).

[395] A few tribal representatives responding to the surveys said that they usually heard about the case informally before receiving notice from the state.

or rescheduled.[396] Although they had information about cases, as a practical matter it was often difficult to act upon the information in a timely way.

3. Timing of Notification

Statutes and court rules set out the timing of notification of tribes. ICWA requires the state to notify the tribe at least 10 days before a hearing involving foster care placement or termination of parental rights.[397] Court file information showed that the state notified the tribes in a timely manner about two-thirds of the time. However, notice went out to the tribe late (more than ten days after the petition was filed) in about a third of the cases.[398]

Information about which hearings the state provided notice of often was conflicting or incomplete. In the surveys, tribal representatives said that they often or usually received notice of ninety-day reviews, adjudication and disposition hearings, annual reviews, and DFYS six-month reviews.[399] A majority of attorneys responding to surveys (61%) said that they believed that tribes usually received notice of subsequent hearings (after the initial request by DFYS for temporary custody). In response to another survey question, one-third of the attorneys said that the state always gave ICWA notice before adjudication, disposition, or termination. Many of the remaining attorneys who responded said that the state gave notice most of the time.

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[396] In Bethel, if the tribe did not participate in the initial hearing, it would not receive formal notice of the continued hearing. In other communities, interviewees said that no-one received notice of a continued hearing, so the tribe did not receive the notice either.

[397] *See* 25 U.S.C. §1912(a).

[398] Some Fairbanks cases appeared particularly puzzling. In those cases, although tribes in some instances participated in discussions about the case during the time the case was open, notice did not go out to the tribes and BIA until after a final disposition had occurred (either the court adjudicated the child CINA and parties agreed on a disposition, or the case appeared to end). It was not clear from the case files why the Attorney General's office delayed formal notice to tribes when they apparently did not object on the record to the tribes' participation. Interviews suggested that this situation may have been more common in the past than in late 1995 and 1996.

[399] Seventy-eight to eighty-nine percent of the respondents said that they often or usually received notice of each of these events. Recall that "often" meant 26-50% of hearings and "usually" meant more than 50% of hearings. About three-quarters said that they usually or often received notice of termination of parental rights and adoptions.

4. Summary

The surveys, and particularly the responses given by the tribal representatives, supported a finding that notice practices could be improved.[400] The interviews and notes on court observations suggested that many people were very concerned about deficiencies in ICWA notice. The two findings may not be inconsistent. Practices differed by communities, and the variation among them may have led to different levels of concern even if notice actually had been given. ICWA workers reported that even when the state correctly sent notice to the tribal council, the council might not timely pass on the notice to the ICWA worker.

As discussed elsewhere, continued or delayed hearings created particular problems for tribal workers participating by phone. If the hearing was delayed, and the tribal worker could not stay by the phone (some villages had only one or a few phones, making it difficult to tie up the phone or stay near it), the tribe missed the hearing. Or the court clerk might not realize that the tribe wanted to be called back.

In one court observation, a tribal representative said that the tribe had only learned about the hearing from a family member and had not received notice from the state. The assistant AG remarked after the hearing that it had been a continued hearing and that the state was not obligated to give new notice. The state had not given new notice to other parties in the case either. Or the tribe might have received notice of the hearing but not been able to actually participate because the hearing was delayed due to other court matters.

Interviewees in Sitka said that the state (DFYS, in that community) was scrupulous about giving notice. At the opposite end of the spectrum, interviewees characterized the Fairbanks ICWA situation in general as antagonistic, at least among some of the participants, and thought the bad relationship had affected notice to tribes, at least in the past.

[400] Notice practices that could be improved included issuing notice with more attention to who actually was receiving it; issuing notice within the legally required time frames; issuing notice for each of the events in the case for which it was required; finding a way to provide notice of continued hearings; and finding ways to improve the likelihood that a scheduled hearing would occur at the time set.

C. Intervention

When a tribe learns of an ICWA case it must decide whether to intervene. Tribes can intervene formally or informally, depending on the judge, the circumstances, and local practices. The Sitka tribe and tribal court had a long history of close cooperation with the state DFYS and state court on children's cases.[401] Interviewees said that the tribe always attended court hearings involving the tribe's children but rarely entered a formal intervention because the tribe agreed with the DFYS action and placement. The Sitka state court said that it asked tribal representatives to speak about their concerns even if the tribe had not intervened formally.

In Fairbanks, interviews established that the judges usually permitted tribes to participate informally at early stages of the proceedings without having established ICWA status. After that, the court typically required a formal motion. Interviewees also reported that the Fairbanks Attorney General's office had, at least in the past, required tribes to give evidence of the child's membership by providing a written resolution, enrollment paperwork or testimony of other persons.[402] Tribal representatives protested that these requirements burdened the tribes because they were difficult to get from the tribe, especially on short notice. The Fairbanks judges had differing requirements for proof of membership, a situation which confused tribal representatives and others. Evidence accepted by one judge was not always accepted by another. Another, less common, source of confusion came from competing placement recommendations by tribes when a child was a member of more than one tribe.

Anchorage also allowed tribes to participate in the early stages of the hearing without a formal motion for intervention accompanied by proof of membership. In Anchorage, interviewees' concern centered more around means of increasing tribal participation than conflicts about how and when the tribe should be allowed to intervene.

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[401] Extensive interviews conducted for earlier Judicial Council reports focused on the almost-daily contacts among these agencies, and a working relationship that all participants described in positive terms. Social workers from the tribe and DFYS considered each ICWA case together, and decided whether to file the case in the state or tribal court, depending on which they believed could handle it most effectively. *See* RESOLVING DISPUTES LOCALLY: ALTERNATIVES FOR RURAL ALASKA (1992), and RESOLVING DISPUTES LOCALLY: A STATEWIDE REPORT AND DIRECTORY (1993).

[402] More recent interviews suggested that the Fairbanks AG's office and the Tanana Chief's Conferences have resolved this issue.

In Bethel, most cases were ICWA, and the judge and magistrate said they encouraged tribal participation. Unless the assistant AG objected, the court permitted informal participation and asked the tribe to file an affidavit later establishing that the child was a member. The judge and magistrate noted that some tribes participated much more actively than others.

Survey information about intervention suggested that tribes usually used a letter to the court or a motion filed by a non-attorney tribal representative to intervene. Judges said that they permitted tribes to intervene either by letter or motion, or by notice of intent to intervene. About half (44%) of the tribal representatives who responded to the survey said that they could "always" participate informally before the court had approved formal intervention, and about half (44%) said that they could do this "sometimes."[403] DFYS respondents to the surveys said that tribes usually or often intervened (22% and 18% of the respondents, respectively).

Records from the case files showed formal documents filed on behalf of the tribe in 35% of the ICWA cases. Most of the interventions appeared to have been filed either at the petition for adjudication or temporary custody, or at the adjudication. Tribal representatives said that they intervened at the petition for adjudication, presumably when a hearing was set. Attorneys who responded to the survey appeared to concur that this was the likely time for intervention.

With the exception of Fairbanks, respondents did not characterize active opposition to tribal participation as a major problem. On the surveys, 83% of tribal representatives said that their motions to intervene were "rarely" opposed. If someone opposed intervention, they said, it was likely to be the state (33%) or a parents' attorney (17%).[404]

D. Participation

1. Who Participated

Tribes made different decisions about who to send as their representative. Although the project did not collect detailed information, interviews and surveys suggested that the primary representatives were tribal employees who worked

[403] The other choice was "never."

[404] Half of the respondents said that no-one opposed, or did not answer the question.

specifically with ICWA cases, and less often, tribal officials or an attorney representing the tribe.

In Anchorage, the court observer noted tribal participation in three of seven hearings, each by telephone. In Bethel, the tribe participated in two of the twelve hearings observed.[405] As in Anchorage, the tribe participated by phone in both hearings. In Fairbanks, tribes participated in two of the four ICWA hearings observed.[406] Case file data showed that tribal representatives spoke on the record at 5% of the hearings held in the 473 cases reviewed.[407]

The survey information showed that the person who appeared in court was most likely to be the tribal ICWA worker. At times, regional non-profit staff or tribal council members also assisted. An attorney representing the tribe was unlikely to appear.

2. Nature of Tribal Participation

About half the judges said that they allowed non-attorney tribal representatives to cross-examine other witnesses, make opening statements, give testimony, make motions and arguments, and file pleadings. Attorneys (assistant AGs, and parents' attorneys) said that tribal representatives rarely asked the court to rule on discovery matters, and tribal representatives appeared to support that observation, saying that they rarely needed the judge's help to get information about the case.[408] Few interviewees and no survey information suggested that tribes had major problems, or that other persons did, with the level of tribal participation when tribes actually were in court.

3. Language and Cultural Barriers to Tribal Participation

Another aspect of participation in ICWA cases in general had to do with possible language or cultural barriers to resolving the case. DFYS staff said that language was an issue rarely (80%) or occasionally (16%). However, 23% of them said that a party in an ICWA case would often or usually benefit by having an interpreter. About the same

[405] The court observer noted that ICWA workers throughout the area had been at a training program during the week that project staff were compiling data in Bethel, and suggested that the scheduling conflict might have caused the unusually low participation.

[406] At a third hearing, parties disagreed about whether ICWA applied.

[407] A tribal representative appeared in court at least once in 18% of the 473 cases, or 39% of all ICWA cases.

[408] Recall that "rarely" meant less than 5% of hearings.

percentage of ICWA respondents thought that interpreters would help a large part of the time. Attorneys saw less need for interpreters, with only 6% saying that parties would often or usually benefit. Attorneys, DFYS staff and tribal representatives agreed that judges did not often appoint interpreters. A much larger group of DFYS staff saw cultural issues as barriers, with 41% saying that lack of cultural familiarity with courts and DFYS created barriers occasionally, and a few (four respondents each) saying that it created barriers often or usually.

E. Placement of ICWA Children

One of the most important purposes of ICWA is to benefit Indian children by retaining their tribal heritages. To achieve this end, courts are required to follow certain placement preferences in the absence of good cause to the contrary.[409] The order of preference is first with extended family members, then with other members of the child's tribe or tribes, then with other Indian families, and last with an Indian institution. Compliance with ICWA placement preferences generated a great deal of discussion in the context of this assessment of the court's role in permanency planning.

1. Tribal Participation in Placement

Survey data suggested that DFYS staff saw themselves as usually (69% gave that answer) contacting the tribe to explore placement options as soon as they had a case with an Indian child. However, many also said that they did not contact a tribe about placement until after the court had allowed the tribe to intervene.[410] About half the judges said that they usually inquired about DFYS efforts to meet ICWA preferences; 31% of the attorneys thought the judge usually inquired.[411] Over half of the tribal representatives who responded to the survey said that they thought that judges asked DFYS about ICWA placement preferences often or usually.

DFYS staff said that the tribe occasionally (45%) helped find placement for children, with smaller percentages saying that the tribe helped often (16%) or usually (18%). Tribal representatives said that they often (22%) or usually (61%) searched for

[409] 25 USC §1912. In general, see Chapter 2.

[410] Fifty-seven percent said they "usually" waited until after intervention.

[411] Note that CINA Rule 10(c)(4)(B) requires the judge at the temporary custody hearing to make a finding regarding DFYS' efforts to comply with ICWA placement preferences.

relatives. About one-third said that the tribe usually played a role in placing a child in a foster home, and another third said that the tribe often did this.

2. Compliance with Placement Preferences

The placement preference outcome, from a tribal perspective, appeared to be relatively positive: 72% of the tribal representatives responding to the survey said that DFYS often or usually placed children from the tribe in a Native foster home; 67% said that the placement was often or usually with extended family; 17% said placement was often or usually with a tribal-licensed home, and 11% said placement was often or usually with an Indian institution. However, only about one-third said that they thought the judges actually required compliance with ICWA (as distinct from an inquiry).

Other data supported the tribal representatives' impressions. Judges said that DFYS rarely (40%) or occasionally (29%) asked the court to deviate from ICWA preferences; attorneys thought that happened a little more frequently. Half of the tribal representatives who answered the survey believed that DFYS occasionally or often asked the judge to deviate from ICWA placement; half believed this happened rarely.

The relatively positive findings from the survey concerning state compliance with the placement preferences of ICWA conflicted strongly with interview findings. Most interviewees said that one of the worst problems related to ICWA was the lack of Native foster homes in every part of the state. An Anchorage GAL estimated that about one-quarter of children were placed with relatives; she made the estimate in the context of her belief that the state was "way out of compliance with ICWA preferences." Others cited efforts to recruit Native families, particularly in Anchorage and Nome, and the frustration felt when the efforts were perceived to have failed.[412]

Data from a variety of sources failed to clarify the situation, although they suggested that compliance with ICWA placement preferences varied somewhat by location.[413] The Citizens' Review Panel for Permanency Planning looked at 96

[412] Apparently of a hundred or more Native families in one recruitment who indicated interest in becoming foster parents, only about 1% ended up being licensed. DFYS staff said that in general, licensing foster parents was very difficult, and only about 1% of all families who initially indicated interest ever were licensed.

[413] Court files did not contain clear information consistently on whether the placement conformed with ICWA preferences.

Anchorage-area ICWA cases that had come before it in calendar year 1995 and found that the initial placement of 69% of the children was in a non-Native, non-relative home. After a period of time, nearly half of those children were moved to placements with relatives,[414] and after further time, about half of those moved back to non-Native, non-relative care. DFYS data on ICWA placement for the fourth quarter of FY94[415] through the fourth quarter of FY95[416] showed that DFYS was in compliance, statewide, for about three-quarters of their placements.[417]

F. Other ICWA-related Issues

1. Active Efforts

Survey, interview, case file, and court observation data examined a series of other issues related to ICWA requirements. Little data was available on some of the questions asked. For example, ICWA requires the court to make "active efforts" to reunify an Indian family, a higher standard than the "reasonable efforts" required in other cases. Case file hearing records gave little evidence of oral inquiry into "active efforts" that could be distinguished from an inquiry into "reasonable efforts." Interviewees confirmed that judges and other participants often did not make the distinction.

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[414] The Citizens' Review Panel found that 34% of Alaska Native children, 37% of African-American children and 27% of Caucasian children in the 1995 Anchorage cases reviewed were placed in relatives' homes. CRP 1995 ANNUAL REPORT, *supra* note 187, at 8. DFYS reported that at the end of FY95, 25% of children statewide were placed with relatives, 14% were in institutional care and the balance were in non-relative foster care. In March, 1996, DFYS data showed that about 30% of the children in the northern region of the state were in relative placements; about 28% in the southcentral region and about 21% in the southeast region.

[415] April, May, and June of 1994.

[416] April, May, and June of 1995.

[417] August 2, 1995 memo to DFYS Director, re Fourth Quarter FY95 report. Detailed data from another memo for August, 1995 showed that 41% of Bethel-area children were placed with relatives, as compared to 21% of Fairbanks children, 25% of Anchorage children, 12% of Mat-Su children, 26% of Juneau children, and 18% of all children (including the Juneau children) in southeast. If these percentages were correct, and DFYS' other finding that about 75% of its ICWA placements were in compliance, the implication would be that DFYS placed a substantial number of children in non-relative, Native or Indian homes, or perhaps Native-run institutions. Another explanation is that DFYS defines compliant placements differently than other organizations. Although some interviewees suggested that the situation was not hopeless, all agreed that DFYS had many more Alaska Native/Indian children in its custody than it had appropriate placements.

2. Expert Witnesses

ICWA and court rules also provide for the use of "expert" witnesses at various points in the process. The case files contained very little helpful information about whether the court used experts. Interviewees did not mention it, although some said that participation by tribal representatives gave the court helpful information about cultural differences and needs.

3. Tribal Services

Another area of interest was whether tribes could offer services that would help reunify families. About half the DFYS respondents to the survey said that the tribe did this occasionally, and about 25% said the tribe often provided services. Tribal representatives perceived the tribe as offering services a little more frequently than that, but not substantially more often. Tribal representatives thought that families received culturally relevant services occasionally (28%) or often (39%), but none saw families receiving them usually.

4. Other Factors

DFYS staff saw distance between parents and children, lack of tribal foster homes, and lack of services in the community as barriers to the tribes' abilities to provide services. Tribal representatives agreed in responding to their survey that lack of available services and lack of tribal foster homes presented barriers. About half of DFYS respondents, and about 22% of tribal representatives responding to the survey saw lack of tribal organization as a significant barrier to providing services. Again, however, services varied by community. A Bethel interviewee said that some of the tribal councils "monitor, follow up and very aggressively encourage parents to get into treatment." In Fairbanks, interviewees said that the Tanana Chiefs' Council licensed and paid for its own foster homes. In Sitka, interviewees emphasized the help provided by the Sitka tribe.[418]

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[418] Depending on the communities, tribal courts also heard and decided children's cases. Earlier evaluations found that Sitka and Minto courts, for example, resolved cases in their tribal courts, thus diverting them from state courts. *See* ALASKA JUDICIAL COUNCIL, RESOLVING DISPUTES LOCALLY: ALTERNATIVES FOR RURAL ALASKA (1992). To the extent that tribal courts resolved the tribes' cases in tribal courts, the state benefitted by not needing to provide services or foster care, and by, arguably, having the cases resolved in ways more satisfactory to all participants. One interviewee said that since December, 1994, Tanana Chiefs Conference had provided such extensive foster care services that DFYS had not taken custody of any children in the TCC region.

G. Adjudication Rates

As briefly discussed in Chapter 4, this assessment uncovered statistically significant disparities in the rates at which Native and non-Native children were adjudicated CINA, and this disparity held across all locations (with the possible exception of Bethel, where the difference could not be analyzed because all but two of the CINA cases there involved Native children). This finding was unexpected and was not suggested in the interviews.[419]

As discussed in Chapter 3, adjudicating more Native children CINA has at least two arguably negative aspects. First, it was a common practice in CINA cases to defer adjudication as long as the parents were "working the case plan," so that the system can be seen as treating adjudication as a punishment. Second, a parent with an adjudication on his or her record might be more prejudiced than a parent whose case never reached adjudication in subsequent contacts with the system.

However, a higher rate of adjudication is not necessarily a negative factor for Indian children. The fact that an Indian child has a prior adjudication on record may allow the system to respond faster and more appropriately to current abuse or neglect. Further, more consistent adjudications may spur both DFYS and parents to focus on the children's best interests. A related question raised by the disparity but not answered by this study concerns whether non-Native children are not being adjudicated CINA when they should be. We recommend that the state consider a policy of earlier and more consistent adjudications for all children.[420]

One aspect of the finding that made the high rate of ICWA adjudications especially puzzling was its consistency in three very different communities. Before making the finding, the data had already established very clearly that Anchorage, Fairbanks, and Sitka varied greatly in their ways of handling cases, and their level of cooperation with tribes. However, three of the four did appear to have similar rates of adjudication for cases in general, and similar percentages of ICWA cases, suggesting possible correlations between ICWA cases and adjudication rates. It would have made

[419] Upon discovering the disparity, staff performed some additional data analysis and interviews in an attempt to explain it. We found that the data available to us did not offer any likely explanations for the disparity. Thus, although we discuss several possible explanations later, we note here that none seem satisfactory. We conclude that more study is needed.

[420] *See* Recommendations #40-42 in Chapter 9, *infra.*

more sense if the communities had different rates of adjudication, given the difference in their styles otherwise.

We considered several possible explanations for the disparity in adjudication rates.

1. Discretion

Based on prior studies of ethnic-based sentencing disparity and on data gathered from the current study, we hypothesized that unjustified disparate treatment of similarly situated children might occur if the CINA system permits decision-makers and other important players large amounts of discretion to resolve cases informally. The current study demonstrated that assistant attorneys general lack uniform standards for deciding when and whether to take cases to adjudication, and that the courts by and large do not actively manage case time lines, including time lines for adjudication. The result could be a system into which unconscious bias could creep.

2. Cultural Differences

Some interviewees suggested that Alaska Natives, particularly those with a Yupik background, tended to admit to the allegations contained in CINA petitions more readily than persons of other cultural background. One difficulty with this hypothesis was that, unlike criminal cases in which every defendant in a criminal case has a formal set of charges, not every parent in a CINA case had a formal petition asking for adjudication. The assistant AG, not the parent, filed the petition for adjudication of CINA, and also decided whether to set it on for hearing, leaving the parent only the choice of whether to admit or contest the petition.[421] In Anchorage, Bethel and Sitka, the state's practice was to begin the case by filing a petition for adjudication, so that in those communities nearly every case had a petition for adjudication and the data could not discern significant differences at that point in the process. The Fairbanks assistant AGs initiated many cases with petitions for temporary custody, as opposed to petitions for adjudication. The Fairbanks assistant AGs filed petitions for adjudication twice as often in Alaska Native/Indian cases as they did in non-Native cases.[422] Because assistant AGs in Fairbanks filed

[421] Interviewees mentioned contested hearings on petitions for adjudication but never talked about the frequency with which judges found that the petition was not supported and dismissed the case. In general, it appeared probable that even in contested hearings, judges almost always adjudicated the child as CINA.

[422] The finding was statistically significant, at p›.0008.

proportionately more petitions for adjudication in Alaska Native/Indian cases, the disparity probably had a source other than cultural differences in willingness to admit the allegations in the petition.

A second difficulty with the hypothesis was that interviewees appeared to agree, before this particular finding was made, that most parents agreed to adjudication, if the state decided to ask for an order. In Bethel, Fairbanks and Sitka, particularly, interviewees appeared to agree that contesting an adjudication was the exception rather than the rule; and none distinguished between ICWA/non-ICWA cases when they made that statement. Nor did Anchorage interviewees, who were more likely to talk about contested adjudications, mention any perceived differences in likelihood that a parent would contest based on cultural background.

Finally, the hypothesis that Yupik parents, in particular, were more likely to admit allegations was undercut by the fact that the significantly higher rate of adjudication held true across the state including Fairbanks and the Interior communities (mainly Athabascan), Anchorage (varied) and Sitka (primarily Tlingit/Haida).

3. More Serious Cases

Another hypothesis to explain the higher rate of adjudications in ICWA cases was that the facts were "worse" in those cases. The project did not have sufficient data about the underlying facts of the cases to test that hypothesis. Several interviewees, asked about the substantially higher rates of adjudications in Bethel at a time prior to knowing about the higher rates of adjudication in ICWA cases, suggested that family situations in Bethel were worse than in Anchorage at the point that DFYS took custody. They thought that the more serious facts caused the higher adjudication rates. However, another, very experienced observer believed that facts were less serious in some Bethel cases.

One possible indication that the cases had worse facts in them from the beginning would have been that the cases reached adjudication more quickly, on the assumption that if the cases were worse, the state would have decided to adjudicate them more quickly. A review of the time to adjudication comparing ICWA and non-ICWA cases in each community revealed no significant differences between the two types of cases.

4. Cultural Practices

A fourth hypothesis was that lack of understanding of cultural factors and/or lack of culturally appropriate resources might have made the ICWA cases appear more difficult and less susceptible to handling in the informal manner in which most cases were concluded. One observer suggested that the dynamics of CINA cases led to rewarding parents perceived as cooperative with no adjudication, and to dealing with parents perceived as uncooperative by pushing for adjudication. Parents might be perceived as uncooperative because they failed to get transportation to a treatment program, or because they did not meet the terms of the program. The observer believed that Native parents were much less likely to get into treatment programs, or to do well once there, because the programs were culturally inappropriate. This view explained why the rate of petitions for adjudications as well as the rate for adjudications were significantly higher among Indian cases as compared to non-Native cases, and was consistent with other findings. The explanation did implicitly suggest that the state failed to consider cultural differences as sensitively as the requirements of ICWA mandate.

5. Village Cases

A fifth hypothesis was that the adjudicated ICWA cases might have originated disproportionately in villages. The assumption underlying that hypothesis was that because of the greater difficulties in finding placements and providing services to parents and children living in villages, DFYS would not remove a child from a village home unless the harm or danger of harm was so great that it would be easier to agree that an adjudication was appropriate. Data showed that for Fairbanks (the one community that had the right combination of ICWA/non-ICWA and village/non-village cases to test the hypothesis) there was no significant difference in the adjudication rates. A high percentage (65%) of Bethel cases came from villages; the rate of adjudication between cases that originated in Bethel and those that came from outside Bethel did not differ significantly either.

H. Conclusion

This assessment examined ICWA cases as a special subset of all CINA cases. The assessment found, once again, that courts' and other agencies' implementation of ICWA varied by community. In terms of notice to tribes and tribes' participation, the data (while somewhat conflicting) suggested that problems existed, and that they were

more or less serious depending on the locale; that tribes often received timely notice; and that they seldom were prevented from participating informally before intervention. The data also suggested that many, but not most, Alaska Native and Indian children were placed (often with tribal assistance) in ICWA-compliant homes. The assessment also found that many persons interviewed saw lack of ICWA placement as a major problem.

Sitka stood out as the location with the best performance on ICWA overall, due to its long-established relationships among the tribal workers, the state court, and the state agencies. Fairbanks (at least in the past) may have suffered from a somewhat antagonistic relationship between a key tribal representative and a key assistant attorney general; however, interviewees noted a more recent interest in working with ICWA cases.[423] Bethel appeared to have worked actively and successfully during the past two years to involve tribes and communities in every aspect of CINA cases. In Anchorage, respondents and interviewees expressed deep concerns with ICWA issues, and interest in finding solutions to perceived problems.

The most disturbing finding involved disparate adjudication rates between Alaskan Indian and non-Indian children. The assessment had enough information to make this finding, but not enough fully to understand the reasons for the disparity or its full consequences.

[423] The Fairbanks DFYS office has had an active ICWA review committee for twelve years. The ICWA committee, which includes members from the Inupiat Eskimo and Athabascan communities, performs a number of staffing functions in ICWA cases with the goal of ensuring compliance with ICWA.

Chapter 7
Other Agency Findings

This assessment focused on the Alaska Court System. Findings here on other agencies were more tentative than those for the court, and other data that we did not have might lead to other conclusions. The findings are presented to assist these agencies, and are not meant to be definitive.

A. DFYS

1. Resources

Some DFYS workers, as well as other system participants, agreed that social workers' workloads were overwhelming and that DFYS needed more staff. Others thought that administration of caseloads led to the perception in some locations of overwork. Either the perception or the actual overloads affected the system in a multitude of negative ways. Cases were not adequately and promptly investigated, cases were not expeditiously processed, AGs were forced to file expedited motions when this really should not have been necessary, and discovery was not promptly produced. The lack of resources went deeper than overworked social workers. Lack of support staff and office automation severely handicapped the ability of the social workers to complete their assigned tasks.

Lack of resources did not explain all of the problems at DFYS. National Guidelines suggest twenty-six or fewer cases for each social worker.[424] Some interviewees said that the Anchorage caseload was at or below that level, despite a perception that the social workers in that office were heavily overloaded. A July 1996 internal administrative review said that while the workload was high, "the feeling that the workload is out of control is likely due, in part, to the failure to establish sound office procedures." The review suggested several ways of reducing the pressure without adding new staff, including eliminating the separation between intake and ongoing social workers, and changing supervisory roles and responsibilities. Another source of management problems in the Anchorage office, according to interviewees, was the procedure for handling clerical work. Some of the delays in sharing information in response to discovery requests, and delays related to case transfers appeared related to the clerical problems.

Bethel and Fairbanks interviewees also talked about heavy caseloads, and the delays they caused. Recent changes (since 1994) in Bethel, however, reduced the caseload by better management, increased number of social workers, and improved morale. The Sitka office apparently had a relatively manageable caseload. The extensive cooperation with the Sitka tribe[425] enabled both agencies to better use the resources in the community.

2. Office Structure

Most of the offices distinguished between intake and ongoing social workers, or at least, between those stages of a case. Intake workers investigated reports of harm, took children into custody, and dealt with the family in the very early stages of the case. Ongoing workers took over responsibility for families soon after a case opened, and continued until the case closed. Survey data indicated that judges, attorneys and GALs across the state thought DFYS routinely transferred its cases always or sometimes. Few of these respondents said that DFYS never transferred cases, indicating that it was probably a statewide DFYS practice. However, fewer than half of the DFYS workers statewide thought that transfers happened regularly.

The Anchorage interviewees said that the transfer process created serious problems, both for families and for the process. The major issues were the lack of

[424] CHILDREN CAN'T WAIT, *supra* note 355, at 140.

[425] Discussed in Chapter 6.

continuity for the family, and the delays caused because the transfer did not take place quickly. Most survey respondents said that transfers caused some delay, with attorneys and GALs seeing more delay than judges. DFYS workers said that the transfer rarely caused delay.

3. Training and Coordination with Other Agencies

Some survey questions and interview comments focused on the related topics of social worker training, and coordination of DFYS efforts with those of other agencies. DFYS workers who responded to the survey had spent a substantial amount of time in their jobs: 53% had worked at DFYS more than five years, and 14% had worked there between three and five years. They also had received some training in the past year. Over half (57%) had more than three days of training, and another one-quarter (25%) had one to three days. Most (84%) responded that they had received training in cross-cultural communications.

DFYS respondents to surveys perceived very little interaction with the court for training or to work out issues of mutual concern. Most (74%) said that judges or court personnel helped train DFYS workers less than once every other year. Many (65%) also said that they met with court staff to work out issues of mutual concern annually or less often. Interviewees said that judges in southeast met periodically with DFYS and other agencies to address specific issues.

4. Foster Home Licensing

Interviewees raised several issues related to licensing foster homes. Chief among these were the need for more homes, the need for different types of homes, and the related issue of licensing standards.

a. Need for more homes – Every community agreed that it needed more foster homes. Sitka interviewees said that the community had nine or ten homes, but needed fifteen to twenty. An Anchorage social worker said that community had lost 52 homes in a one-and-a-half year period. National data indicated that for every one hundred families contacted about being foster parents, or interested, fifty would come to an orientation, twenty-five would complete training and only three to five would be licensed. Discussing that statistic, a licensing worker noted that the best source of new foster families was referrals from existing foster parents.

b. Need for variety of homes – Chapter 6 gives some data on ethnicity of foster home and ethnicity of relative placements. As that chapter notes, most respondents agreed that the state needed more Native foster homes. Because this assessment did not set out to compile data on placement and foster homes, it cannot evaluate the actual needs.[426]

In addition to the need for more Native homes, interviewees said that homes for other ethnic groups would be valuable, and that homes oriented to special needs or groups of children would help. Among the specialized needs, those of teenagers stood out. Teachers and teenagers responding to a newspaper request for input for this assessment recommended more group homes for teenagers, saying that these would help the transition from structured programs to independence. A Fairbanks judge agreed, saying that the community had group homes at one time, but at the present, had only standard foster homes.

Several interviewees discussed the problems with lack of Native foster homes and efforts to resolve them. The topic generated some of the strongest disagreements found during the assessment. While some observers believed that the joint Native/DFYS recruitments in Anchorage and other communities were done in good faith, others charged that "cultural bias" affected DFYS willingness to license Native and African-American foster homes.

Some of the debate centered on the question of the appropriate standards for licensing Native foster homes. Some interviewees said that DFYS should use different standards, especially in rural areas. Some said that DFYS did use different standards in rural communities, but even with that, found that they did not have enough Native homes. The presence of guns, homes that did not meet standards for fire safety, and potential foster parents with histories of substance abuse or crimes all were given as reasons why DFYS did not have as many Native homes as needed. At least one Native social worker thought that the standards were appropriate and thought Native children should not be placed in homes that fell short.

Interviewees also said that Native families might not want to become foster parents for various reasons. A Sitka interviewee said that payments were low, and that families had a hard time making ends meet with them. Others said that working with

[426] We note that the recently enacted federal Multi-Ethnic Placement Act prohibits a state from delaying or preventing a child's foster or adoptive placement for reasons related to ethnicity.

DFYS was not culturally acceptable to Native families. They saw DFYS actions as "taking a stand against brother or aunt," or helping to "break up an Indian family." Another believed that "most" Native families had experience, directly or indirectly, with the foster care system and did not want to be part of it.

c. Pros and cons of placement with relatives – DFYS placed children in foster homes or with relatives.[427] DFYS reports from 1995 showed that at the end of 1995, 25% of children in foster care were placed with relatives. Relatives might obtain an emergency license or a regular license. They might receive payment through AFDC (if either the child or the relative qualified) or through DFYS.[428]

Many interviewees saw advantages to placing children with relatives. It often meant less disruption for the child, if the child knew the relatives. Visitation between child and parents might be easier to arrange. Culturally, the child might be in a more appropriate situation.

Other observers saw potential disadvantages to placement with relatives. One said that relatives were not as objective about the children and their needs, and became "entangled in the family and part of the problem." She also said that two thirds of the situations in which children were abused while in foster care were emergency licensure homes.[429]

B. Department of Law

Assistant Attorneys General represented DFYS and the state at nearly all CINA hearings, and drafted many of the orders that judges signed. Interviews and other sources of information suggested that the assistant AGs working with DFYS social workers played a very significant role in the pace and outcome of every case. The state, as represented by the assistant AG and DFYS workers, decided when to ask for the important stages in a case, including dismissal, adjudication and termination of parental rights. If the state asked for dismissal or adjudication of CINA, the court very rarely denied the petition.

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[427] A third option, used in some cases, was to place the child with the parents, with DFYS maintaining "supervisory custody." A few children were placed in group homes or in institutions.

[428] *See* Chapter 5, *supra,* note 379 and accompanying text about relatives as foster parents.

[429] Apparently most of those were relatives. In 1996, DFYS adopted requirements for training of foster parents, and began to require that emergency foster parents complete training to continue with their license after 90 days.

Interviewees typically believed the AGs were overworked, though not to the same degree as DFYS workers. We note that the Department of Law apparently allocated resources so that the Anchorage office had much higher caseloads than other offices. Differences in amount of travel required, assignment of other types of cases, and different methods of participating in cases[430] were cited as justifying the larger numbers of cases per attorney in Anchorage.

Other agencies commented about how the AGs affected their work. For example, Bethel interviewees said that in years past, draft adjudication orders had taken three or four months to arrive at the court; at present, they took only a few days. Similarly, dismissal orders took months, in the past. In both Bethel and Fairbanks, respondents noted that custody orders had expired and weeks or months had passed before new custody extension orders were requested.[431] Interviewees in Anchorage noted that attorneys were unprepared for trial, at times, which required rescheduling. They also said that the AG's office was six to eight weeks behind in getting draft orders to the court. An Anchorage GAL noted that adoptions could not proceed until the termination orders were complete, and that months-long delays left children in limbo. In all of the instances cited, delays in the AG's office caused delays in the entire process.

Assistant AGs and others noted that the AGs, in turn, relied on DFYS actions. One AG said that his office sometimes pushed DFYS to move a case from the intake to the ongoing social worker with a phone call. Another said that probable cause findings could be delayed if the AG needed to redraft the DFYS petition for adjudication to allege more solid grounds for custody.[432] In Anchorage, several interviewees mentioned the delays caused by DFYS' slowness in getting discovery to the AG's office, compounded by the time needed for the AG to review the material before providing it to other parties.

Ultimately, although the AG's office relied on DFYS for substantive decisions about the needs of the family, the AG's office had final responsibility for the legal aspects of the process, including the pace of the litigation, and drafting petitions and legal documents. The AGs also, as noted earlier[433] spoke in court far more often than

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[430] For example, the Fairbanks AG's office apparently had DFYS prepare some documents (e.g., order for temporary custody) that assistant AGs handled in other offices.

[431] This situation also occurred in Anchorage, although perhaps not with the same frequency.

[432] Another AG said that the AG should prepare the petitions from the beginning. Social workers generally are not lawyers and may not have training in legal writing.

[433] Chapter 5, *supra*, Section E, noted that social workers spoke at 27% of all hearings; the AGs spoke at 84%.

did the social worker. Judges, because they often viewed their roles as limited by legal restrictions or by lack of time,[434] saw the attorneys as responsible for setting the pace of the case.

The AGs did not mention any uniform standards for deciding whether and when to take a case to adjudication or for other time lines. Different AGs had different ways of structuring the litigation. A Fairbanks AG noted that the office typically asked for a review of the case six months after adjudication, if a parent's substance abuse was an issue, so that they could consider whether termination of parental rights was appropriate. A Bethel AG said that if the case appeared to be one which could be resolved with two months of intensive effort, he did not push for adjudication.

Synthesizing all these different comments on various aspects of the AGs' roles, highlights the pivotal role that AGs played in the management and timing of CINA cases. As a result, the assessment found that recommendations about CINA cases should carefully consider the effects on the AG's office.

C. GALs/CASAs[435]

Guardians ad litem functioned somewhat independently from the other professionals in the CINA system. They viewed themselves as responsible to the judge rather than to one of the parties (i.e., state or parents), and as the primary representative of the child's interests. Some interviewees saw them as potentially as pivotal as the assistant AG. One judge said that the GAL should control the case rather than the AG.

GALs tended to carry heavy caseloads, with up to 180 children per GAL in Anchorage, Fairbanks and Bethel. A Sitka GAL said that her job entailed first a review of the paper documents associated with the case, then a meeting at length with the child. She also met with the child's teacher, and with tribal and state social workers. GALs in other communities reported similar efforts at the beginning of the case. As cases progressed, interviewees saw the GAL's role as one of "offering solutions to the court," and "riding herd on DFYS." Another said that the GAL should "articulate to those in power the needs of the child." A Fairbanks interviewee, however, said that GALs there were too overloaded to do much other than "respond to a crisis or

[434] Chapter 5, *supra*, Section A.

[435] GALs are described in note 216, *supra*; CASAs are described in note 203, *supra.*

investigate to file a report." When GALs did have time, they not only met with the children and other professionals in the case, but also with parents and service providers.

GALs submitted reports to the court at various points that other parties relied upon. Bethel court observations included a case in which the GAL's report was not available until the day of a hearing. The attorneys read the report during breaks in other cases rather than go to the hearing without having read the report.

GALs also took responsibility for requesting reviews and pushing for permanency for children. Interviewees said that GAL appointments often ended when the court signed a disposition order after adjudication. Some interviewees saw this as a reason to delay adjudication, because if the case had a disposition in which the child stayed in an out-of-home placement, no GAL would be available to represent the child's interests.

Ending the GAL's appointment at disposition was not a statewide practice, because numerous interviewees mentioned roles for GALs after disposition. Many viewed GALs as key to requesting post-disposition reviews, encouraging termination of parental rights when needed, and representing children who were between termination and adoption.[436] To the extent that GALs continued their appointments after disposition, they appeared more likely to expedite the process by pushing for reviews and action than to delay the process by submitting reports late.

The GALs' important role suggests the need to consider their training. Training appeared to be offered by the Office of Public Advocacy in Anchorage, but not in other communities. A Sitka GAL mentioned a several-day program that had featured ICWA information. A Fairbanks social worker thought that more training about ICWA would help the GALs in that area.

Another consideration was the characteristics and qualifications of GALs, and how those affected their work. Fairbanks interviewees discussed the importance of having GALs from various ethnic backgrounds, especially Native. They believed that having GALs of a specific ethnic background available to work with families and children with the same background would improve placement decisions and provision

[436] Even then, the practice did not appear consistent. Although some interviewees talked about the GALs' post-termination role, others said that GAL appointments lapsed after termination.

of services. Fairbanks interviewees also said that non-attorney GALs approached cases differently from attorneys, which increased their effectiveness in the GAL role.

CASAs — Court Appointed Special Advocates — assisted GALs in Anchorage, Kenai, and the Palmer/Wasilla area, and will expand to Fairbanks and other parts of the state when possible. The Office of Public Advocacy trains CASA volunteers to assist the GAL by meeting with the child, service providers, and others. CASAs act as a "friend" to the child, taking them for special outings, helping with visitation, and otherwise assisting with the child's needs. Each CASA has only one to three children or cases at a time.

D. Parents' Attorneys

The work of parents' attorneys has been considered elsewhere, especially in Chapter 5. Please see Section E for that discussion.

E. Citizens' Foster Care Review Panel

The Citizens' Foster Care Review Panel was discussed in Chapter 2 and Chapter 5.

F. Legislature

The legislature structures the characteristics and management of CINA cases through statutes and by providing resources. Some interviewees mentioned statutory changes that they believed would help the process. These included:

- Permit children's statements to be introduced as evidence without requiring them to testify. Judges said that forcing children to testify opened them up to charges of lying or exaggerating, and was "probably one of the worst things we do to kids."

- Many interviewees thought that the law requires the state to wait too long before terminating parental rights.[437] A Sitka interviewee suggested that the legislature act to permit termination of rights

[437] A consistent theme throughout the interviews was the belief that the standard for termination is so high that it is difficult to meet it without showing that the parent has failed repeatedly at the treatment plan. The need to show repeated failure led to, in many interviewees' eyes, repeated attempts to engage parents in treatment, and many delays.

much earlier in the case. A Fairbanks interviewee said that some states take the child's age into account when deciding whether to terminate parental rights. For example, the standard for termination in Michigan law involves consideration of whether it would be safe for the child to return home "within a reasonable time, considering the age of the child."

- Revise AS §47.10.080(1) to be consistent with the Adoption Assistance Act, 42 USC §675(5)(c), which sets the permanency planning hearing within eighteen months after the child is removed from the home. Alaska's statute permits the eighteen months to be counted from the date of removal, counted from the date of disposition or termination of parental rights. Because fewer than half of the cases reviewed for this assessment contained dispositions, permanency planning hearings were not occurring even for children who had been outside the home well over eighteen months.[438]

Many interviewees saw a need for more resources for the CINA system. They believed that additional judges, masters, court administrative staff, DFYS staff, assistant AGs, parents' attorneys, GALs and CASAs should be added. They also saw the need for resources for treatment programs, more foster homes, better visitation provisions, and other services. In stating the need for more resources, they pointed out that keeping children in state custody created substantial costs for the state. To the extent that providing any of these resources would enable the state to avoid taking custody, the state would save money. By providing the resources to handle cases expeditiously, the legislature could reduce delay and resolve cases more quickly, again in theory reducing costs to the state.

Interviewees mentioned some points of resource need more frequently than others. They saw these points as sources of significant delay in cases, and hypothesized that reducing these delays could move the CINA process more quickly. Some of these points were:

- Delays, particularly in the Anchorage and Bethel AG's offices, in getting draft orders to the court.[439] Delays in getting orders signed

[438] Depending on the community, DFYS or the court do schedule permanency planning hearings. Bethel, in particular, has focused on permanency planning in the past two years.

[439] In the summer of 1996, the AG's office informed the Judicial Council that it was assigning a full time AG to live in Bethel. The office hoped that this would improve the handling of both the Bethel and Anchorage caseloads.

by the court had a ripple effect, causing other delays throughout the life of the case.

- Lack of treatment choices in every area. Many interviewees said that a significant source of delay was the amount of time parents had to wait to get into treatment. They noted that often delays of up to several months occurred while the parents waited to have their needs evaluated, and additional delays came after evaluation, waiting to get into the recommended programs. Many also said that the state needed culturally appropriate treatment, in every area.

- Preventive services. Interviewees believed that working with families before it was necessary to take children into custody to protect them potentially reduces costs in two ways. First, by teaching parenting skills, helping with employment and education, and reducing substance abuse, prevention would keep families from the behaviors that led to the state taking custody of children.[440] Second, in theory, well-documented interventions prior to taking state custody would lead to quicker resolution of cases if the state did take custody.

- More DFYS resources. Interviewees suggested that DFYS needed more social workers, better clerical assistance, more computers, and more foster homes. All of these resources would enable DFYS to work with families more closely, prepare and file reports and other paperwork more promptly, and increase the quality of placements for children reducing trauma to them and future need for services.

- Training. Interviewees and survey respondents indicated that training for agency staff, courts, and foster parents could improve the ability of the organizations to work effectively. DFYS staff also might benefit from time management and case management training.

Interviewees also mentioned some sources of assistance to the CINA system that would improve it at relatively low cost to the state. For example, some observed that close collaboration with tribal organizations directly benefitted the state in several ways. Tribal organizations in some parts of the state handled many children's cases without state intervention. The tribes provided tribal courts, treatment, and foster

[440] Several interviewees and the Citizens' Foster Care Review Panel said that most parents' problems were caused by substance abuse.

homes. If cases did come to state courts, tribal collaboration benefitted the state by identifying possible placements with relatives or friends, or ICWA-compliant placements. Tribes also provided treatment programs and a variety of services for parents and children. Proponents of greater tribal collaboration with the state pointed to Sitka and Bethel as examples of communities where that approach has apparently helped to reduce or keep caseloads lower.[441]

Another source of assistance, mentioned by several interviewees, was the CASA program. The program uses volunteers to work with GALs in CINA cases. Each CASA receives only one to three case assignments at a time, so the CASA can devote much more attention to the child and the child's needs than other players. Interviewees suggested that CASAs be used throughout the state, especially in rural areas where travel costs were high. Interviewees who believed that GALs played a critical role, and could with more resources, expedite cases, saw CASAs as a low-cost way to boost the effectiveness of GALs.

[441] The state and tribes have formed a tribal/state collaboration group that meets quarterly to develop and implement methods of increasing tribal participation.

Chapter 8
General Recommendations

This chapter contains general recommendations to improve the way courts handle child abuse and neglect proceedings. Recommendations are based on the findings and conclusions set out in earlier chapters. This chapter is followed by Chapter 9 containing recommendations specific to each stage in CINA proceedings. While many of the recommendations in the two chapters overlap, they are treated separately for ease of reference. Chapter 10 discusses specific recommendations for ICWA cases and Chapter 11 discusses recommendations for agencies other than the court system. Chapter 12 sets out recommendations concerning implementation of improvements by the court system.

A. General Principles for Handling CINA Cases

This assessment has led to two preliminary yet vital conclusions. At first glance, these points may seem obvious and not particularly significant. However, the recommendations have far-reaching implications, and will be extremely difficult to implement.

Recommendation 1. The court system must review directives, court rules, and statutes that set priorities for appellate and trial courts' management of all types of cases, and direct appellate and trial courts to ensure that CINA proceedings receive the emphasis that they deserve.

This report has emphasized the importance of CINA cases to the parents, to society at large, and especially to children. Courts should treat each CINA case — and indeed each hearing—as an emergency—because from the child's perspective it is exactly that.

A number of factors make it difficult to give CINA cases the attention they deserve. The statutes, procedures, and rules governing CINA cases appear in a variety of places, making it difficult for a person unfamiliar with the field to grasp them quickly. Local practices are complex, and vary so widely from court to court that parties familiar with practice in one community cannot easily go to another court. The cases involve so many parties that it is difficult to coordinate the schedules of every person. Although the cases are important, CINA filings comprise a very small percentage of the court system's total civil and criminal filings, making it more likely that their importance will be overlooked. Because they are among the most difficult and unpleasant cases for judges to handle, few may volunteer to work with them. Finally, because CINA cases are confidential, people outside the system often do not know about them or how they are handled. Courts should recognize that although CINA cases constitute a small percentage of total filings and require different case management techniques than other civil cases, their importance merits the extra effort.

Every type of case appears to have priority for the courts, based on one directive or another. Simply adding CINA cases to this list will not materially increase the courts' ability to focus on these cases. Thus, the court system should comprehensively review the order of priorities that courts must apply. Administrators and courts must have realistic standards deciding priorities among cases.

Recommendation 2. Courts must ensure that the primary focus of any CINA proceeding always is the child who is the subject of the proceeding.

As discussed throughout this report, CINA cases present frequent opportunities for conflict among parents' rights, tribes' interests, institutional interests, and the child's best interests. In a case that may involve six or more parties, the GAL is the only party who advocates exclusively for the child's best interest (although DFYS represents the state's interest in protecting children from harm, it also must work to rehabilitate parents and has its own institutional interests as well). The judge is the one participant who can ensure that the child's interests remain paramount.

While this principle may at first seem obvious and non-controversial, it is often neither. While all parties pay lip service to the child's interest, in reality it often falls far down the list of priorities. The courts, DFYS and the Attorney General's office may place their own schedules, priorities, and needs ahead of the children's, often due to limited resources. All parties must keep the child's timeframe in their perspective, as well as considering their own needs and those of their agencies.

Courts, including the supreme court, have at times focused narrowly on other parties' rights to the practical exclusion of the interests of the children.[442] This does not mean other parties' rights (such as the parents) should be ignored or minimized. However, courts should analyze them in the context of the interests of the children. Our law creates parental rights, and imposes obligations on DFYS to provide services to parents, precisely because of a societal belief that **children**, as a general rule, fare better with their parents (at least those who can minimally care for their children) than in an often impersonal foster care system. The reason for helping parents is so that they can provide for their children. Thus, parents' rights must be understood in the context of what is best for the children.[443]

B. Proper Role for Judges

As discussed in Chapter 5, Section A, this subject emerged in interviews as a primary concern of parties in the CINA system. Many respondents thought that significant deficiencies in the handling of CINA cases could be cured if judges would increase the amount of initiative and effort they exercised. While a few judges justified a positive, active role, most saw their proper role as more limited and passive than the role envisioned by the parties.

> **Recommendation 3. Judges must take a more active role in CINA cases to protect the interests of the children involved in these cases.**

Advocates for a passive judicial role pointed out that few judges have training in this area and it is unreasonable to assume that most could become experts. Neither do judges have an overall view of the funding limitations at DFYS and other agencies.

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[442] See *Nada A. v. State*, 660 P.2d at 441 n. 5, where the supreme court said that a child's right to a permanent, adequate home is not "fundamental" for purposes of constitutional analysis.

[443] The supreme court acknowledged in one of its earlier child in need of aid decisions that "in recent years the courts have become increasingly aware of the rights of children." *D.M. v. State*, 515 P.2d at 1237 (footnote omitted).

What a judge might see as a reasonable and necessary order might have real and substantial negative consequences for agency workers.

Nevertheless, the federal law and national practice guidelines clearly envision a much more active role for judges than they currently take. Judges should actively manage the pace and substantive progress of CINA cases because "[i]n child welfare cases, the judge is not merely the arbiter of a dispute placed before the court, but, rather, sets and repeatedly adjusts the direction for state intervention on behalf of each abused and neglected child."[444]

Nor should judges treat CINA cases the same as other civil cases in the adversarial system. The court must manage CINA litigation more proactively than other civil litigation, because "the law assigns to the juvenile court a series of interrelated and complex decisions that shape the course of state intervention and determine the future of the child and family."[445] Federal law requires the judge to be the gatekeeper in CINA cases. As one respondent pointed out, DFYS may have expertise in child welfare matters, but it lacks expertise in court case management. The judge is the only player in a position to oversee case management and case progress.

Recommendation 4. Judges must ensure at the start of CINA cases that the state has sent notice to all required persons and entities including putative fathers and tribes, that DFYS has a definite plan for the case, and that the court has set time lines for case progress, including due dates for discovery, adjudication and disposition.

Judges should get CINA cases off on the right track at the very beginning of the case. Other recommendations specify the necessary steps, but this section emphasizes some basic points. The findings showed that notice often did not go to all parties (absent parents and Indian tribes, especially) early in the case and that this lack of early notice substantially delayed some cases. The state should ensure prompt notice to all parties.

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[444] RESOURCE GUIDELINES, *supra* note 213, at 15. One interviewee noted that in states in which the child is a ward of the court, judges see their responsibility as much more directly involving them in the case.

[445] *Id.* at 14.

The court should consider requiring the state's attorney to file an affidavit certifying that all potential parties have been served with notice, and describing the efforts made to locate any parties who were not served. The court should encourage assistant AGs and social workers to precede, or at least supplement, formal notice with direct, informal notice. If a potential party has not been served, the court should follow up to make sure the state locates and serves the individual.

Second, the court should assure from the very beginning that DFYS has a plan for the case, and that the agency and the parents know the court will review their progress. Finally, the court should set dates for case progress, using objective standards.[446]

Recommendation 5. As a general rule, judges should be assigned early in the case, and each judge should keep all cases before him or her from start to finish.

The judge should have a direct relationship with each family.[447] Judges should have a sense of ownership in the case and responsibility for the children involved. They should invest the time necessary, both on and off the bench, to gather complete information and assess the results of decisions.

Recommendation 6. At the temporary custody hearing and at other hearings, each judge should address the parents directly.

The judge should impress upon the parents the seriousness of the matter, and also should offer to answer questions about orders or the process.

C. Reasonable Efforts Findings

As discussed in Chapter 5, this assessment found that, as a whole, Alaska's courts complied with the requirement of making reasonable efforts findings at the

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[446] *See* Recommendation #36.

[447] The National Resource Guidelines cite a number of benefits from one-family-one-judge calendaring. A single judge who hears all matters related to a single family's court experience develops a unique judicial perspective. The judge develops a long-term perspective that enables the judge to identify patterns of behavior exhibited over time by all parties, provide consistency and continuity, and make decisions consistent with the best interests of the child. NATIONAL RESOURCE GUIDELINES, *supra* note 213, at 19. Court locations that use judge-supervised judicial officers, such as Anchorage, still should maintain the principle of one-family-one-judge.

various points required by law and court rule. However, these findings often were part of a stipulated order and were presented at a brief hearing during which the judicial officer made a minimal inquiry on the record. By investing only a few more moments in each hearing, judges could seriously inquire about the state's reasonable efforts, thus laying a foundation for DFYS to devise and, where necessary, revise the family's case plan. Also, by carefully reviewing prior DFYS efforts to help the family, "the court can better evaluate both the danger to the child and the family's ability to respond to help."[448]

> **Recommendation 7. The court should seriously inquire at every hearing about the state's reasonable efforts and should find specifically that the state made reasonable efforts, or did not make reasonable efforts, or that it was an emergency and that reasonable efforts were not necessary under the circumstances (only at the first hearing; at subsequent hearings, the court is reviewing reasonable efforts to reunite the family).**

At each hearing, including ninety-day review hearings, judges should ensure that the record reflects the services provided, and more importantly, the family's ability to use them. A five-minute interactive discussion in court, rather than a pure stipulation, may in the long run reduce the amount of time spent on the case.[449]

> **Recommendation 8. Judges should learn, to the extent possible, what resources are available in their communities so they can effectively make reasonable efforts findings.**

The judge cannot review the agency's efforts to provide services unless the judge knows what is available. Yet judges often do not know about appropriate treatment services, and the available services change rapidly. Thus, the court system should educate judges and magistrates about what services are available to families in their

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[448] *Id.* at 38. Some jurisdictions use concurrent planning to help balance the tensions inherent in many foster care cases. In this process, the child welfare agency plans for both reunifying the family, if possible, and simultaneously looks at realistic permanent placements for the child in case the reunification efforts do not succeed. Alaska's DFYS is exploring concurrent planning as a possibility for appropriate cases.

[449] To the extent that this recommendation is inconsistent with the supreme court's interpretation of CINA Rule 15(g) in *R.R. v. State of Alaska*, Slip Op. No. 4359 (June 21, 1996), Rule 15(g) should be amended. See Chapter 5, Section D.

communities and statewide.[450] The court must consider how to keep the judges' knowledge current for these rapidly changing resources.[451]

D. Delay/Time Standards

The subject of delay is complex. The CINA system is fraught with tension between the parties whom delay benefits and those whom it harms. Although the child's need for stability and finality weighs in favor of resolving cases quickly, other parties' interests and caseloads create a system that tolerates delays of months or even years. Parents' constitutional right to the care and control of their child, their need for services that may not be immediately available, and their need for time to come to terms with what they have to do weigh in favor of delay. The judges' passive management styles and lack of time to devote to each individual CINA case also contribute to tolerance for delay. Large caseloads assigned to social workers and assistant attorneys general in some communities make them less likely to push hard for a timely resolution in any one case. Coming to a fair and just resolution may require time for parties to consider the various choices. The large number of parties also makes some delay almost inevitable. If a case is appealed, the pace of appellate proceedings may contribute to additional delay.

A recommendation that everything occur on time simply is not realistic. Judges and the other actors in the system must wrestle with the tensions in almost every case to establish a balance between speed, fairness, and thoroughness. Nevertheless, judges and parties in courts around the state should take a serious look at procedures and expectations in speedier locations, such as Sitka. Although some judges and attorneys doubt whether the court can adjudicate cases quickly, Sitka gives evidence that they can.

> **Recommendation 9. The court system should develop comprehensive time standards for CINA cases, incorporate these time standards in the CINA Rules, and build them into its computerized case management system.**

[450] See Recommendation 21, *infra*, regarding judicial education.

[451] Many communities have handbooks of resources that list local social services agencies, substance abuse treatment, counseling, and a wide range of other services. These and other resources can be used by judges or parties to assess the local services available for children and families.

Time standards are probably the most important concrete steps the court system can take to ensure CINA cases receive the attention they deserve and are processed expeditiously. The standards should leave the court discretion to vary from them in exceptional cases. "Exceptional" in this context, means that the court should not vary from the time standards except under unusual circumstances.

At a minimum, time standards should include a deadline for completing contested temporary custody hearings, a deadline for setting and completing adjudication hearings,[452] a deadline for setting disposition hearings (when they do not occur immediately after the adjudication hearing),[453] and a deadline for completing contested termination of parental rights trials.

In thinking generally about policies regarding delay, and in thinking about delay in each individual case, the court and judges should distinguish between "constructive" delay and "drift" delay. Constructive delay benefits the child. Drift delay arises when the case is delayed because of scheduling difficulties, including waiting times for services to become available or the unavailability of key professionals (including judges). The court should consider adopting a rule that encourages promptness.[454]

The assessment has shown the timeliness of adjudication hearings to be a particular concern. Chapter 4, Section D discusses the importance of early and accurate adjudicatory findings of abuse and neglect, and finds that fewer than half of all Alaska CINA cases statewide ever reach adjudication. If the case cannot be dismissed within 30 days of the temporary custody hearing, the judge should set it for adjudication.[455]

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[452] Judges recommended 45-90 days; social workers and a number of attorneys (but not parents' attorneys) thought that adjudication could occur within 30 days. The Sitka court adjudicates many cases in about 60 days.

[453] Some courts schedule separate adjudication and disposition hearings, while others hold both at the same time. We take no position on whether they should occur together, as long as delays between them do not exceed thirty days.

[454] Possible language for such a rule might provide:

"Rule 1

....

(g) Avoiding Delay. These rules will be construed to minimize delay, because delay in Child in Need of Aid cases directly prejudices the welfare of the involved children."

This language is based on *The Children Act of 1989*, from England and Wales.

[455] The National Association of Juvenile and Family Court Judges' Resource Guidelines for improving court practice in child abuse and neglect cases suggest that "[c]ourt rules or guidelines need to specify a time limit within which the adjudication must be completed." RESOURCE GUIDELINES, *supra* note 213, at 47.

National guidelines recommend, based on experience in other jurisdictions, that adjudication be completed within 60 days of removal of the child. Most persons whom we interviewed (other than parents' attorneys) believed that most cases should reach adjudication within forty-five to ninety days. Judges should deny requests to delay adjudication hearings absent newly discovered evidence, unavoidable delays in notifying parties, and unforeseen personal emergencies.[456]

Laying out time lines for major events, especially adjudication, has a number of benefits. Among them, the court could reduce the number of preadjudication ninety-day review hearings, which might well save court hearing time in the case overall.

Recommendation 10. Court administration should consider ways to free up judges' and masters' calendar time for CINA hearings. The court probably also needs to provide more judges or judicial officers to hear CINA cases.

Numerous interviewees, particularly those in Anchorage and Fairbanks, complained about lack of timely access to judges' and masters' calendars for motions and other hearings (especially contested hearings). Improving access to judges' calendars could reduce case delay. The court should consider which case management strategies would make more calendar time available. The court also should consider other solutions, including devoting more judge and court time to CINA cases.[457] See also Recommendation 24, regarding judicial resources.

Recommendation 11. The court should institute a pilot project requiring parties to attend pretrial conferences to see whether these can limit the issues at contested hearings, with less trial time and fewer scheduling problems.[458]

The National Resource Guidelines state that pretrial conferences often help "to resolve preliminary issues and to arrive at a time estimate for the hearing."[459] This assessment found that some scheduling delays occurred because parties overestimated

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[456] *Id.* at 47.

[457] We note that only a handful of the eleven Anchorage judges regularly (or ever) devote calendar time to CINA cases.

[458] *See* CINA Rule 13.

[459] RESOURCE GUIDELINES, *supra* note 213, at 20.

the amount of time needed for a hearing.[460] Because Anchorage already requires a preadjudication case conference, and because it has the most CINA filings, the court should designate Anchorage as the pilot project site. A qualified administrator or other person should design an evaluation program. The pilot project should gather data for one year and report to the supreme court whether scheduling problems decreased.

E. Consistency

While differences in practice from court to court may be justified and useful, the Council found that courts throughout the state handled CINA cases so differently that they created major problems for both the users of the system and the children whom it served. The vast differences made difficulties for court and other agency personnel trying to handle these cases, difficulties in comparing data from the courts, time-consuming needs for agencies to tailor their cases to the different processes throughout the state, and procedural and substantive disparities in the management and potentially in the outcomes of cases. These differences were based largely or entirely on the location in the state rather than on actual differences among cases. Disparate treatment of similarly situated litigants raises due process and equal protection concerns.

> **Recommendation 12. The court should make its procedures, forms, and hearing names consistent statewide to a much greater extent than is now the case.**

The court system should create a committee to thoroughly review the diverse ways in which different courts handle CINA cases and make these practices consistent unless there is a good reason for differences. At a minimum, the committee should discuss case numbering, case closing procedures, any court forms used in CINA cases, and procedures for notifying tribes under ICWA (see Chapter 10 on ICWA recommendations).

For example, the committee should recommend either that the Fairbanks court change its case numbering method to comply with Administrative Bulletin #7, effective January 1, 1982, which requires that each child be assigned a unique number when

[460] Data showed that although few hearings lasted longer than twenty minutes, attorneys often requested several hours or days of court time for contested hearings. Judges then had to look many weeks or months ahead in order to find the block of time on their calendars.

a case is opened for that child, or that the court system amend its administrative order to endorse the Fairbanks case numbering system. Regardless of which system is chosen, all courts should use the same system.

Recommendation 13. The court should implement its statewide computerized case management system for CINA cases as quickly as possible. The new system should be able easily to find family information in related cases.

The assessment found that courts often did not have information about the case history, decisions made by judges in other locations, and other, related cases (*e.g.* divorce, criminal, child support). A universal child identifier entered into a statewide computerized management system would permit judges to track CINA cases from different locations. The system also should be able to identify related cases for the parents and other family members (*e.g.* criminal, child support, paternity, domestic violence, and divorce), and should be able to identify all CINA cases involving the same family.

Recommendation 14. The court should incorporate time standards into its computerized and manual case management systems, devise means to encourage compliance, and evaluate the standards.

The Anchorage Children's Court has made a first attempt at creating a case management system incorporating time standards. The Bethel court is considering a similar project. Courts should consult with professionals in the CINA field to set time standards and means of encouraging their use. However, as discussed in Recommendation 42, *supra*, all CINA cases should be dismissed or adjudicated within 45-90 days of case opening.

The case management system should track time from case opening to closing. This assessment found that some CINA cases (perhaps 20%) can be resolved and dismissed in 60 days or less. Other cases (perhaps 20%) will take more than six months to resolve, whether because they are proceeding to termination or because they are otherwise complex. The remaining 60% of cases can be resolved between two and six months. The case management system should include standards based on these data.

Each court should designate an administrator or a committee to encourage compliance with and evaluate these standards. The evaluators should report to each other, the supreme court and the presiding judges every six months.

> **Recommendation 15. All courts, particularly the Fairbanks and Bethel courts, should ensure that their completed CINA cases contain a dismissal or other standardized closing document, and that the document is filed within two weeks of case resolution.**

As discussed in Chapter 3, Section (C)(1), lack of a closing document and lack of a standard closing document unnecessarily complicate data collection and case monitoring. All courts should either require the assistant AG to submit a closing document for *all* completed CINA cases within two weeks of case resolution, or the court should prepare and file its own closing document within two weeks of case resolution.

All CINA participants who file closing documents should agree on and use a standard form statewide. Each court should designate a person to check periodically for compliance with this requirement. The compliance monitors should report to each other, the supreme court and the presiding judges every six months.

F. Coordination and Cooperation

The foster care system would benefit from coordination and cooperation between the involved parties probably to a greater extent than any other part of our legal system. The courts can do much to encourage this cooperation.

> **Recommendation 16. Judges should encourage a non-adversarial tone in CINA cases.**

Creating a non-adversarial tone in CINA cases has several benefits. First, parties who have a cooperative attitude may be more willing to stipulate to key issues rather than to litigate them. Stipulations can save court hearing time, and can achieve outcomes superior to those reached through litigation. Second, contested hearings can create an adversarial atmosphere that may prevent parents and DFYS from developing the cooperative relationship necessary to accomplish what is best for the child.

A judge can encourage a non-adversarial tone by: (1) requiring pre-hearing conferences involving the GAL, parents and state; (2) addressing discovery problems as soon as they come to the judge's attention; and (3) encouraging interested parties and the court system administration to explore a mediation pilot project for CINA cases. (See Recommendation 35, regarding mediation.)

Recommendation 17. The judge in each community should initiate meetings with CINA system professionals to discuss issues and solve problems. The court system also should organize periodic statewide meetings.

Canon 4 of the Code of Judicial Conduct clearly permits judges to organize and participate in groups that improve the administration of justice. Such meetings should include GALs, parents' attorneys, AGs, and DFYS. Other interested people such as citizen review panel members, service providers and foster parents' organizations should participate as appropriate. The meetings need not be regular (a Juneau judge holds meetings one to three times a year, on no particular schedule). Participants should use these meetings to discuss statewide policies as well as local practice issues.

Recommendation 18. The Anchorage court should consider whether CINA court cases could benefit from work done by the Anchorage Citizens' Foster Care Review Panel.

The Anchorage court should establish a pilot project to evaluate the usefulness of the Citizens' Foster Care Review Panel reviews in the court's annual review and permanency planning processes. In designing the pilot project, the court should consult with all players in the CINA system (especially parents' attorneys) to resolve evidentiary and other possible problems with CRP information. As part of this project, the court should provide guidance to the panel about the type of information that the court needs in order to make its reviews and decisions.[461]

Recommendation 19. The court system should consider whether providing copies of the local Citizen's

[461] Note that the Citizens' Foster Care Review Panel has recommended that the Anchorage court designate it as the administrative body for conducting permanency planning reviews. Although the National Resource Guidelines recommend that only courts conduct permanency planning hearings (RESOURCE GUIDELINES, *supra* note 213, at 78), the court should at least consider this option.

Foster Care Review Panel reports to judges could improve decision-making in CINA cases.

A number of participants in this assessment thought that the CRP's reports would help the judge's decision-making. Some parents' attorneys, however, expressed concern over lack of evidentiary standards for the CRP's reviews, and said that their clients' positions often were not adequately represented because they did not have time to attend the CRP review hearings. The Citizen's Panel reports currently are not admissible in CINA cases because of evidence rules limiting submission to parties. The court should consider, in consultation with all players in the CINA system, whether the rules should be changed to permit admission of local Citizen's Foster Care Review Panel review reports, and if so, if any evidentiary safeguards are necessary.

Recommendation 20. The Anchorage court, DFYS, and Citizen's Foster Care Review Panel should coordinate post-disposition reviews, or parties should agree how a single review could serve multiple purposes.

The Anchorage court should time its annual review to coincide with the Citizens' Panel review (the citizens' panel reviews each case every six months).

G. Judicial Education

Respondents overwhelmingly favored giving judges more background and techniques for handling CINA cases. Judges who do not handle many CINA cases (for example, those in Anchorage) benefit from education about the system and specialized topics. For judges who handle more CINA cases, education would help standardize procedures and judicial expectations statewide.

Recommendation 21. The court system should systematically train all judges, magistrates and clerks about CINA cases, both at the annual judicial and magistrate conferences and at special training sessions. The application of the Indian Child Welfare Act should be covered, and the court should provide cross-cultural training as well.

Respondents, including judges, stressed the need for basic education about the laws and procedures, as well as training to understand that CINA cases differ from

other civil cases and the importance of looking at a case from the child's point of view. Other important topics would include education about reasonable efforts, what to look for in case reviews, family dynamics, cultural issues, and how actively to manage cases.

Recommendation 22. The court system should develop a CINA bench book for judges and magistrates.

The bench book should lay out the nuts and bolts of how to handle a CINA case, including summaries of relevant state and federal legislation, court rules, and appellate decisions. The book also should discuss appropriate time lines and case management philosophy.

Recommendation 23. The court system should develop a CINA handbook for clerks and administrators.

This handbook would parallel the judge's benchbook but would focus on clerks and administrators. Clerical and administrative understanding and oversight of CINA cases is critical to proper review.

H. Judicial and Court Administration Resources

Improved and active case management, better coordination with other agencies involved in CINA cases, and other steps recommended in this assessment will reduce delay and lead to earlier, more satisfactory resolution of CINA cases. The court also must provide the resources necessary to handle the caseload.

Recommendation 24. The court should allocate sufficient judicial and administrative resources to CINA cases.

The court has in the past recognized the importance of groups of cases by establishing committees to set and monitor policy and its implementation (*e.g.*, Rules Committees, Fairness and Access Committee, Mediation Task Force), designating deputy presiding judges, allocating central administrative and clerical staff resources, and (in multi-judge courts) assigning judges to specialized caseloads. The court should consider each of these options, and other appropriate means, to assure that CINA cases have adequate resources.

The court should establish objective measures to determine when this requirement has been met. For example, the court should consider setting a goal of having 75% of CINA cases adjudicated within 90 days of the date the case opened (the remaining 25% of the CINA cases probably will be closed without adjudication in less than 90 days).

I. Miscellaneous

1. Court Facilities

Recommendation 25. All court facilities should have a private area where case discussions can occur. This space should include access to a telephone so that tribal representatives in ICWA cases, and other parties unable participate in person, can fully participate in the case discussion.

CINA cases are confidential, and CINA case participants need a private space in which to discuss their cases immediately before hearings.

Recommendation 26. The new Fairbanks courthouse should be designed to have an area other than the hallway to discuss CINA cases.

The court system should provide at least one conference room in which the parties can meet privately before hearings.

Recommendation 27. The Anchorage courthouse should have an area other than the hallway to discuss CINA cases.

The court system should provide at least one conference room in which the parties can meet privately before hearings and for Interim Case Conferences. The Anchorage children's court recently lost its conference rooms.

Recommendation 28. The Bethel courthouse should have a private area other than the coat closet to discuss CINA cases.

Recognizing that space is at a premium in the Bethel courthouse, the court system nevertheless should consider how it could make a private meeting room available on days when the court hears CINA cases.

2. Parties and Participation

Recommendation 29. Judges, GALs, and parties to the case should use information from the foster parents about the child to help determine appropriate actions in the case.

This recommendation recognizes that although foster parents are not parties to the case, they often have extremely valuable information about the child's needs and progress. Judges and others in the case should take this information into account as much as possible.

Recommendation 30. The judge should appoint a GAL in every CINA case.

This assessment showed that the judges appoint GALs in most but not all cases. Because the GAL is the only party that advocates expressly and exclusively for the child's best interest, a GAL is necessary to every case. Also, the court should consider keeping GAL, CASA and attorney appointments in place post-disposition (especially post-termination) to press DFYS for progress towards permanency.

Recommendation 31. The court, Office of Public Advocacy, and Public Defender Agency should consider requesting amendment of AS §47.10 to limit the rights of absent or putative parents in CINA proceedings.

This assessment found that case delays often were caused by absent or putative parents becoming involved late in the case. The court, OPA and the PDA should contact other jurisdictions which limit the rights of those parents in CINA proceedings.[462] This suggestion should *not* substitute for early and diligent relative

[462] For example, the New York State legislature has adopted specific statutory guidelines for identifying unwed fathers who have constitutionally protected parental rights which must be surrendered or terminated before their child can be adopted (fathers with full, substantive rights), fathers who have some lesser connection with their child which entitles them to notice of adoption proceedings (fathers with due process rights), and putative or unidentified fathers who have not made efforts to establish a relationship with a nonmarital child and therefore do not have the right to be

searches. It is designed to reduce unnecessary delay and expense to the court system caused by absent or uninvolved parents who received early notice but who chose not to participate until later.

Recommendation 32. The CINA rules on notice should be amended to specify that the state give notice to all parties of continued or postponed hearings.

This assessment found that decision-making in CINA cases often suffered from lack of participation by all parties, particularly tribes. Lack of notice requirements for continued hearings contributed significantly to this problem. Although this notice will require resources, the improved decision-making in CINA cases merits the investment.

Recommendation 33. The CINA rules and state statutes should be amended to permit parties other than the state to petition for post-disposition extensions of custody exceeding the two-year limit.

CINA Rule 19(e) and AS §47.10.080(c) permit the state to petition for extension of custody. They should be amended to permit other parties in the case (specifically, the Guardian ad Litem) to petition for extension of custody.

Recommendation 34. Judges should permit non-attorney GALs to participate as fully as attorney GALs at this and subsequent hearings.

In Anchorage and perhaps in other locations, GALs are appointed before the temporary custody hearing and appear at the temporary custody hearing. Interview data suggested that at least some judges limit the role of non-attorney GALs. CINA Rules 11 and 3(h) envision an active role for GALs. To the extent that the non-attorney GAL wishes it, the judge should permit active and meaningful participation.

3. Alternative Dispute Resolution

Mediation as an alternative to litigation of child welfare cases has been used successfully in several other jurisdictions, most notably Florida and Oregon.

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included in a court decision to approve a mother's surrender, termination or consent to adoption of the child. RATTERMAN, TERMINATION BARRIERS: SPEEDING ADOPTION IN NEW YORK STATE THROUGH REDUCING DELAYS IN TERMINATION OF PARENTAL RIGHTS CASES, at Appendix O, pp. 1-5 (ABA Center on Children and the Law 1991).

Recommendation 35. The court should design and implement a mediation pilot project and evaluation to help resolve CINA cases.

Many respondents believed that the adversarial system is ill-suited to resolving problems in CINA cases. Mediation is one alternative that can be better than the adversarial process at enhancing communications, breaking down rigid position-taking, and encouraging parents' involvement in the case plan.

All mediators should be well trained in CINA law, domestic violence, child abuse and neglect, cultural issues, and family dynamics. Confidential mediation sessions, facilitated by court-appointed, neutral third-party mediators, should include all participants, especially the parents. For mediation of jurisdictional issues, the court's policy should state that mediated agreements must reflect a full and accurate statement of jurisdictional facts. The court also should experiment with mediation of disposition and post-disposition issues. Oregon has had particular success mediating termination of parental rights cases.[463] The court should consult with the director of Oregon's mediation program.

The court also should evaluate the pilot project. At a minimum, the evaluation should examine whether mediation helped resolve cases that otherwise the parties would have contested, whether it helped resolve cases earlier, and whether the mediation process worked better than the traditional court process at actively involving parents in the case.

4. Specialized Judges

Some respondents suggested creating specialized judges to handle all CINA cases or setting up a specialized family court. Anchorage does have a specialized master, and the judges in Bethel and Sitka use masters to varying degrees. Expanding the use of masters would increase knowledge and consistency in CINA cases, and therefore is worth considering. However, relying excessively on masters or creating a specialized family court increases the possibility of "burnout" and judicial isolation. Also, the real possibility exists that a court created exclusively to handle CINA cases

[463] Although contested terminations are relatively rare in Alaska, they tend to consume a disproportionate amount of judicial and agency resources. Thus, to the extent that mediation could resolve terminations that otherwise would be contested, the state could save money. Parents and children also would benefit from a non-adversarial resolution. At least one attorney described instances of Alaska judges using settlement and mediation techniques to resolve difficult CINA cases.

would be viewed as less important than general jurisdiction courts, and therefore would not receive equal resources. Thus, the court system should evaluate this suggestion with caution.

Chapter 9
Recommendations for Stages of CINA Proceedings

This chapter contains recommendations specific to the major stages of CINA proceedings, from the temporary custody hearing, to adjudication and disposition, annual reviews, and the permanency planning hearing. These recommendations are consistent with and should be considered in the context of the general recommendations set out in the previous chapter.

A. Temporary Custody Hearing

At this hearing, required by state law and CINA Rule 10, the state must show that probable cause exists to believe that the child who has been removed from the home is a child in need of aid.[464] To authorize continued removal, the judge also must make a finding about whether or not DFYS made reasonable efforts under the circumstances to prevent or eliminate the need for removal and to make it possible for the child to return home.[465] If DFYS has removed an Indian child from the home, the court must make findings about DFYS' efforts to comply with ICWA placement preferences.

[464] State law and CINA Rule 10 also require a temporary custody hearing when the state has filed a petition for adjudication or for temporary custody but has not removed the child from the home.

[465] A finding of no reasonable efforts would *not* mean that DFYS had to return the child to the home.

1. Notice of Hearing

As discussed in Chapters 4 and 6, court rules require the state to serve notice of the petition and hearing on all parties, including the parents, GAL and Indian tribe, within a reasonable time before the hearing. The rule also requires the state to make diligent efforts to locate the parties and give them actual notice of the time and place of the initial hearing.

The notice requirements are clear, and crucial to early resolution of cases. As discussed in Chapters 4 and 5, interviews showed that CINA cases were delayed, sometimes years after first entering the court system, because of failure to notify putative parents early. Recommendations on notice are contained in Chapter 8.

2. Setting Time Lines and Deadlines

Principles of sound case management (discussed in Chapter 8) and concern for the child's best interests suggest that judges should set time lines and deadlines for case progress, and that they should do so as early as possible in the proceedings. Judges always should set the next hearing at the conclusion of the current hearing.

> **Recommendation 36. The judge should set time lines for case progress, including party notification, relative searches, and due dates (if necessary) for any discovery needed.**

At the temporary custody hearing, the judge should inform the parties of time lines and deadlines for other important case events, including relative identification, location of absent or putative fathers or mothers, and exchange of discovery documents. Judges should require the state to identify relatives, and locate (phone number and address) and notify putative or absent parents within 30 days of case opening.

3. Conduct of Hearing

Recognizing that hearing time is limited, caseloads are large and that the temporary custody hearing is an emergency hearing with little time to prepare, the judge nevertheless should make the temporary custody hearing as thorough and

meaningful as possible.[466] When temporary custody hearings are thorough, some cases can be resolved without subsequent court hearings and reviews. In other cases, a comprehensive initial hearing can help simplify and shorten early hearings and can move the case more quickly to the later stages of the process.[467]

> **Recommendation 37. The judge should allow enough time on the record for a thorough and meaningful treatment of issues at the temporary custody hearing.**[468]

The judge should allow sufficient time to hear from all parties present who wish to speak, to address important issues such as visitation and child support orders, the immediate needs of the child, any discovery problems brought to the judge's attention, medical treatment for the child, and to make the required findings (placement, reasonable efforts, why continuation of child in the home would be contrary to the child's interest, and if the child is Indian, whether DFYS complied with ICWA placement preferences). At this early stage, the court also should actively seek to identify and resolve potential sources of delay in the litigation.

B. Pre-Adjudication Review Hearings

If the judge sets the adjudication hearing within forty-five to ninety days of the temporary custody hearing, no ninety-day review hearing should be necessary before adjudication. If calendaring problems, newly discovered evidence, failure to locate and notify parties or other extraordinary events delay the adjudication hearing past the ninety-day limit, the court will need to hold a ninety-day review hearing. The court also will need to hold ninety-day review hearings in cases that the assistant AG commenced with the filing of a petition for temporary custody (as opposed to a petition for adjudication) if the state has custody for more than ninety days.

1. Notice of Hearing

CINA rules require notice of each hearing to be given within a reasonable time before the hearing.

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[466] *See* NATIONAL RESOURCE GUIDELINES, *supra* note 213, at 30.

[467] *Id.* at 31.

[468] Recall that the National Resource Guidelines recommend 60 minutes.

Recommendation 38. At the first ninety-day review hearing, the judge should review identification and notice to all required persons and entities, including putative and absent parents and the possible tribe of an Indian child.

If a putative or absent parent has not been located and notified by the first ninety-day review hearing, the judge should *seriously* inquire into the situation and should satisfy himself or herself that the state has made diligent efforts to notify all absent parties. The same is true if the state has not yet identified relatives, or notified the child's tribe.

2. Conduct of Hearing

Recognizing that court calendars are crowded and CINA workers' caseloads too large, parties nevertheless should strive to make all review hearings meaningful. This is especially true for the ninety-day hearings, which in many cases are all that occur during the life of the case.

Recommendation 39. The judge should allot enough time at the ninety-day review hearing to meaningfully consider the case progress.

The assessment suggested that parties too often "went through the motions" of case review, instead of seriously inquiring about agency and parent efforts. The court should use the review hearing for meaningful reporting, and to identify and eliminate potential sources of delay in the litigation. In particular, GALs or social workers can present a social history of the case that will help the judge and other parties to understand the context for reasonable efforts findings and proposed case plans.

C. Adjudication

The importance of early and accurate adjudicatory findings of abuse or neglect is discussed elsewhere in this report.[469] One major finding of this assessment concerned the state's failure to adjudicate over half of the CINA cases it filed, despite the fact that many of those cases remained open for months, and sometimes years. A second finding concerned delays in adjudications once they had been requested. Delays occurred at

[469] See Chapter 4 (Section D), Chapter 8, and Section D of this chapter.

this stage because of calendaring and scheduling problems, attorneys who were not prepared, and failure to notify absent or putative parents. Judges can eliminate delay caused by failure to notify parties by following the recommendations regarding proper notice and relative searches at earlier stages of the litigation. Principles of sound case management and interview data from this assessment suggest that judges can reduce unnecessary and damaging delay, make better decisions and make better use of their hearing time by actively managing CINA litigation. They also can make more use of alternative means of resolving issues, such as mediation, as recommended elsewhere in this report.

Recommendation 40. The courts, the Department of Law, and DFYS should develop and implement statewide uniform standards and time lines for deciding whether and when to take CINA cases to adjudication.

As discussed in Chapter 4, adjudication rates vary by community. As discussed in Chapter 6, lack of statewide standards to regulate assistant AGs' discretion may allow unjustified disparate treatment to creep into CINA cases.

Recommendation 41. Judges should deny requests to continue adjudication hearings absent newly discovered evidence, unavoidable delays in notifying parties, and unforeseen personal emergencies.

The National Resource Guidelines recommend against granting continuances except for these three reasons.[470]

Recommendation 42. If the state has filed a petition for adjudication, the judge should set the case for the adjudication trial no more than 90 days from the date of the temporary custody hearing. If the case is not set for adjudication by the time of the first ninety-day review hearing, the judge should set the case for adjudication within 30 days. If the state has not filed a petition for adjudication by the time of the ninety-day review hearing, the judge should require the state to file a petition for adjudication or to dismiss the case within 30 days.

[470] RESOURCE GUIDELINES, *supra* note 213, at 47.

As discussed in the general recommendations chapter, national guidelines, experience in other jurisdictions, experience in Sitka, and interview data[471] suggest that most CINA cases (*at least* 75%) can and should be adjudicated or dismissed within forty-five to ninety days of the state's taking custody. By setting the adjudication hearing at the conclusion of the temporary custody hearing, the judge takes an active role in case management. By setting the adjudication trial to occur no later than ninety days after the temporary custody hearing, the judge eliminates the need for any ninety-day review hearings.

Setting a firm and early adjudication trial date conveys to parents the importance of the situation, and gives social workers and AGs a time frame upon which they can rely. Making adjudicatory findings of abuse or neglect early in the case is crucial to establish the facts that will in turn structure the case plan. In Anchorage, implementing this recommendation will require that the court consider its system for assigning judges and masters, and make adjustments needed to assure continuity.

D. Disposition

Interview and case file data showed that the court often handled the disposition hearing at the same time as the adjudication. Often parties saw significant advantages to this practice. At other times, parties prefer to hold the disposition hearing at a later date, but it should not be delayed any significant length of time.

Recommendation 43. If the judge does not hold the disposition hearing immediately after the adjudication, the judge should set the disposition hearing for no more than 30 days later.

Setting the disposition hearing for no more than 30 days after the adjudication helps avoid unnecessary delays in permanence for children.

Recommendation 44. The court should ensure that all required reports are filed within a reasonable time before the disposition hearing.

[471] Judges recommended 45-90 days; social workers and a number of attorneys thought that adjudication could occur within 30 days. The Sitka court adjudicates many cases in about 60 days.

The assessment showed that DFYS, and sometimes GAL, disposition reports were not filed timely. The parties need advance notice of the report in order to respond.

E. Termination of Parental Rights

The assessment showed that some CINA cases proceeded relatively quickly to a voluntary relinquishment or involuntary termination, while others foundered for months and years because of procedural failures earlier in the process (e.g., deadlines were not set and even if set were not followed; absent parents were not notified timely; and calendaring difficulties caused trial dates to be delayed, the latter mainly in Anchorage). Many of these procedural failure delays will be reduced as judges and the court system implement some of this assessment's earlier recommendations. However, some special consideration also is required.

> **Recommendation 45. Judges and court system administrators should give special attention to termination trials when reassessing calendaring priorities.**

Abused and neglected children are harmed by delayed termination trials, as are parents, because of the high stakes. Delayed or continued termination trials drive up court operation costs and counsel fees, and extend children's time in foster care (and consequently extend the time the state must make foster care payments).[472]

> **Recommendation 46. If unacceptable delays persist after one year of implementing earlier recommendations, each presiding judge should meet with the children's court judges and other CINA professionals to identify and discuss specific causes of delay.**

F. Post-Disposition Review

This section discusses two types of post-disposition review: the annual review and the permanency planning hearing.

[472] RESOURCE GUIDELINES, *supra* note 213, at 91.

1. Annual Review

At the annual review the judge determines whether the child continues to be a child in need of aid, and whether continued custody or supervision by DFYS is in the child's best interests. Court rule and state statute require the court to make certain further findings if the child is not returned home.

Recommendation 47. Each court location should reassess its procedure for setting and "tickling" files for annual review to ensure that annual review hearings are not skipped.

Each of the different court locations uses a different method of setting and "tickling" files for annual review. Although DFYS and the court can benefit from cooperatively handling this responsibility, ultimately the court must ensure that the annual reviews are held, and that they are held timely. Some courts set the date for the annual review at the time of disposition, insuring that it will not be overlooked.

Recommendation 48. The court should ensure that all required reports are filed within a reasonable time before the annual review.

The assessment showed that DFYS, and sometimes the GAL, failed to file annual review reports or filed them late. The parties need advance notice of the report in order to respond.

Recommendation 49. Courts that routinely conduct annual reviews on paper should consider holding some annual review hearings.

The Anchorage children's court lacks the resources to hold hearings in all cases scheduled for annual review. Currently, parties can request an in-court review. The court should consider creating more formal guidelines for which cases require in-court hearings, for example, cases in which a parent's rights have been terminated or cases in which the goal is adoption.[473]

[473] Termination cases are particularly problematic because the parents are no longer parties. Unless the child has effective, independent representation, no-one left in the case may have the incentive to push for resolution. In those cases, the purpose of the annual review is to ensure that all possible is being done to place the child for adoption. *Id.*, at 96.

2. Permanency Planning Hearing

Federal law requires that a permanency planning hearing take place within eighteen months of a CINA case's filing in court. Social science research underscores the need for permanency planning: children deprived of a permanent home for more than eighteen months develop affective and other problems with lifelong effects.

> **Recommendation 50. The CINA Rules and Alaska statutes should be amended to provide for the permanency planning hearing within eighteen months of the case's filing, as required by federal law.**

As discussed in Chapters 2, 4 and 5, some CINA cases are not scheduled for permanency planning hearings. Also, state and federal law appear to be inconsistent on when the permanency planning review should be held. Revisors should make it clear that the permanency planning hearing should occur eighteen months after removal regardless of the status of the case. For example, a case that is pre-disposition at eighteen months deserves court attention to permanency issues. Assuming a case is post-disposition, the permanency planning hearing should take the place of the first annual review.

> **Recommendation 51. The court should hold permanency planning hearings when they are required by federal law.**

Whether or not the CINA rules and state statutes are amended as recommended above, judges should calendar a permanency planning hearing in every CINA case within 18 months of removal of the child, as required by federal law. If the annual review and permanency planning hearings fall within ninety days of each other, the court should schedule them to occur as one hearing.

Chapter 10
ICWA Recommendations

The recommendations outlined above should benefit all Alaskan children--both Native and non-Native. However, the dictates of the Indian Child Welfare Act require that extra steps be taken in cases involving Indian and Alaska Native children.

A. Notice and Intervention

Recommendation 52. Courts should interpret expansively the notice and intervention requirements of ICWA and Alaska law to increase tribes' participation in finding solutions for Indian children.

Our assessment has established that Alaska's Native communities have the resources and the commitment to search for constructive solutions in CINA cases. Their willingness and ability to contribute to helping children has been especially evident in Sitka, where tribal and state social workers collaborate weekly and the relationship between the state and tribal court judges is marked by cooperation, communication and mutual dedication to children. Bethel is a second example of joint state and tribal efforts aimed at helping children. In recent years, the Bethel DFYS office has begun to work closely with tribal resource providers and village leaders to ensure the safety of children, while the Bethel court stresses the importance of community involvement (including village councils and tribal courts) in CINA cases.

Alaska courts should make every effort to involve tribes in a constructive search for solutions.

We have emphasized in this report the importance of keeping the child's interests paramount in CINA proceedings.[474] Our assessment shows that notifying a child's tribe about a CINA proceeding and allowing it to fully participate improves the chance of resolving CINA cases positively. The tribe will not always make a contribution, whether due to limited resources or other reasons, but it often does.

Recommendation 53. Judges should require at the Temporary Custody Hearing that the state show it has given notice to all applicable tribes.[475] Judges also should require notice to tribes at other hearings as required by law.

It is critical both for the constructive involvement of tribes and the progress of the case that tribes receive notice early in the process. CINA rules require the state to make diligent efforts to give actual notice, and experiences in Sitka (and more recently in Bethel) show that cultivating a cooperative relationship with tribes makes complying with this requirement relatively simple. Note also our general recommendation in Chapter 8 that the state be required to notice tribes of the time and place of continued hearings. Courts should consider sanctions if notice requirements are consistently not met.

Recommendation 54. Courts should allow tribes to participate informally in early stages of the proceedings; and should develop a consistent statewide rule on intervention.

The informal participation which most courts allow tribes early in the process keeps cases moving forward and helps involve tribes in finding solutions. This informal representation probably should be recognized in the CINA Rules.

One problematic issue concerning intervention, particularly in Fairbanks, has been the documentation which a tribe is required to file with the court to show that a child is a member of the tribe. Practices between AG offices, courts and judges vary

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[474] *See* Recommendation #2 at Chapter 8, *supra.*

[475] *See* Recommendation # 4 at Chapter 8, *supra.*

widely. We recommend that the court work with the parties to develop and adopt a court rule specifying intervention procedures in CINA cases. While the Council takes no position as to the exact requirements to be included in such a rule, it should be drafted recognizing tribes' rights to determine membership, and should facilitate participation of tribes.[476]

Recommendation 55. The Court System should work with DFYS and the Department of Law to develop a standard notice document which includes response forms for participation by the tribe.

The problems concerning notice and intervention mentioned in the preceding recommendations would be minimized if the courts, DFYS, and the Department of Law work with Native representatives to develop standardized forms for giving notice in ICWA cases. Ideally, the notice forms would include a computer-generated form with case information included for the tribe to return if it wanted to participate in the case. Such forms would provide a straightforward procedure for tribal officials with little legal background to provide the necessary information to courts for participation.

B. Participation

Recommendation 56. Courts should allow non-attorney tribal representatives to take a full role in the proceedings as envisioned by CINA Rule 3(h).

We found that by and large tribal representatives are given ample opportunity to participate in CINA proceedings. However, some judges and participants may be unaware that CINA rule 3(h) specifically allows a non-attorney representative for a tribe.

Recommendation 57. Courts should actively work with tribes to facilitate telephone participation. Statewide protocols, possibly included in a court rule, should be developed.

The only practical way for many tribes to participate in hearings is by telephone. Courts must continue to work with tribes who need to participate telephonically to assure timely hearings and accurate information about how to contact the court.

[476] *See* Recommendation #52.

Because telephonic participation from a village with limited access to phones presents special difficulties for tribes, the court should consider setting a time certain for those hearings, even if the court follows a different practice in setting other hearings. Statewide protocols should be developed to insure consistency.

Recommendation 58. Courts should work to minimize language and cultural barriers to tribal participation.

Courts should reduce as many language and cultural barriers as possible. Judges can reduce barriers by making it clear that interpretation is available when needed. The court system can help by providing materials that explain court processes for tribes, parents, and other participants. The court should bring needs and issues related to language and cultural barriers in ICWA cases to the attention of the Supreme Court's Advisory Committee on Fairness and Access.

Recommendation 59. The courts should encourage (or even require) DFYS, the Department of Law, and other participants in informal case discussions to include tribal participation. Court facilities must be designed to allow telephonic participation by the tribes in these discussions.

This assessment has found that many, if not most, of the decisions in CINA cases are reached at informal case discussions often held immediately before court hearings.[477] While we have recommended elsewhere that the courts emphasize formal hearings more, informal discussions will continue to be critically important. It is essential that tribal representatives be involved in these discussions as well as formal hearings. Since this participation can only occur telephonically in many case, court facilities with telephonic access should be made available.

C. Placement

Recommendation 60. Courts must review ICWA's placement preferences in every case (for each placement) and require compliance for each placement in each case unless good cause indicates otherwise.

[477] This practice is formalized in Anchorage through a standing order by the master that requires parties to meet one-half hour before scheduled hearings. Certainly, when courts order such conferences, they should order the participants to involve any tribal representatives.

ICWA emphasizes an Indian child's interest in their Indian heritage (and the extent to which this interest was ignored by courts before the passage of ICWA) by requiring courts to give preferences for placements which will emphasize that heritage. Courts must require the state to comply with these preferences unless the best interests of the child require a good cause finding to vary the preferences.[478] We note particularly one respondent's observation that at the temporary custody hearing judges may fail to make the finding required by CINA Rule 10(c)(4)(B) concerning DFYS' efforts to comply with ICWA placement preferences.[479]

Of course, some placements are not immediately subject to court review. However, courts should check to make sure ICWA is being complied with at the next hearing.

D. Adjudication Rates

Recommendation 61. The courts, the Department of Law, and DFYS should develop and implement statewide uniform standards and time lines for deciding whether and when to take CINA cases to adjudication.

(See Recommendation 40 in Chapter 9.)

Recommendation 62. The court system, DFYS and the Department of Law should undertake further study to determine whether disparate adjudication rates between Native and non-Native CINA cases remain after statewide uniform standards have been implemented.

An unexpected finding of the assessment concerned disparate adjudication rates between Native and non-Native children's cases. As discussed in Chapters 4 (Specific Findings) and 6 (ICWA Findings), this assessment uncovered statistically significant disparities in the rates at which Native and non-Native children were adjudicated CINA, and this disparity held across all locations (with the possible exception of Bethel, which could not be analyzed because all but two of the Bethel CINA cases

[478] *See* 25 USC §1915(a),(b); CINA Rule 10(c)(4)(B); CINA Rule 19(b); CINA Rule 20.

[479] Note that *In re BLJ,* 717 P.2d 376 (Alaska 1986), does not restrict the court's authority to require compliance with ICWA placement preferences. That case did not involve an Indian child and did not mention ICWA.

involved Native children). We note also a 1992 resolution from the Alaska legislature requesting a comprehensive review of the implementation of the ICWA.[480]

E. Judicial and Court Employee Education

See Chapter 8, Recommendations 21-23, regarding training for judicial officers and court employees on ICWA and cultural issues.

[480] Legislative Resolve No. 68 (1992). Source: CSHJR 73(HES) am.

Chapter 11
Other Agency Recommendations

The recommendations in this chapter rely on findings made incidental to this project's assessment of the court's role in children in need of aid cases. Because the project did not set out to study these agencies specifically, other information beyond the scope of this project may suggest different recommendations. The recommendations should not be considered outside the context of the findings of this report, and should be regarded as a foundation for further discussion.

A. DFYS[481]

1. Caseloads and Office Organization

Recommendation 63. DFYS should continue review of its management and office organization practices, including the transfer of cases from intake workers to ongoing workers.

DYFS should review its management practices for ways to better allocate resources and improve morale. For example, many interviewees praised major efforts by the Bethel office to work collaboratively with tribal service organizations and village

[481] These recommendations are made with the understanding that DFYS and the state have been working actively in the past few years to address many of the problems found in this assessment.

leaders, and to concentrate on preventive services. They credited these changes with substantially reduced caseloads, improving interagency cooperation, improving use of office resources, and creating permanency for many children whose cases had been pending for years.

Data pointed to one specific aspect of caseload management that appeared to cause problems in some offices (especially Anchorage): the transfer of cases from the intake workers to ongoing workers. The summer, 1996 Anchorage DFYS administrative audit addressed this problem, and DFYS should monitor progress towards resolving it. DFYS should consider whether confusion and delays caused by separating the intake and ongoing functions balance the benefits gained by making the distinction.

Recommendation 64. Following its review of office and management policies, DFYS should request from the legislature adequate funds to fulfill its responsibilities to Alaska's children. The request should include adequate office support staff and computers so that social workers can focus on their caseloads.

After DFYS has maximized the efficiency of its offices, it needs to justify to the legislature a funding request sufficient to at least minimally fulfill its duties. We found a lack of secretarial support and lack of computer automation to be particular problems.

2. Training and Coordination with Other Agencies

Recommendation 65. DFYS should emphasize training of its social workers, with particular attention to the requirements and rationale of ICWA. Judicial and other agency personnel should be invited to participate.

DFYS should continue to provide training for social workers on the CINA process and ICWA. It should consider inviting judges and court personnel to work on designing and carrying out training, to assure that workers accurately perceive the court's needs. The dialogue with the court about training should also increase the opportunities for the court and DFYS to resolve mutual problems.

3. Foster Homes

Recommendation 66. DFYS should continue its search for more foster homes, particularly more Alaska Native foster homes.

Interviewees agreed that the state needs more foster homes, and in particular, more ICWA-compliant homes. DFYS should consider continuing recruitment, and looking for innovative ways to increase Native participation. For example, if the most persuasive method of finding new foster homes is through the testimony of satisfied existing parents, DFYS and Native groups might work together to have Native foster parents recruit others. Similarly, DFYS should work with other ethnic groups and community organizations to recruit foster parents. DFYS should continue modifying its forms to make them easier to use.

Licensing standards, emergency placements, and relative placements all appeared to be closely intertwined. DFYS should review innovative programs and policies from other states to see if some could be adapted to Alaska. Other possible parts of the solution may include the possibility of using tribally licensed foster homes, and using more in-home services to prevent removal of children. DFYS should involve as many different groups in the search for solutions as possible.

Recommendation 67. DFYS should consider recognizing a range of out-of-home placement options in addition to foster homes.

Interviewees made a compelling case for the need to have a range of out-of-home care choices. Often teenagers were reluctant to go back to a nuclear family setting when they had been in treatment or other out-of-home settings for some time. Group homes that provided structure and supervision, but appropriate independence, seemed more suitable for some. DFYS should explore the need to provide custody choices that serve a range of needs, rather than relying on a single model.

The state routinely works with existing Native organizations to agree on children's cases that the Native groups will handle without direct state participation. The state should continue and expand these efforts, using TCC, AVCP, Kawerak, Sitka, and other successful examples.

B. Department of Law

Recommendation 68. The Department of Law should continue to review its allocation of resources among various offices in the state.

Most interviewees, no matter what their job or location felt overwhelmed. Interviewees from agencies outside the courts saw delays caused by assistant AGs as an exceptional problem in Anchorage and Bethel but not in Fairbanks or Sitka. This suggested that some Department of Law offices may be more pressed for resources than others.[482]

Recommendation 69. The Department of Law, like DFYS, should review the resources it needs to effectively handle CINA cases and justify appropriate funding requests to the legislature.

Recommendation 70. The Department of Law must work closely with the court system in implementing the recommendations of this assessment.

Recommendation 71. The Department of Law should work with the court system, GALs, DFYS and others to create and implement statewide standards governing whether and when to take a case to adjudication.

Alaska's legal structure for children in need of aid cases places most of the discretion in the state's hands. Even if the court adopts most of the recommendations in this report, Department of Law will retain this discretion and ultimate responsibility for CINA cases. The Department must continuously work to exercise this discretion in a fair and consistent manner, in cooperation with DFYS, and with special attention to the needs of the children.

Recommendation 72. The Department of Law should emphasize training its AGs in cooperation with DFYS.

[482] Department of Law formed a committee to address these issues in 1996. The assessment project did not have information about its findings at the time of this report.

The Department of Law works closely with DFYS social workers at every point in a CINA case, providing legal advice, drafting documents, and speaking in court on behalf of DFYS. The assistant AGs rely on the social workers to make substantive decisions about the families' needs, prepare reports, and in many cases, prepare some of the legal documents. Because the two agencies' actions complement each other, and at times overlap, they should consider designing some training programs that can give each agency's staff a clearer understanding of the work and needs of the other agency. Assuming that AGs continue to rely on social workers to draft legal documents, assistant AGs should train DFYS staff on how to draft petitions that comply with state law. Conversely, DFYS staff should train assistant AGs in the social work principles that underlie their work with families.

C. GALs/CASAs

Recommendation 73. The Office of Public Advocacy (OPA) should assess the most cost effective ways of providing its GAL services, and then justify this level of funding to the legislature.

OPA, which is responsible for GALs in Anchorage and in other parts of the state, is a critical link in the foster care system because GALs are the only participants before the court who directly and exclusively represent the children. OPA should work with the court to examine whether some CINA cases could be litigated without a GAL, and other ways of increasing the effectiveness of GALs (including considering the expanded use of magistrates).[483] In particular, expanding the use of GALs after the disposition hearing might spur more prompt final resolution of cases.

Recommendation 74. OPA should continue to offer training for GALs and CASAs, and should facilitate attendance of GALs and CASAs from communities other than Anchorage.

To the maximum extent possible, as recommended throughout this report, OPA should assure that at least part of the training is done in conjunction with other agencies. Joint training will maximize each agency's training resources, and facilitate the interagency collaboration that is essential to effective management of CINA cases.

[483] This suggestion is not inconsistent with Recommendation 30 in Chapter 8 (recommending that a GAL be appointed in every case). The GAL could evaluate the case initially and decide whether it was one in which GAL services were necessary and cost-effective.

Recommendation 75. The court should work with OPA to establish standards for the responsibilities, workloads, and training of GALs statewide.

Courts throughout the state had developed their own methods for appointing and using GALs in cases. Because the role of the GAL is so crucial, the court should help establish a consistent, statewide approach to the appointment and work of GALs.

Recommendation 76. The court should work with OPA to create a statewide CASA program. The legislature should provide the resources for the program.

CASAs assist the GAL, and indirectly the court, by serving as a direct link with children in state custody. The program relies on volunteers, and requires limited state resources. Training, supervising and assigning CASAs throughout the state could greatly help the state to locate resources, and understand the needs of children in foster care, at a relatively low cost.

D. Parents' Attorneys

The study found that, for the most part, parents' attorneys were well-trained attorneys who advocated vigorously for their clients. Along with assistant AGS, they played a critical role in the pace at which CINA cases moved. While continuing to represent their clients fully, parents' attorneys should seek out opportunities to work cooperatively with the other agencies involved in CINA cases, and with the courts.

E. Citizens' Foster Care Review Panel

The Citizens' Foster Care Review Panel appears to be serving the community well in Anchorage. The legislature should consider whether similar panels in other communities with significant numbers of CINA cases.

F. Legislature

Recommendation 77. The legislature must provide adequate resources so that the agencies involved in the foster care system can fulfill their functions.

It appears clear that Alaska's foster care system is stretched perilously thin at its current level of funding. Agencies, especially DFYS, appear overburdened even at the current level of service delivery—which we find inadequate.

The Council recognizes that the State of Alaska faces and will continue to face severe fiscal restraints due to declining oil revenues. Moreover, the Council certainly does not have the expertise to divide limited funding between worthwhile projects.

Nevertheless, DFYS, OPA, the Attorney General's Office, the Public Defender and the courts provide essential services for Alaska's children. The legislature should require these agencies to make efficient use of resources and should require all budget requests to be fully justified. But the legislature should provide the necessary funds to protect Alaska's children. The costs of not doing so will in the long run exceed what we should provide now.

The legislature should make a comprehensive review of the resources devoted to neglect and abuse cases to decide whether resources can be allocated more effectively, and whether more resources are needed. This review should include resources available to tribal and Native organizations, and should encourage expansion of these services.

Recommendation 78. The legislature should amend AS §47.10.080(1) concerning the permanency planning hearing so that the provision is consistent with federal law.

The statute should require the permanency planning hearing to be held within eighteen months of when the state takes custody of a child.

Recommendation 79. The legislature should work with the court, Office of Public Advocacy, and Public Defender Agency as they consider whether AS §47.10 should be amended to limit the rights of absent or putative parents in CINA proceedings.

As discussed in Chapter 5, case delays often were caused by absent or uninvolved parents becoming involved late in the case. In Chapter 8, the Council recommended that the court, Office of Public Advocacy and the Public Defender Agency contact other jurisdictions which limit the rights of certain parents in CINA

proceedings.[484] The legislature also has an interest in this issue and should be involved at some level in the discussions.

G. The Judicial Council

> **Recommendation 80. When evaluating applicants for judicial appointment, the Judicial Council and Governor should consider applicants' experience, abilities and willingness to actively participate in managing and hearing CINA cases, and to participate informally in court system attempts to improve the way it handles CINA cases.**

This report has emphasized the importance of the judge's participation in CINA cases. The Judicial Council will consider the experience, abilities and willingness to focus on CINA cases in its evaluation process for judicial applicants. The Governor should do the same in appointing judges.[485]

[484] See the New York approach, *supra* at note 462. We note that various courts have upheld the constitutionality of New York's scheme. *Id.*

[485] The Judicial Council also makes nominations for the Public Defender, a position with important responsibilities in the CINA system, and will consider the same factors.

Chapter 12
Implementation

The assessment of Alaska's foster care system in this report is a product of the Alaska Court System's contract with the Judicial Council to conduct a review of how the courts handle Child in Need of Aid (CINA) cases. The same federal project which funded the assessment will provide follow-up funding for three additional years. The approximate level of funding is $100,000 in federal funds and $30,000 in state matching funds (which can include time of existing staff spent on the project).

In this chapter, we suggest to the Alaska Court System how it can implement the recommendations set out in prior chapters. These implementation recommendations are not comprehensive, but are meant to offer initial suggestions to the courts.

Recommendation 81. The court system must make a substantial commitment of time and effort to carry out years two through four of this project.

Despite the availability of federal funds, the implementation of improvements in how the courts handle CINA cases will require a substantial effort. A large number of court administrators, judges and clerks will have to spend hundreds of hours reviewing data, deciding on an implementation plan and carrying out that plan. If these efforts do not have the full support of the supreme court, as well as the participants, any improvements will be piecemeal and insubstantial at best. We believe

the implementation efforts should be endorsed by the Alaska Supreme Court and headed by a justice of that court.

Recommendation 82. The supreme court should create a special CINA committee to review this assessment, recommend specific changes in court rules and policies, and oversee implementation of the changes.

The Council's preliminary findings show incredible variation in the ways courts handle cases, in the degree to which they comply with state and federal law, in the speed with which they handle cases, in their familiarity with the area of law and its procedures, and in their effectiveness. The Council has made recommendations on increasing efficiency and effectiveness, and on improving other aspects of the system. However, it is essential that a group of judges and court staff familiar with these cases review the assessment, decide on specific corrective policies and rules, and supervise the implementation of changes. Without this "court ownership" of the follow-up, we believe that ultimately the project will not lead to real and lasting improvements.

We envision this committee consisting of several superior court judges, district court judges/masters, court administrators and clerks, chaired by a supreme court justice. The committee should include representatives from the major agencies involved in CINA cases and should be representative of all areas of the state. They must be willing to make a major commitment of time and effort over years two through four of the project. (We estimate eight meetings in year two.)

Recommendation 83. The court system should use project funds to hire staff to focus on this project.

The CINA Committee and other committees discussed *infra* need staff support in order to succeed. Further, project staff should assist in providing training and in writing training materials as described below.

The support staff might consist of a permanent part-time position of about 30 hours per week, an independent contractor hired to provide staff support, or some combination of the two. Support could be provided by one person or duties could be divided among several, including existing staff. The Council would be glad to discuss with the court system the possibility of the Council participating in some way.

Recommendation 84. The court system should establish other specialized committees (or subcommittees) as necessary to carry out this project.

We envision other court committees or subcommittees to focus on specific aspects of the assessment and the CINA committees' policy directives. A clerks' committee might be involved in making filing procedures consistent. A subcommittee should recommend changes in the court's case management system to effectively track CINA cases. Subcommittees to oversee judicial and magistrate training also would be necessary.

Recommendation 85. The court system should focus on the following products in year two of the project:

a. beginning to develop consistent and effective policies and court rules to expeditiously handle CINA cases as recommended in this report;

b. extensive judicial, magistrate and clerk training, with statewide sessions being supplemented with regional and local efforts;

c. the development of a judge's manual for CINA cases including a benchbook, as well as a clerk's manual for CINA cases;

d. implementation and improvements (financed by project funds) to the trial court's computerized case management module for children's cases; and

e. development of a pilot project to mediate CINA cases.

Chapter 13
Conclusion

This assessment of Alaska's foster care system has been an engaging, if somewhat overwhelming, project for the Alaska Judicial Council. We have examined a system in detail which is of vital interest to Alaska's children, families and society as a whole, but one in which there has been little prior study.

It is important to remember that this assessment is intended to be followed up by three years of federally subsidized efforts to implement improvements in the system. These efforts, funded by over $130,000 in federal and state money for the first year of implementation, offer real opportunities to build upon the Council's assessment and make real differences for Alaska's children. But the implementation requires a substantial effort and commitment from the Alaska Court System and other involved agencies in order to succeed. The Council urges the Legislature, Courts and others to make this commitment.

The Council's recommendations from its assessment are detailed in Chapters 8-12 of this report. However, we summarize what we believe are the most important six recommendations here.

1. **The Legislature must provide adequate resources so that the agencies involved in the child welfare system can fulfill their functions.**

We have found that Alaska's abused and neglected children have suffered from lack of resources. The Judicial Council recognizes that the State of Alaska faces and will continue to face severe fiscal restraints due to declining oil revenues. Moreover, the Council certainly does not have the expertise to divide limited funding between worthwhile projects.

Nevertheless, the interests of the State, families and particularly children are so closely intertwined with the workings of the child abuse and neglect system in Alaska that the Council is obligated to emphasize the importance of adequately funding the agencies necessary to the system's operation.[486] By the same token, the agencies must become more efficient, must clearly present and justify funding needs to the legislature, and must adequately allocate funding and personnel to CINA cases.

2. The Courts and the child abuse and neglect system as a whole must emphasize the children's best interests first and foremost.

While the foster care system pays lip service to the interests of children in Alaska, a major rethinking is necessary to ensure that the interests of children really do come first.[487] Agencies, including the courts, DFYS, and the Attorney General's office, must attempt to the greatest extent possible to make sure the agencies' resource limitations do not assume more importance than the child's interests.

Judges in particular must take a more active role in CINA cases to protect the interest of the involved children.[488] Finally, courts and other agencies must not lose sight of the rights of children when considering the rights of parents and others.[489]

3. The Court System must take a more active role to ensure that the needs of the children in the CINA system are protected.

[486] *See* Recommendation #77 at Chapter 11.

[487] *See* Recommendation #1 and 2 at Chapter 8.

[488] *See* Recommendation #3 at Chapter 8.

[489] *See* Recommendation #2 at Chapter 8.

We have recommended that the judges take a much more active role in handling CINA cases.[490] While this will require changes in current practice, an expanded role is consistent with the role of judges as envisioned in federal law. The supreme court's CINA committee should discuss how best to implement this change.

4. The Alaska Court System and child welfare system as a whole must process CINA cases much more quickly to protect the interests of the children in the system.

We have stated in this report that to the children involved in each case, each hearing is an emergency. But we have found that cases often move through the system slowly at best, with little incentive for finding solutions expeditiously.[491]

All involved agencies need to focus on moving forward expeditiously in CINA cases. The courts in particular should establish time lines for CINA cases to ensure they are resolved as soon as possible.[492]

5. The Court System must adopt statewide standards to ensure that CINA cases are handled fairly and with a greater degree of consistency.

We found an unnerving amount of inconsistency in the ways in which courts handle CINA cases. While reasons for variation certainly exist in some circumstances, the Court System must review these inconsistencies and enforce some degree of consistent and rational case management.[493]

6. Given the disproportionately high number of Native children involved in Child in Need of Aid cases, the Court System must pay special attention to its handling of ICWA cases.

Chapter 6 of this assessment identified several areas meriting further study or more attention: disparate adjudication rates for Native children, deficiencies in

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[490] *See* Recommendation #3 at Chapter 8.

[491] *See* discussion in Chapter 5, Section C.

[492] *See* Recommendation #9 at Chapter 8.

[493] *See* Recommendation #12-15 at Chapter 8.

meeting ICWA notice requirements, and ways the court could better encourage tribal participation in ICWA cases. The court should take a hard look at the recommendations in Chapter 10.

These recommendations will not be easy to implement. Resources are scarce, both for the involved agencies and for the state as a whole. Judges are to a substantial degree uncomfortable with the increased role envisioned in this report (and in federal and state law).

However, failure to make improvements in the foster care system will directly lead to increased neglect and abuse of Alaska's children—our most important resource. In addition to the impact on children and families, failure to address problems in the system will deeply affect society as a whole. It cannot be surprising that abused and neglected children later become delinquent children, and grow into adults who often abuse society through crime, as well as their own children. The cost and effort of improving Alaska's foster care system may be high, but it is not nearly so high as ignoring the problems.