

IMPLEMENTING THE KEEPING FAMILIES TOGETHER ACT IN FIVE STEPS

THE GOAL IS TO MAINTAIN FAMILY CONNECTIONS



Step 1: Advocating for the child/ren to remain home

- Assess ICWA – is there a reason to know? (If so, consider active efforts)
- To remove, the petitioner must show all of the following:
 - 1) Reasonable efforts
 - 2) Imminent physical harm due to child abuse or neglect
 - 3) A causal connection (cannot be established with mere evidence of substance abuse, etc.)
 - 4) Harm of removal is outweighed

Step 2:

Advocating for the child to remain home with prevention services

If the Court finds that removal is required, the court *must* assess whether the child can safely remain home with prevention services and place the child in-home if parent *agrees* to court-ordered services.



Step 3: Presumption of Relative Care (Including Court Ordered Support for Relatives)

Placement with a relative or suitable other is mandatory unless licensed foster care is necessary to prevent imminent physical harm *or* reunification would be hindered.

Step 4: Least Harmful Foster Care Placements

The Petitioner must identify location of licensed foster care placement. The Court can order restrictions on the licensed foster care placement necessary to ensure child well-being.



Step 5: Visitation and Family Time

- Did the 72 Hour visit happen?
- The Court must order an individualized visitation plan with the goal of providing the maximum parent, child and sibling contact possible.

PREPARING FOR THE HEARING

TALK TO YOUR CLIENT

- The petition must contain: (RCW 13.34.040(5))
 - A statement constituting a dependency;
 - The names, residence, and contact information, if known to the petitioner, of each parent guardian, or custodian of the alleged dependent child;
 - If the petitioner is seeking removal of the child from a parent, guardian, or custodian the petition shall contain a **clear and specific statement as to the harm that will occur if the child remains in the care of the parent**, guardian, or custodian, and **the facts that support that conclusion**.
- You are entitled to discovery prior to the hearing. RCW 13.34.090(5)
 - (“Copies of department records to which the child and the child’s parents have legal access pursuant to chapter 13.50 RCW shall be given to the child or child’s counsel, and the parents, guardian, legal custodian, or his or her legal counsel, **prior to any shelter care hearing...**)
- You have a right to present testimony. RCW 13.34.065(2)(b).
 - There are many more issues now so these hearings will take longer –
- Continuances (RCW 13.34.065(1)(b)).
 - Only an attorney for a child, parent, guardian or custodian can ask for a continuance beyond 72 hours – if the client is unable to attend or lawyer is not adequately prepared – *not* the state.
 - (Note that this reverses *T.P.* to the extent that the case prohibited continuance requests by parents’ counsel needing more time to prepare).
 - Court congestion and/or DCYF’s failure to produce discovery are not bases to continue.
 - *In King County* -- If the child is in the home of parent, guardian or legal custodian, shelter care can be continued for 14 days from the filing of the petition (LJuCR 2.3(g), King County).
- Encourage your client to identify willing relatives and suitable others willing to care for a child
 - Encourage client to contact them to attend the hearing;
 - Contact those people your client identifies prior to the hearing.
- Ask your client to make a communication plan with you in the first conversation.
 - What are all of the ways to reach them? Which are the best ways? Who do you have permission to contact if you are having trouble finding them?

Legislative Intent:

(1) The legislature recognizes that children and families are better served when the state provides support to allow children to be cared for by their loved ones and in their communities. The legislature finds that decades of research show that Black and Indigenous children are still disproportionately removed from their families and communities despite reform efforts.

(2) For these reasons, it is the intent of the legislature to safely reduce the number of children in foster care and reduce racial bias in the system by applying a standard criteria for determining whether to remove a child from a parent when necessary to prevent imminent physical harm to the child due to child abuse or neglect...

STEP 1: REMAIN HOME

STEP 1, PART 0 – DOES THE PETITION ALLEGE A PRIMA FACIE CASE?

- If the petitioner is seeking removal of the child from a parent, guardian, or custodian “the petition shall contain a **clear and specific statement as to the harm that will occur if the child remains in the care of the parent**, guardian, or custodian, and **the facts that support that conclusion.**” (RCW 13.34.040(5))
 - Consider whether petition alleges a prima facie basis for removal.

STEP 1, PART 1 – ASSESS ICWA – IS THERE A REASON TO KNOW THE CHILD IS OR MAY BE AN INDIAN CHILD?

- Has *any* participant indicated the child has Tribal *heritage*? If so, there is a “reason to know” the child is an Indian child and ICWA applies. *Matter of Dependency of Z.J.G.*, 471 P.3d 853 (Wash. 2020).
 - “If the court has ‘reason to know’ the child is or may be an Indian child the court must treat the child as an Indian child until it is determined on the record that the child does not meet the definition.” *In re Dependency of Z.J.G.*, 196 Wn.2d 152, 175, 471 P.3d 853 (2020) (citing 25 CFR § 23.107(b)(2)).
- Consider whether to argue about notice to Tribes
- Where the Department had prior contact with the family and reason to believe the child was at risk of physical damage or harm, the Department must demonstrate it has **at least begun active efforts** to avoid breaking up the family – even when the shelter care order is agreed.
 - *Proof of active efforts will not be required at all shelter care hearings under ICWA. See In re Dependency of J.M.W.*, 199 Wn.2d 837, 848 n.5, 514 P.3d 186 (2022).

If active efforts were not made: *The remedy for improper removal of an Indian child is immediate return of the child, unless doing so “would subject the child to a substantial and immediate danger or threat of such danger.” 25 U.S.C. § 1920; RCW 13.38.160 (same). This remedy is proper during the early stages of a dependency or any other stage where removal of the child may have been improper. Matter of Dependency of G.J.A.*, 197 Wn.2d 868, 911, 489 P.3d 631, 652 (2021)

Note: “[T]he history of abusive removals without notice to tribes and the historical failure of state courts to provide proper due process to Native families means that tribal members may not have knowledge of their political affiliation with a tribe.”

In re Dependency of Z.J.G., 196 Wn.2d at 180.

STEP 1, PART 2 – DID THE PETITIONER MAKE REASONABLE EFFORTS TO PREVENT OR ELIMINATE THE NEED FOR REMOVAL AND TO MAKE IT POSSIBLE FOR THE CHILD TO RETURN HOME? RCW 13.34.065(5)(a)

If it is an ICWA case, both active and reasonable efforts are required.

- Were *both* parents, even if they were non-custodial parents, provided reasonable efforts?
 - "...[W]here the parents live separately, each parent must be considered individually and reasonable efforts should be made for both parents before the Department considers other options." *Matter of Dependency of L.C.S., 200 Wn.2d 91, 105, 514 P.3d 644, 651 (2022)*
- Were there any efforts?
 - "[A] flexible standard does not excuse the Department from making no efforts to maintain placement with a parent..." *Matter of Dependency of L.C.S., 200 Wn.2d 91, 104, 514 P.3d 644, 651 (2022)*
 - "Reasonable efforts by the department to shorten out-of-home placement or avoid it altogether **should be a major focus** of the child welfare system. It is intended that providing up-front services decrease the number of children entering out-of-home care and have the effect of eventually lowering foster care expenditures and strengthening the family unit." RCW 74.14C.005
- What assessment of the parents was done?
 - "Although the child's safety is of paramount concern, a perceived safety risk is an insufficient reason to excuse reasonable efforts." *Matter of Dependency of L.C.S., 200 Wn.2d 91, 107, 514 P.3d 644, 652 (2022)*
- If the dependency petition or other information before the court alleges that experiencing homelessness or the lack of suitable housing was a significant factor contributing to the removal of the child, the court **shall inquire as to whether housing assistance was provided** to the family to prevent or eliminate the need for removal of the child or children. RCW 13.34.065(4)(d).
 - What housing assistance was provided?

If reasonable efforts were not made the court must RETURN HOME

STEP 1, PART 3 – IS THERE AGREEMENT TO OUT OF HOME CARE OR EVIDENCE OF IMMINENT PHYSICAL HARM DUE TO CHILD ABUSE OR NEGLECT

- Does your client agree to out of home care? If so advocate to check this box:
 - [] The child has no parent, guardian, or legal custodian to provide supervision or care for such child;
- If no agreement:
 - What is the evidence that removal is **necessary**?
 - What is the evidence that harm to the child is **imminent**?

- What is the evidence of a “**physical harm**” – rather than emotional harm or a “concern”?
- What is the evidence of **child abuse or neglect**? Including a pattern of severe neglect?

For reference:

- RCW 26.44.020(1) “Abuse or neglect” means sexual abuse, sexual exploitation, or injury of a child by any person under circumstances which cause harm to the child’s health, welfare, or safety, excluding conduct permitted under RCW 9A.16.100; or the negligent treatment or maltreatment of a child by a person responsible for or providing care to the child. An abused child is a child who has been subjected to child abuse or neglect as defined in this section.
- RCW 26.44.020(18) “Negligent treatment or maltreatment” means an act or a failure to act, or the cumulative effects of a pattern of conduct, behavior, or inaction, that evidences a serious disregard of consequences of such magnitude as to constitute a clear and present danger to a child’s health, welfare, or safety, including but not limited to conduct prohibited under RCW 9A.42.100. When considering whether a clear and present danger exists, evidence of a parent’s substance abuse as a contributing factor to negligent treatment or maltreatment shall be given great weight. The fact that siblings share a bedroom is not, in and of itself, negligent treatment or maltreatment. Poverty, homelessness, or exposure to domestic violence as defined in RCW 26.50.010 that is perpetrated against someone other than the child does not constitute negligent treatment or maltreatment in and of itself.

If court does not find agreement OR evidence of all three things: 1) imminent 2) physical harm 3) due to child abuse or neglect then the court must RETURN HOME (unless the parent is alleged to have engaged in custodial interference.

STEP 1, PART 4 – CAUSAL RELATIONSHIP BETWEEN THE PARTICULAR CONDITIONS IN THE HOME AND IMMINENT PHYSICAL HARM TO THE CHILD. RCW 13.34.065(5)(a)(II)(B)(I)

- What evidence is there that removal is **necessary** to prevent imminent physical harm, *beyond evidence of community or family poverty, isolation, single parenthood, age of the parent, crowded or **inadequate housing, substance abuse, prenatal drug or alcohol exposure, mental illness,** disability or special needs of the parent or child, or nonconforming social behavior?*
 - **A drug test is not a parenting test!** Removal requires evidence beyond simply evidence of substance abuse or mental illness. No shortcuts – evidence of imminent harm must relate to the child and parenting.
- If those conditions are alleged, what additional evidence, if any, connects those conditions to the child’s safety? RCW 13.34.065(5)(a)(II)(B)
 - *“The existence of community or family poverty, isolation, single parenthood, age of the parent, crowded or inadequate housing, substance abuse, prenatal drug or alcohol exposure, mental illness, disability or special needs of the parent or child, or nonconforming social behavior **does not by itself constitute imminent physical harm**”*

If court does not find evidence of a causal connection between the conditions in the home and imminent physical harm due to child abuse or neglect the court must RETURN HOME.

STEP 1, PART 5 – BALANCE THE HARM OF REMOVAL. RCW 13.34.065(5)(a)(II)(B)(III)

The harm of removal is weighed against the evidence of imminent physical harm. This balance occurs *before* the court considers whether the parent agrees to participate in prevention services.

- After considering the particular circumstances of the child, does the imminent physical harm to the child outweigh the harm the child will experience as a result of removal?
 - Consider factors that relate to the harm of removal and ask client for permission to explore these topics at the hearing:
 - In order to assess the harm of removal you need information about the child, their life, and the family’s structure.
 - Age of the child? Language spoken at home? Culture, traditions? Family structure? Neighbors? Activities (familiar day care, school, sports team)?
 - What kinds of developmental milestones is the child working on? Walking? Reading? (Cite evidence which shows removal is highly likely to interrupt those milestones)
 - How was the child removed – was it at night? Who did the child go with? Where did the child go? Did they get a chance to collect their things? What information was provided to the child about what would happen next? (Cite work of Monique Mitchell) – note that this harm is ongoing.

The remedy if court finds that the harm of removal outweighs the imminent physical harm due to child abuse or neglect the court must RETURN HOME

STEP 2: REMAIN HOME WITH COURT ORDERED SERVICES

STEP 2, PART 1 – WOULD PARTICIPATION IN PREVENTION SERVICES PREVENT OR ELIMINATE THE NEED FOR REMOVAL

- *If the court finds imminent physical harm due to child abuse or neglect (“step 1”), then we move to step 2: ask will participation in “prevention services” prevent or eliminate the need for removal? RCW 13.34.065(5)(b)(i).*
- *For reference, prevention services are defined:*
 - RCW 13.34.030(21) "Prevention services" means preservation services, as defined in chapter 74.14C RCW, **and other reasonably available services, including housing assistance**, capable of preventing the need for out-of-home placement while protecting the child. Prevention services include, but are not limited to, prevention and family services and programs as defined in this section."
 - RCW 13.34.030(15) "Housing assistance" means appropriate referrals by the department or other agencies to federal, state, local, or private agencies or organizations, assistance with forms, applications, **or financial subsidies or other monetary assistance for housing**. For purposes of this chapter, "housing assistance" is not a remedial service or family reunification service as described in RCW [13.34.025\(2\)](#).

- RCW 13.34.030(20) "Prevention and family services and programs" means specific:
 - **Mental health** prevention and treatment services,
 - **Substance abuse** prevention and treatment services, and
 - **In-home parent skill-based programs** that qualify for federal funding under the federal family first prevention services act, P.L. 115-123.
- For purposes of this chapter, prevention and family services and programs are not remedial services or family reunification services as described in RCW 13.34.025(2).
- RCW 74.14C.010(3) "**Family preservation services**" means **in-home or community-based services drawing on the strengths of the family and its individual members while addressing family needs to strengthen and keep the family together where possible** and may include:
 - (a) **Respite care** of children to provide temporary relief for parents and other caregivers;
 - (b) Services designed to **improve parenting skills** with respect to such matters as **child development, family budgeting, coping with stress, health, safety, and nutrition; and**
 - (c) Services designed to **promote the well-being of children and families**, increase the strength and stability of families, increase parents' confidence and competence in their parenting abilities, promote a safe, stable, and supportive family environment for children, and otherwise enhance children's development.
- Note RCW 74.14C.040 describing IFPS.
- Did your client have an opportunity to consult with you prior to deciding whether to agree to proposed prevention services as a condition of having the child return to or remain in the care of the parent? RCW 13.34.065(5)(b)(i).
- Does your client agree to participate in the prevention services identified by the court that would prevent or eliminate the need for removal? If so, the court shall place the child with the parent. RCW 13.34.065(5)(b)(i).
 - The court shall not order a parent to participate in prevention services over the objection of the parent.
- Note that the definition of prevention services is broad – consider how it can include a safety plan your client proposes – including and not merely in-home services offered by a provider.

If court finds that court ordered services would prevent the need for removal and client agrees to services then the court must RETURN HOME.

STEP 2, PART 2 – EXCLUDING SOMEONE FROM THE HOME

- Would the issuance of a temporary order of protection directing the removal of a person or persons from the child's residence prevent the need for removal of the child? RCW 13.34.065(5)(b)(iii).

If court finds that issued a TOP excluding someone from the home would prevent the need for removal court must RETURN HOME with TOP.

STEP 3: PRESUMPTION OF RELATIVE CARE

STEP 3, PART 1 – THE INQUIRY: WHO IS WILLING TO CARE FOR THE CHILD

- The court must inquire of the petitioner and *any other person present at the hearing for the child* whether there are any relatives or other suitable persons who are willing to care for the child. RCW 13.34.065(5)(c)(ii).
 - This inquiry must include whether any relative or other suitable person: Has expressed an interest in becoming a caregiver for the child; Is able to meet any special needs of the child; Is willing to facilitate the child's sibling and parent visitation if such visitation is ordered by the court; and Supports reunification of the parent and child once reunification can safely occur.
- Did the court inquire of the parents whether the department has discussed relative placement with them? RCW 13.34.065(4)(b).

STEP 3, PART 2 – PRESUMPTION OF PLACEMENT WITH RELATIVE

RCW 13.34.065(5)(c)(i)(A)

- The court **must** place with the relative or suitable other person **unless** the court finds there is reasonable cause to believe that:
 - “Placement in **licensed foster care is necessary to prevent imminent physical harm to the child** due to child abuse or neglect, including that which results from sexual abuse, sexual exploitation, or a pattern of severe neglect, **because no relative or other suitable person is capable of ensuring the basic safety of the child**; or
 - The efforts to reunite the parent and child will be **hindered**.”
- The petitioner must present evidence that relatives who are willing to care for the child would subject the child to imminent physical harm, otherwise the court must order relative placement.

STEP 3, PART 3 – PLACEMENT PREFERENCE – GREAT WEIGHT

- The court must “give great weight to the stated preference of the parent, guardian, or legal custodian, **and the child**.” RCW 13.34.065(5)(c)(ii)(B).

STEP 3, PART 4 – INSUFFICIENT BASES FOR REJECTING A RELATIVE

- If a relative or other suitable person expressed an interest in caring for the child, can meet the child's special needs, can support parent-child reunification, and will facilitate court-ordered sibling or parent visitation, the following must not prevent the child's placement with such relative or other suitable person:

- An incomplete department or fingerprint-based background check, if such relative or other suitable person appears otherwise suitable and competent to provide care and treatment, but the background checks must be completed as soon as possible after placement;
- Uncertainty on the part of the relative or other suitable person regarding potential adoption of the child;
- Disbelief on the part of the relative or other suitable person that the parent, guardian, or legal custodian presents a danger to the child, provided the caregiver will protect the safety of the child and comply with court orders regarding contact with a parent, guardian, or legal custodian; or
- The conditions of the relative or other suitable person's home are not sufficient to satisfy the requirements of a licensed foster home.

STEP 3, PART 5 – ENSURING RELATIVES RECEIVE SUPPORT

- If necessary to ensure safe conditions in the home “the court may order the department to provide financial or other support to the relative or other suitable person”
 - Consider whether to ask for a court order to provide support for the relative – is there a home or car repair that would ensure child safety? A bill that needs to be paid? What is needed to keep the child safely with the relative?
- Has the relative expressed a desire to become a licensed foster care placement (and receive financial support)? If so, the court shall order the department to commence an assessment of the home of such relative or other suitable person within 10 days and thereafter issue an initial license as provided under RCW 74.15.120 for such relative or other suitable person, if qualified, as a foster parent. RCW 13.34.065(5)(i).
 - The relative or other suitable person **shall receive a foster care maintenance payment, starting on the date the department approves the initial license.** If such home is found to be unqualified for licensure, the department shall report such fact to the court within one week of that determination. RCW 13.34.065(5)(i)

The department is currently developing its initial license process – prior to issuing an initial license, it will only require a Code X background check of those 16 and over in the home, a walkthrough of the home, and a court order as noted in this section. If all three criteria are met, licensing will issue an initial license. More details should be available soon.

STEP 4: LEAST HARMFUL FOSTER CARE PLACEMENT

STEP 4, PART 1 – THE INQUIRY – RCW 13.34.065(5)(j)(i)

- The petitioner **shall report to the court**, at the shelter care hearing, **the location of the licensed foster placement the petitioner has identified for the child.**
- *The court shall inquire as to whether:* (A) The identified placement is the least restrictive placement necessary to meet the needs of the child; (B) The child will be able to remain in the

same school and whether any orders of the court are necessary to ensure educational stability for the child; (C) The child will be placed with a sibling or siblings, and whether court-ordered sibling contact would promote the well-being of the child; (D) The licensed foster placement is able to meet the special needs of the child; (E) The location of the proposed foster placement will impede visitation with the child's parent or parent.

STEP 4, PART 2 – COURT ORDERS TO LIMIT THE HARMS OF FOSTER CARE

RCW 13.34.065(5)(j)(ii)

- The court may order the department to:
 - (A) Place the child in a less restrictive placement;
 - (B) Place the child in a location in closer proximity to the child's parent, home, or school;
 - (C) Place the child with the child's sibling or siblings;
 - (D) **Take any other necessary steps to ensure the child's health, safety, and well-being;**
- The court shall advise the petitioner that (RCW 13.34.065(5)(j)(iii)):
 - (A) Failure to comply with court orders while a child is in shelter care will be considered when determining whether reasonable efforts have been made by the department during a hearing under RCW 13.34.110; and
 - (B) Placement moves while a child is in shelter care will be considered when determining whether reasonable efforts have been made by the department during a hearing under RCW 13.34.110.

STEP 5: VISITATION/FAMILY TIME

STEP 5, PART 1 – THE INQUIRY – HAS THE DEPARTMENT COMPLIED WITH THE 72 HOUR VISIT?

- If a child was removed prior to the hearing, The first visit must take place within 72 hours of the child being delivered into the custody of the department, unless the court finds that extraordinary circumstances require delay. RCW 13.34.065(9)(d)
- Did the 72-hour visit happen? If not did extraordinary circumstances require delay? When will the parent see their child again?
 - Consider whether to remind the court of the harms of removal – delaying contact increases harm because it increases the uncertainty, and toxic stress, for the child and parent.

STEP 5, PART 2 – ORDERING FAMILY TIME AT INITIAL HEARING: RCW 13.34.065(9)

- If a child is placed out of the home of a parent, guardian, or legal custodian following a shelter care hearing, the court **shall order the petitioner to provide regular visitation with the parent, guardian, or legal custodian, and siblings. Early, consistent, and frequent visitation is crucial for maintaining parent-child relationships and allowing family reunification. The**

court shall order a visitation plan individualized to the needs of the family with a goal of providing the maximum parent, child, and sibling contact possible. RCW 13.34.065(9)(a).

- Visitation under this subsection shall not be limited as a sanction for a parent's failure to comply with recommended services during shelter care. RCW 13.34.065(9)(b).
- Visitation under this subsection may only be limited where necessary to ensure the health, safety, or welfare of the child. RCW 13.34.065(9)(c).