

INTRODUCTION



The people of Louisiana recognize the family as the most fundamental unit of human society; that preserving families is essential to a free society; that the relationship between parent and child is preeminent in establishing and maintaining the well-being of the child; that parents have the responsibility for providing the basic necessities of life as well as love and affection to their children; that parents have the paramount right to raise their children in accordance with their own values and traditions; that parents should make the decisions regarding where and with whom the child shall reside, the educational, moral, ethical, and religious training of the child, the medical, psychiatric, surgical, and preventive health care of the child, and the discipline of the child; that children owe to their parents respect, obedience, and affection; that the role of the state in the family is limited and should only be asserted when there is a serious threat to the family, the parents, or the child; and that extraordinary procedures established by law are meant to be used only when required by necessity, and then with due respect for the rights of the parents, the children, and the institution of the family, and only to the extent that such procedures are not prohibited by the Louisiana Constitution of 1974, as amended.

La. Ch. C. art. 101.

A. PRELIMINARY CONSIDERATIONS

Child in Need of Care (CINC)¹ is a highly specialized area of law. The cases are unique and involve the application of not only the Louisiana Children's Code but also numerous Federal laws as well as policy considerations. They require you, as judges, to make the most important of all decisions and sometimes extremely difficult ones that can forever impact a child and family's life.

This Benchbook is designed to support a judiciary empowered to improve outcomes for children and families in Louisiana, with the child's health and safety being the paramount concern. While this work will require increased time and effort on the part of courts, attorneys, the Department of Children and Family Services (DCFS), and other stakeholders, the aim is to bring our State in line with State and Federal laws and best practice and expedite permanency and decrease the trauma experienced by families and children involved in CINC proceedings.

A sizeable workgroup across the State and profession² created this Benchbook to assist you in making the most informed decisions possible. Taking time to engage with families and understand the complete picture of a case can be challenging with a full docket. However, your role and the time you give to the parents and children before you can never be underestimated.

¹ Louisiana is unique in calling these cases Child in Need of Care. It speaks to how we understand that our children (and parents) may indeed be in need of care. In Louisiana, there was a point in time that our flag said: "We care for our own." We understand that child welfare is another way of saying that we, as fellow citizens, want our children to fare well.

² The collaboration we have in Louisiana is noteworthy and has been recognized nationally. Such collaboration is typified by the name of our annual child welfare conference "Together We Can."

B. ORIENTATION

The Benchbook contains a section dedicated to every CINC proceeding in Title VI of the Louisiana Children’s Code (i.e., Informal Adjustment Agreement, Instanter Order, Continued Custody Hearing, etc.).³ Each section contains 4 parts: Introduction, Outline, Overview, and an Appendix.⁴ The Introduction is a summary of State and Federal law provisions governing the proceeding and highlights some “Practice Tips” and “Helpful Guidance” further explicated in the Overview. The Outline is a table of contents for the Overview. The Overview is the core of the section. It provides a detailed and comprehensive guide to the relevant Children’s Code provisions for the proceeding and applicable Federal laws along with “Practice Tips” and “Helpful Guidance.” Finally, each Appendix includes a bench card and court document templates for the proceeding. The bench cards are meant to be a quick reference of key findings and orders to be made at each hearing, along with essential judicial functions for that hearing. The court document templates contain the required State and Federal law findings and model orders⁵ for the hearing, including Title IV-E of the Social Security Act requirements and best practices. Editable Word Document versions of these templates may be found at: www.clarola.org (Children’s Law Advocacy Resource Online website). Editable versions are provided so that the court or attorney completing the order can delete irrelevant sections. There are Appendices at the end of the Benchbook that include a list of acronyms, DCFS Court Reports,⁶ and other helpful information. Please note that when “Article(s)” are referenced throughout the Benchbook, these are Articles from the Louisiana Children’s Code

C. OVERARCHING PRACTICE PRINCIPLES

There are 10 overarching practice principles that should help guide the court in every CINC proceeding pursuant to Title VI of the Louisiana Children’s Code.

(1) Court’s Role

The court ensures due process and fundamental fairness for every family that comes before the court. For example, determining whether notice is proper must be done in every hearing—whether an attorney raises the issue or not. The requirement of notice is based on State law, Federal law, and the United States Constitution. The advisements required by law to make to parents at hearings are also critical.

The court’s role is to be a check and balance on Executive Branch action. One aspect of the court’s oversight is to hold DCFS accountable to the responsibilities it has under Federal and State law. For example, the court is required to assure DCFS makes reasonable efforts to prevent or eliminate the need for a child’s removal from the home, reunify the family if the child has been removed, and achieve timely permanency. While DCFS proposes a case plan for the family, the court’s role is to review the case plan and determine if it protects the health and safety of the child and is in the child’s best interest. Although the court may not order a specific placement if the child is in DCFS custody, judges have the authority to disapprove a placement that the court deems not in the best interest of the child. The court also has ongoing authority to make visitation and custody orders throughout the life of the CINC proceeding, as well as other orders that may be necessary. Hearings should not be a rubber stamp for agency recommendations.

(2) Parties

The participation of children and parents at CINC hearings cannot be undervalued. Early engagement of parents has been shown to expedite reunification, so that the child can return safely home, which is the primary goal of the CINC process when appropriate. It is incumbent on judges to create an environment where parents and children are treated with respect, patience, dignity, courtesy, and as part of the problem-solving process.

When there are unidentified, alleged, and/or absent parents, DCFS must make ongoing efforts to locate parents and establish filiation. To this end, the court should also question parents present in court for identifying information about the co-parents who

³ By way of clarification, Judicial Certification of Children for Adoption (Title X), Surrender of Parental Rights (Title XI), and Adoption of Children (Title XII) are not included in this Benchbook.

⁴ The final section “Child Welfare Assessment and Decision Making Model (CWADM)” is short and, thus, does not include an introduction or outline.

⁵ In addition to court orders, there are also Affidavits, Petitions, court reports, and other templates in some sections.

⁶ Use of the DCFS Court Report templates provided in this Benchbook for Disposition Hearings, Case Review Hearings, and Permanency Hearings are being implemented in a phased-in approach across the State.

are not present, or who may not have been identified to DCFS. Parents have a legal right to know that there is a CINC proceeding regarding their child and to be involved, and children have a right to know who their parents are. When a child does not know who one of his/her parents is, that also means the child may not know his/her race, ethnicity, medical background, culture, relatives, religious ties, and more. Children before the court may be affected for their entire life if this information remains unknown.

The right of the child to be present at CINC hearings is clearly set forth in the Children's Code, and the court and the child's attorney have a duty to ensure the child's presence in court when appropriate. Although some raise concerns about having children in court, engaging even young children in planning their future and keeping them safe can be empowering and reduce their anxiety and confusion about the court process.

Youth can be particularly vulnerable to the concerning outcomes that often befall former foster children. Judges can support youth in having a voice in the case by embracing a popular youth mantra: "Nothing about me without me." This holds true not only in the courtroom but also in planning and implementing the plan for transition to adulthood. Judicial oversight ensures that groundwork is laid to promote permanent connections and stability.

(3) Attorney Role and Appointments

Assistant District Attorneys, DCFS attorneys (Bureau of General Counsel), parent attorneys, and child attorneys should be properly trained and well-versed in the relevant laws. The court plays a role in expecting attorneys to do their job and come to court prepared with a clear position on each case.

The 2018 Child and Family Services Review (CFSR) conducted on Louisiana's child welfare system revealed the need for improvement in legal representation of parents and children. Early appointment by the court of counsel is one important indicator of quality legal representation for parents and children. For this reason, best practice is to appoint the children's representation program and make the referral to the local Public Defender's Office for parents at the earliest possible juncture (i.e., in the Instant Order if one is granted). As soon as it becomes clear that there is an absentee parent, a curator ad hoc should be appointed.

Courts should encourage attorneys to meaningfully engage with their clients before and after court. Attorneys should be meeting with their clients in advance of hearings, and this is the impetus for including parent contact information in the Affidavit in Support of Instant Order templates. The court might consider giving attorneys time and space after hearings to address immediate client questions and concerns. The Order templates also require DCFS to notify the child's attorney immediately upon a change in the child's placement so that the attorney has access to the child and the child has access to the attorney.

(4) Alternatives to Removal and/or Placement in Foster Care

Louisiana has identified the need to promote alternatives to removing children from their families and placing them in foster care based on the volume of research showing the trauma that removal causes to children and parents and the negative lifelong consequences. The Benchbook contains sections on Instant Safety Plan Orders, Informal Adjustment Agreements, Temporary Restraining Orders and Protective Orders, all of which are available to the court in this vein.

In addition, the Benchbook emphasizes that whenever it is safe to do so children should reside with a parent in tandem with safety plans, Protective Orders, and/or other terms and conditions if appropriate. For example, an Instant Safety Plan Order should be requested instead of an Instant Order for Removal whenever safe to do so. Foster care is and should be the safety plan of last resort. When a child is in DCFS custody, DCFS should be able to articulate at each hearing if there are safety concerns preventing a child from returning home with one or more of the safety options listed above, notwithstanding case plan progress.

If it is not safe for a child to reside with a parent, the child should reside with a suitable relative or other individual known to the child. Safety plans, Protective Orders, and/or other terms and conditions can be ordered by the court to manage any identified safety and risk issues. Thus, an Instant Order for Removal and Provisional Custody to a Suitable Relative or Individual should be granted instead of an Instant Order for Removal and Provisional Custody to DCFS whenever possible. Similarly, transferring custody or legal guardianship to a suitable relative or other individual are less restrictive placements than foster care. Courts should require early assessment of relatives and other individuals that matter to the child whether in State or out-of-State and look towards every available person in the child's network as a resource and/or potential placement.

(5) Reasonable Efforts

DCFS is legally required to make reasonable efforts to: (1) prevent or eliminate the need for removal; (2) reunify the family; and (3) achieve timely permanency for the child. The court is obligated to determine whether DCFS efforts are reasonable or not by making diligent inquiry into the specific facts and circumstances of the case. The court must then make written findings for each child.

The court's reasonable efforts inquiry begins with DCFS's request for an Instant Order for Removal—whether made in person, on the telephone or in writing. The judge's duty is to ask about efforts made by DCFS to prevent removal and determine whether those efforts are reasonable. For example: What actions has DCFS taken? What services has DCFS offered? What court interventions have been sought? What family members have been identified? If the agency asserts that reasonable efforts are not required, the court must be satisfied with the articulated exception. The court is required to make reasonable efforts findings (as well as contrary to the welfare findings) in the first court order sanctioning a removal.

While "reasonable efforts" is an ongoing inquiry, the Children's Code requires specific findings at the Continued Custody, Disposition, and Permanency Hearings if the child is not placed in parental custody (unless there is a judicial determination that they are not required per applicable State and Federal law). Regarding the Continued Custody Hearing, a stipulation to the information contained in the Affidavit in Support of Instant Order for Removal is not sufficient for the reasonable efforts findings, and the State risks losing Federal funding for the child if these findings are not correctly made. For the Disposition Hearing, reasonable efforts determinations must be made if the child was removed prior to Disposition or is removed at Disposition.

At Permanency Hearings, the court is required to determine whether DCFS made reasonable efforts to reunify the parent(s) and child (unless a judicial determination has been made that reasonable efforts are not required by law) and/or to finalize the child's placement in an alternative safe and permanent home in accordance with the permanent plan. Finalizing placement in accordance with the child's permanent plan could include inquiry into timely filing of the Termination of Parental Rights Petition, early initiation of the Interstate Compact on the Placement of Children process, completion of child-specific certification for relatives and individuals, effectively involving youth in planning transition to adulthood, implementing the Youth Transition Plan, and thoroughly searching for permanent connections for youth.

(6) Stipulations

The Children's Code requires a Pre-Hearing Conference if there is a stipulation at the Answer or Adjudication Hearings. This conference helps assure that any stipulation by a parent is knowing and voluntary. It should be noted that if a child objects to the stipulation, best practice is to hold the Adjudication Hearing.

The judge is to be present at the Pre-Hearing Conference, and there must be a separate and signed Pre-Hearing Conference Order reciting the actions taken. These conferences can be valuable even when there is not a stipulation.

There is nothing in State law authorizing stipulations at the Continued Custody Hearing. Courts must be aware that even if there are stipulations, specific findings must be made at the Continued Custody Hearing, Answer, and Adjudication to comply with State and Federal laws, including Title IV-E. Consequently, the Order templates for the hearings contain the required findings.

(7) Timelines

The Adoption and Safe Families Act (ASFA) requires strict adherence to timelines in child welfare cases due to the history of children languishing in foster care. Delays in achieving permanency further traumatize separated parents and children. In addition, failure to meet statutory timelines can impact Federal funding received by DCFS for the child. Commencing hearings within required timeframes and then recessing them does not satisfy the mandated timelines and will not cure the jeopardy to Federal funding.

If the court grants a continuance or permits a delay in any hearing that exceeds the maximum allowable times established by the Children's Code, the court is mandated by Supreme Court Rule XXXIII, Part II, Sections 1 and 2 to report such continuance. The report must be made within 10 days to the Louisiana Supreme Court, along with the reasons for the delay and a copy of the order.

(8) Foster Caregivers (Foster Parents, Pre-Adoptive Parents, and Relatives)

State and Federal law is clear that foster parents, pre-adoptive parents, and relatives (“foster caregivers”), while not parties, have the right to notice and an opportunity to be heard at all CINC hearings involving the child in their care. If a foster caregiver is not present at the hearing, DCFS has to report whether notice was given or what diligent efforts were made to locate and notify the caregiver. However, the hearing may be held in the caregiver’s absence even if notice was not given by DCFS. If present, the court is required by law to solicit information from the foster caregiver regarding the care and treatment of the child.

There is a new “Foster Caregiver Progress Form” that may be completed by foster caregivers to provide information about the care and treatment of the child to the court. DCFS will submit the form to the court, parties, and CASA (if appointed) at each hearing if completed by the foster caregiver, whether present at the hearing or not. The form is provided in the final Appendices to the Benchbook.

From the start of the case until the child is permanently placed, DCFS has a duty to identify and assess the child’s relatives and other individuals with whom the child or family has a relationship. The court can help assure these assessments are both initiated and timely completed. If DCFS is not able to recommend placement in a home based on its assessment, the court can always consider a transfer of custody and/or legal guardianship to the relative or individual.

(9) Indian Child Welfare Act

The Federal Indian Child Welfare Act (ICWA) affords special protections for abused and neglected children who are or may be eligible for membership in a federally recognized Indian Tribe. The inquiries regarding ICWA are to be made by the court in every hearing pursuant to Federal and State law. While ICWA may not be relevant in most Louisiana cases, there are severe repercussions if ICWA is not followed in those cases where it applies. There is a Bench Card specific to ICWA in the final Appendices to the Benchbook that elucidates the standards and steps to take if ICWA is at issue in a case.

(10) Child Welfare Assessment and Decision Making Model (CWADM)

Judges and all legal stakeholders should be familiar with the Child Welfare Assessment and Decision Making Model (CWADM), which is the framework DCFS uses to assess safety and risk, so that courts and DCFS have the best possible information upon which to make decisions with and for families involved with DCFS.

Three core principles are used to determine whether a child is safe or unsafe: (1) threats of danger to the child; (2) the child’s vulnerability to the identified threats of danger; and (3) the caretaker’s protective capacities. The threat of danger considers whether the caretaker’s behavior or family situation is likely to result in imminent harm to the child. The child’s vulnerability considers the extent to which a child can protect himself from the identified threats of danger. The caretaker’s protective capacities consider the way a caretaker thinks, feels, and/or acts and whether those capacities can prevent or control the threats of danger.

CWADM is presented in Section 11 of the Benchbook.

D. FINAL WORDS

The Benchbook is a dynamic, living document. It will be updated as changes arise. For instance, when Louisiana implements State or Federal legislation, such as the Family First Services Prevention Act, the relevant provisions of the Benchbook will be modified accordingly. Your feedback is welcome.



The Louisiana Supreme Court, Louisiana Judicial College, and Pelican Center for Children and Families thank you for the hard work you do on behalf of Louisiana’s children and families.