



JUDICIAL COUNCIL OF CALIFORNIA

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MEMORANDUM

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Presiding Judges of the Superior Courts Court Executive Officers of the Superior Courts	N/A
From	Contact
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Subject	
Senate Bill 873 and the Special Immigrant Juvenile Process in the Superior Courts	

On September 27, 2014, Governor Brown signed Senate Bill 873 (Stats. 2014, ch. 685), which took effect immediately. Several of the bill's provisions respond to the influx of unaccompanied, undocumented children into the United States from Central America. Federal immigration law provides a number of mechanisms for these children to pursue legal residence in the United States. Most of these proceed entirely at the federal level; however, Special Immigrant Juvenile (SIJ) classification, a temporary benefit for maltreated children, requires state court findings as a predicate to eligibility. SB 873 recognizes that maltreated children must appear in superior court—in probate guardianship proceedings; family law custody and visitation, parentage, adoption, or domestic violence proceedings; or juvenile dependency or delinquency proceedings—to obtain the findings under California law necessary to enable them to petition the federal government for SIJ classification. Section 1 of SB 873 “eliminates any ambiguity regarding the jurisdiction of the state court to make findings necessary to enable the federal

government to grant these minors special immigrant juvenile status” and requires those courts to make the predicate findings if the evidence supports them.¹

Current data and federal placement trends indicate that more and more of these children will enter California.² Through other provisions in SB 873, many previously self-represented children will be represented by counsel.³ To help California superior courts anticipate and effectively address issues related to implementing SB 873 and the expected increase in SIJ filings in juvenile, family, and probate guardianship proceedings, this memorandum examines the state court role in the SIJ classification process.

- First, the memorandum outlines the SIJ classification process as set forth in federal statute and regulation.
 - This section discusses eligibility requirements, the petitioning procedure, federal consent requirements, and relevant definitions (pp. 3–6).
 - In the context of the federal process, it gives an overview of SB 873’s affirmation of the role of the California courts in that process (p. 6).
- The next section of the memorandum discusses specific elements of the state court role in the SIJ process.
 - First, it looks at SB 873’s jurisdictional provision in relation to the federal SIJ statute and regulations and California appellate case law (pp. 6–9).
 - Next, it addresses specific circumstances in which federal law places limits on state court jurisdiction notwithstanding SB 873’s grant thereof (p. 9).

¹ Sen. Bill 873; Stats. 2014, ch. 685, § 1 (adding section 155 to the Code of Civil Procedure); Office of Governor Edmund G. Brown, Jr., “Governor Brown Signs Legislation to Help Unaccompanied Minors” (Sept. 27, 2014) gov.ca.gov/news.php?id=18734. Section 2 affirms the courts’ authority to provide interpreters in proceedings regarding a request for SIJ predicate findings. Stats. 2014, ch. 685, § 2 (adding section 757 to the Evidence Code). The bill text is available at http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB873.

² The number of unaccompanied children encountered entering the southwest United States has increased exponentially in recent years, from 6775 in federal fiscal year 2011 to 65,000 in the first 11 months of FY2014, which ends September 30, 2014. See U.S. Customs & Border Protection, Southwest Border Unaccompanied Alien Children, www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children. Although the rate of increase has slowed, the federal government estimates that more than 145,000 unaccompanied children, roughly twice as many as in FY2014, will enter the U.S. in FY2015. See H.R. Rep. No. 113-481, 2d Sess., pp. 4, 10–11 (2014); Sen. Rep. 113-198, 2d Sess., pp. 6, 12–15 (2014). These figures do not include unaccompanied children who elude the authorities or children who enter the U.S. with their families.

³ Stats. 2014, ch. 685, §§ 12, 13 (authorizing the California Department of Social Services (CDSS) to administer up to \$3 million in grants to qualified legal services providers for representation of undocumented children in the custody of the Office of Refugee Resettlement (ORR), a division of the federal Department of Health and Human Services (HHS)).

- This section then outlines additional state law jurisdictional bases over child custody determinations that complement SB 873's grant (pp. 10–12).
- The next section examines the specific SIJ predicate judicial findings in detail.
 - First, it discusses general issues and challenges (pp. 12–14).
 - The section then examines issues unique to each specific finding, some of which depend on the department of the superior court that is asked to make the findings (pp.14–16).
 - This section concludes by reviewing other state statutes, rules of court, and Judicial Council forms related to the SIJ process (pp. 16–17).
- Finally, the memorandum
 - Catalogs available resources that provide additional information and training for the courts and their justice partners on the SIJ process (pp. 17–18),
 - Collects commonly used acronyms in a glossary (p. 19), and
 - Lists state and federal legal authority relevant to the SIJ process and the state court role in that process (pp. 20–21).

SIJ Classification Process

Section 1 of SB 873 added section 155 of the Code of Civil Procedure to a complex legal scheme comprising federal statutes and regulations, California appellate case law,⁴ federal case law, and federal administrative decisions and policy directives. The federal Immigration and Nationality Act (INA) (8 U.S.C. § 1101 et seq.) authorizes the United States Citizenship and Immigration Services (USCIS) to grant SIJ classification to certain undocumented children under state judicial supervision because of parental abuse, neglect, or abandonment. (*Id.*, § 1101(a)(27)(J)(i).) Congress created the SIJ classification in the Immigration Act of 1990 (Pub.L. No. 101-649 (Nov. 29, 1990) 104 Stat. 4978) to provide humanitarian relief to abused, neglected, or abandoned children who enter or remain in the United States without documentation.⁵ If approved by the United State Citizenship and Immigration Services (USCIS), SIJ classification allows a qualifying child to remain in the country and apply for lawful permanent resident (LPR) status.⁶

⁴ *Leslie H. v. Superior Court* (2014) 224 Cal.App.4th 340 (juvenile delinquency); *Eddie E. v. Superior Court* (2013) 223 Cal.App.4th 622 (delinquency); *In re Y.M.* (2012) 207 Cal.App.4th 892 (juvenile dependency and child trafficking); *B.F. v. Superior Court* (2012) 207 Cal.App.4th 621 (probate guardianship).

⁵ *Garcia v. Holder* (9th Cir. 2011) 659 F.3d 1261, 1271; *Yeboah v. Dep't of Justice* (3d Cir. 2003) 345 F.3d 216, 221.

⁶ 8 U.S.C. §§ 1101(a)(27)(J), 1153(b)(4); 1255(h). Eligibility for SIJ classification does not depend on whether the child is “unaccompanied” as defined by federal law. *Id.*; see 6 U.S.C. § 279(g).

To qualify as an SIJ under current federal statutes and proposed regulations,⁷ a child must be (1) “physically present in the United States,” (2) “under 21 years of age at the time of filing” the SIJ petition, and (3) “unmarried.”⁸ In addition, the child must (4) have been “declared [a] dependent [of] a juvenile court or have been legally committed to or placed under the custody of a [s]tate agency or department or an individual or entity appointed by a [s]tate or juvenile court”; (5) be “the subject of a [s]tate or juvenile court determination, under applicable [s]tate law, that reunification with one or both parents is not viable due to abuse, neglect, abandonment, or a similar basis under [s]tate law”; and (6) have been “the subject of judicial proceedings or administrative proceedings in which it has been determined, under applicable state law, that it would not be in the [child’s] best interest to be returned to the country of nationality or last habitual residence of the [child] or his or her parents.”⁹ Finally, the child must obtain the consent of the Secretary of Homeland Security to classification as a special immigrant juvenile.”¹⁰

Any person, including the child, may file a petition with the USCIS for classification of a child as an SIJ. The petition must be submitted on a federal Form I-360 signed by the petitioner and accompanied by evidence of the child’s age and a “juvenile court order” showing that requirements 4, 5, and 6, above, have been met with respect to the child.¹¹ The federal regulations define a “juvenile court” as “a court in the United States having jurisdiction under state law to make judicial determinations about the custody and care of” children.¹² In California,

⁷ The federal SIJ statute has been amended five times since 1990, most recently by the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA 2008); Pub.L. No. 110-457, § 235(d)(1) (Dec. 23, 2008), 122 Stat. 5044, 5079), which expanded eligibility for SIJ classification as part of an effort to protect young victims of human trafficking. The federal regulations have not been amended since 1993. (58 Fed. Reg. 42843 (Aug. 12, 1993).) Proposed rules implementing four sets of statutory amendments, from 1994–2008, were submitted for public comment (Special Immigrant Juvenile Petitions, 76 Fed. Reg. 54978, 54985–54986 (Sept. 16, 2011)) and are expected to take effect in March 2015. To the extent that current federal regulations (see 8 C.F.R. §§ 204.11, 205.1, 245.1) are contrary to congressional intent as expressed in the statutory amendments, they have been superseded. *Leslie H.*, *supra* note 4, 224 Cal.App.4th at pp. 348–349; see *Chevron v. NRDC* (1983) 467 U.S. 837, 842–43 & n.9.

⁸ See 76 Fed. Reg. at 54985 (proposed 8 C.F.R. § 204.11(b)(1)(i)–(iii)).

⁹ See *id.* (proposed 8 C.F.R. § 204.11(b)(1)(iv)–(vi)).

¹⁰ See *id.* (proposed 8 C.F.R. § 204.11(b)(1)(vii)). Approval by USCIS of the SIJ petition constitutes the required consent. William R. Yates, Memorandum #3: Field Guidance on Special Immigrant Juvenile Status Petitions (Yates Memo) (May 27, 2004), at p. 5; see 76 Fed. Reg. at 54985 (proposed 8 C.F.R. § 204.11(c)(1)(iii)).

¹¹ See *id.*, at 54985–54986 (proposed 8 C.F.R. § 204.11(d)); 8 C.F.R. § 103.2. No filing fee or biometric services fee is charged for an SIJ petition. 8 C.F.R. § 103.7(b)(1)(i)(T)(3), 103.7(b)(1)(i)(C)(3).

¹² 8 C.F.R. § 204.11(a), see 76 Fed. Reg. at 54985 (proposed 8 C.F.R. § 204.11(a)). The federal regulations define “juvenile court” so broadly in part to accommodate the wide variety of terms used among the states to denote courts that hear matters related to child welfare and child custody. The federal language describes the underlying legal issues, but defers to each state’s terminology.

as noted above and affirmed by SB 873, this definition is sufficiently broad to include superior courts hearing probate guardianship proceedings; family law custody, visitation, parentage and adoption proceedings; and perhaps others beyond the dependency and delinquency cases that fall under California's Juvenile Court Law (Welf. & Inst. Code, §§ 200–987).¹³

Once the petition is filed, the USCIS must adjudicate it within 180 days.¹⁴ The petitioner bears the burden of establishing by a preponderance of the evidence that the child is eligible for SIJ classification at the time of filing.¹⁵ In making a decision, the USCIS adjudicator reviews the petition and any relevant documentary evidence submitted with it, including the required “juvenile court” order. The adjudicator examines the court order to determine whether the order includes the requisite findings, but does not “second-guess the court rulings or question whether the ... order was properly issued.”¹⁶ The federal agency is “not the fact finder” regarding “issues of child welfare under state law.”¹⁷ If the order includes the required findings and the other requirements are met, the child has established eligibility.

The adjudicator must then decide whether to consent to the SIJ classification. To make this discretionary determination, the adjudicator reviews all relevant evidence in the record to ensure that the court order “was sought primarily to obtain relief from abuse, neglect, abandonment, or a similar basis under [s]tate law” and not primarily for the purpose of obtaining lawful permanent residence.¹⁸ In practice, this requires the adjudicator to determine that a “reasonable factual basis” exists for the state court’s determinations.¹⁹ The petitioner also bears this evidentiary burden.²⁰ Court orders that include or are supplemented by specific findings of fact supporting the court’s rulings will usually be sufficient to warrant consent.²¹

¹³ See United States Citizenship and Immigration Services, Special Immigrant Juvenile Status: Information for Juvenile Courts, § 4 (n.d.) (listing, as examples, juvenile, family, orphans, dependency, guardianship, probate, and delinquency courts).

¹⁴ 8 U.S.C. § 1232(d)(2); see 76 Fed. Reg. at 54986 (proposed 8 C.F.R. § 204.11(h)).

¹⁵ 8 U.S.C. § 1361; 8 C.F.R. § 103.2(b)(1); *In re Chawathe* (AAO 2010) 25 I&N Dec. 369, 375.

¹⁶ Yates Memo, *supra* note 10, at pp. 4–5.

¹⁷ *In re Petitioner [Redacted]*, 2013 WL 8118295, at p. *2.

¹⁸ Donald Neufeld & Pearl Chang, Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions (Neufeld Memo) (USCIS Mar. 24, 2009), 2009 WL 1028912, at p. 3; see 76 Fed. Reg. at 54985 (proposed 8 C.F.R. § 204.11(c)(i)).

¹⁹ *In re Petitioner [Redacted]*, 2013 WL 8118295, at p. *2; Yates Memo, *supra* note 10, at p. 4.

²⁰ Lori Scialabba, Response to Recommendation 47, Special Immigrant Juvenile (SIJ) Adjudications (Scialabba Memo) (July 13, 2011) at p. 4; see Yates Memo, *supra* note 10, at 4–5.

²¹ Yates Memo, *supra* note 10, at p. 5.

If the adjudicator is satisfied that the SIJ petition is “bona fide” in this sense, USCIS will approve SIJ classification. The child will then be permitted to remain in the U.S. and take the next step in the federal immigration process: apply for adjustment to LPR status. If the USCIS is not satisfied both that the evidence establishes eligibility for SIJ classification and that the petition is bona fide, it may deny the petition, request additional evidence, or issue a notice of intent to deny the petition.²² If the USCIS denies the petition after all evidence is submitted, it must issue a written decision explaining the reasons for the denial.²³ The petitioner may then appeal either to the Board of Immigration Appeals (BIA) or the Administrative Appeals Office (AAO), depending on which federal entity has jurisdiction.²⁴

In adding section 155 to the Code of Civil Procedure, SB 873 applies or incorporates several elements of the federal SIJ statute to California law. First, it makes clear that a superior court, including the court’s juvenile, probate, and family divisions, is a “juvenile court” as defined by federal regulations because it has “jurisdiction to make judicial determinations about the custody and care of” children (8 C.F.R. § 204.11(a)). (Code Civ. Proc., § 155(a).) Second, the new section expressly authorizes “these courts” to make the SIJ predicate findings. (*Id.*) Third, section 155 provides that, if an order is requested from the superior court that it make the SIJ predicate findings and there is evidence to support those findings, the court must issue an order that includes all the predicate findings as specified in that section. (*Id.*, § 155(b).)

Section 155 also specifies that the evidence in support of the findings “may consist of, but is not limited to, a declaration by the child who is the subject of the petition.” (*Id.*) Finally, section 155 requires that information regarding the child’s immigration status that arises in a judicial proceeding in response to a request for SIJ predicate findings and is not otherwise protected by state confidentiality laws must remain confidential (*id.*, § 155(c)), that records of such a proceeding not otherwise protected by state confidentiality laws may be sealed under rules 2.550 and 2.551 of the California Rules of Court (*id.*, § 155(d)), and that the Judicial Council must adopt any rules and forms needed to implement its provisions (*id.*, § 155(e)).

²² 8 C.F.R. § 103.2(b)(8). Although the petitioner holds the burden of producing evidence, the supplementary information accompanying the proposed federal rules states that “USCIS may obtain initial or additional supporting evidence, documents, or materials directly from a court ...” 76 Fed. Reg. at 54982. USCIS policy recognizes, however, that state confidentiality laws, such as section 155(c)–(d) of the Code of Civil Procedure, “often restrict disclosure of records from juvenile ... proceedings, so seeking ... records directly from the court may be inappropriate.” Yates Memo, *supra* note 10, at p. 5.

²³ 8 C.F.R. § 103.3(a)(1)(i).

²⁴ *Id.*, § 103.3(a)(1)(ii)–(iii), (iv).

Jurisdiction

This section examines SB 873’s language clarifying superior court jurisdiction to make SIJ predicate findings in the context of federal law and California appellate decisions. It discusses ways in which these sources can inform a superior court’s exercise of that jurisdiction. The section also examines circumstances in which federal law may require the superior court to decline otherwise valid jurisdiction to make certain findings and orders.

After discussing SB 873’s affirmation of superior court general jurisdiction, this section turns to narrower bases in California law for court jurisdiction to make child custody determinations, including those underlying the SIJ predicate findings. This section suggests that, though any superior court division has general jurisdiction to make the requested findings, only certain types of proceeding present the issues of law and fact and the evidentiary basis necessary for the court to make the determinations that underlie the SIJ findings. For example, it identifies the Uniform Child Custody Jurisdiction and Enforcement Act (Fam. Code, §§ 3400–3465) as a necessary jurisdictional basis for most, if not all, of the proceedings in which the superior court will be called on to make SIJ findings. Many other California statutes complement section 155(a) to establish sufficient grounds for superior court jurisdiction to make child custody determinations in various proceedings.

State-federal relations

SB 873 clarifies that a superior court has jurisdiction under California law to make child custody determinations and, therefore, may make the predicate findings necessary to enable a child to petition the federal government for classification as a special immigrant juvenile.²⁵ In this respect, SB 873 codifies federal law and California appellate court decisions defining and affirming the state courts’ role in documenting the existence of the legal and factual bases for an undocumented child to file a federal petition for classification as an SIJ.²⁶

By predicating a child’s eligibility to petition the USCIS for classification as an SIJ on the presentation of a “juvenile court order,” the INA establishes a cooperative relationship between

²⁵ Stats. 2014, ch. 685, § 1.

²⁶ 8 U.S.C. § 1101(a)(27)(J)(i)–(ii); 8 C.F.R. § 204.11(a); see *Leslie H.*, *supra* note 4, 224 Cal.App.4th 340 (juvenile delinquency); *Eddie E.*, *supra* note 4, (2013) 223 Cal.App.4th 622 (delinquency); *In re Y.M.*, *supra* note 4, 207 Cal.App.4th 892 (juvenile dependency and child trafficking); *B.F.*, *supra* note 4, 207 Cal.App.4th 621 (probate guardianship). In each case, the appellate court upheld the superior court’s jurisdiction, in the context of the underlying proceeding, to hear a request for the SIJ predicate findings and to make those findings if warranted. In the context of dependency and delinquency proceedings, the juvenile court has authority over guardianships (Welf. & Inst. Code, §§ 360(a), 366.26(d), 366.3(a)–(c), 366.4, 727.3, 728); custody, visitation, and parentage determinations (*id.*, §§ 304, 316.2, 362.4, 726.4, 726.5); and adoptions (*id.*, §§ 366.26(e), 727.3, 727.31) of children under its jurisdiction.

state courts and the federal government.²⁷ The federal government holds “broad, undoubted” power to regulate immigration, that is, to determine who may enter the United States and under what conditions they may remain. (*Arizona v. United States* (2012) 132 S.Ct. 2492, 2498–2499; see *De Canas v. Bica* (1976) 424 U.S. 351, 354–355. See generally U.S. Const., art. I, § 8, cl. 3 (commerce); *id.*, cl. 4 (naturalization).) State law, on the other hand, traditionally governs domestic relations, including the parent-child relationship and the care and custody of abused, neglected, and abandoned children. (See, e.g., *Ankenbrandt v. Richards* (1992) 504 U.S. 689, 702.) Section 155(a) of the Code of Civil Procedure affirms the state’s part in that relationship.

Both section 155(a) and “[t]he [federal] SIJ statute affirm[] the institutional competence of state courts as the appropriate forum for child welfare determinations regarding abuse, neglect, or abandonment, and a child’s best interests.” (*Perez-Olano v. Gonzalez* (2008) 248 F.R.D. 248, 265–266 (citing *Ankenbrandt, supra*, 504 U.S. at p. 702).) The definition of abuse, neglect, or abandonment varies widely from state to state. Moreover, many state laws may not use those exact terms to describe the same underlying conduct. The INA’s SIJ provisions recognize that competence and variety by generally relying on state courts, acting under authority of state law, to certify the existence of the legal and factual grounds for a petition for SIJ classification.²⁸ Although the details of the SIJ predicate findings have changed over time as Congress has amended the federal SIJ statute for different purposes, the state court’s essential role has remained the same since 1990.

Federal law makes clear that state court authority with respect to SIJ classification is limited to making the predicate findings based on determinations under state law. “State courts play no role in the final determination of SIJ [classification] or, ultimately, permanent residency or citizenship, which are federal questions.” (*Leslie H., supra* note 4, 224 Cal.App.4th at p. 351.)

The federal Secretary of Homeland Security must consent to any SIJ classification. (8 U.S.C. § 1101(a)(27)(J)(iii).) Under current practice and proposed rules, USCIS approval of an SIJ petition constitutes the Secretary’s consent. This consent acknowledges that the request for SIJ classification is legitimate, that is, that the child has not sought classification primarily to obtain LPR status rather than to obtain relief from abuse, neglect, or abandonment.²⁹ The state court order is necessary evidence in support of a federal SIJ petition, but the record as a whole

²⁷ Although this relationship may be unusual, it is not without precedent. See *Printz v. United States* (1997) 521 U.S. 898, 905–906 (Congress may require state courts to conduct naturalization proceedings); *id.*, at p. 907 (state court must entertain a claim under federal law when its ordinary jurisdiction is appropriate and properly invoked under state law); *id.*, at pp. 928–929 (state courts may not refuse to apply federal law).

²⁸ 8 C.F.R. § 204.11(a); see *Gao v. Jenifer* (6th Cir. 1999) 185 F.3d 548, 555 (SIJ statute “generally relies on state courts, acting in their usual course”; emphasis in original).

²⁹ Neufeld Memo, *supra* note 18, at p. 3. See the discussion *infra* at pp. 11–12.

determines whether USCIS approves or denies the petition. Furthermore, approval of the petition is neither a permanent nor final step in the child's federal immigration process. Federal immigration authorities must still review and approve the child's application to adjust to LPR status. At this stage, the federal authorities consider applicable legal grounds for denying admission and exercise discretion under 8 U.S.C. § 1255 whether to admit the child to LPR status.³⁰ The state court's predicate findings do not, therefore, regulate immigration, whether permissibly or otherwise.

In one circumstance, however, the SIJ statute and federal case law do limit the state court's jurisdiction to make certain determinations. Existing federal law requires the specific consent of the Secretary of HHS to state court jurisdiction to determine or alter the custody status or placement of an undocumented child who is in the custody of the ORR.³¹

The statutory language requires specific federal consent to state court "jurisdiction to determine the custody status or placement" of a child in ORR custody. (8 U.S.C. § 1101(a)(27)(J)(iii)(I).) Until 2009, USCIS interpreted that provision as requiring a child in federal immigration custody to obtain specific consent before the commencement of any state "juvenile court" proceedings. The federal court in *Perez-Olano* held, however, that "SIJ-predicate orders are not the same as orders determining custody status or placement." (*Perez-Olano, supra*, 248 F.R.D. at p. 265.)

SIJ predicate orders are "child welfare determinations" appropriately reserved for state courts by Congress in the SIJ statute (*id.*, at p. 265). Predicate findings and orders regarding dependency, abuse, neglect, abandonment, the viability of reunification, and the child's best interests do not necessarily alter the child's custody status or placement.³² USCIS incorporated both the statutory language and the *Perez-Olano* court's interpretation into its guidance on the specific consent requirements in 2009, directing officers to ensure that a child in ORR custody had obtained consent to jurisdiction only when seeking a juvenile court order that "determines or alters the child's custody status or placement."³³ A state court order that does not determine or alter the

³⁰ If the child ultimately wishes to become a naturalized United States citizen, further federal proceedings are required. The federal government has full discretion over citizenship determinations as well. 8 U.S.C. § 1421. It has delegated that discretion to state courts since our nation's earliest days. *Id.*, § 1421(b)(1)(A), (b)(5)(B); see *Holmgren v. United States* (1910) 217 U.S. 509, 516–517.

³¹ 8 U.S.C. § 1101(a)(27)(J)(iii)(I); see 76 Fed. Reg. at 54982, 54985 (proposed 8 C.F.R. § 204.11(c)(2)); *Perez-Olano, supra*, 248 F.R.D. at pp. 264–267.

³² *Perez-Olano, supra*, at p. 264. The *Perez-Olano* court read the statute's use of "determine" to mean "alter." *Id.* The court emphasized that Congress had limited the federal government's authority to require specific consent to "instances when a state court will alter custody status or placement." *Id.*, at p. 266, emphasis added.

³³ Neufeld Memo, *supra* note 18, at p. 3; see 76 Fed. Reg. at 54982, 54985 (proposed 8 C.F.R. § 204.11(c)(2)). There is very little guidance about the sort of orders USCIS would consider to "determine" a child's custody status or placement without altering it.

custody or placement of a child in ORR custody is within state court jurisdiction without the child having first obtained specific consent.

Child custody proceedings

In California, the superior courts are courts of general jurisdiction.³⁴ This point has been clarified in the context of SIJ findings by SB 873 and *B.F.*³⁵ Any court has the authority to hear a request for the SIJ predicate findings. But the superior courts resolve issues and controversies related to child custody or abuse and neglect by applying specific laws in specific procedural contexts. The federal SIJ process depends on the courts' expertise and experience applying those laws in those contexts to make the determinations that underlie the SIJ findings.³⁶ SB 873, incorporating federal law, requires the courts to apply existing state law to the facts before them to determine the existence of abuse, neglect, abandonment, or other similar parental conduct; the ability of the family to reunify; and the best interest of the child.

Because the SIJ predicate findings rely on state courts' expertise in making determinations about the custody and care of children under state law, it is important to survey the specific sources of state court jurisdiction to make findings and orders that seek to protect child well-being and determine custody arrangements in the best interests of children. First, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (Fam. Code, § 3400 et seq.) is, by its terms, the exclusive basis for a California court's jurisdiction to make a child custody determination.³⁷ Such a determination may arise in proceedings for "dissolution..., legal separation..., neglect, abuse, dependency, guardianship, [parentage], termination of parental rights, and protection from domestic violence."³⁸ Physical presence of the child is neither

³⁴ See *Estate of Bowles* (2008) 169 Cal.App.4th 684, 695.

³⁵ Stats. 2014, ch. 685, § 1; *B.F.*, *supra* note 4, 207 Cal.App.4th at p. 628.

³⁶ Code Civ. Proc., § 155(a)–(b); see *Perez-Olano*, *supra*, at p. 265–266; *Leslie H.*, *supra* note 4, 224 Cal.App.4th at p. 351. Courts do not necessarily need to hold hearings, find facts, or apply laws separate from or in addition to those entailed in the resolution of the issues before the court under state law. See *B.F.*, *supra* note 4, 207 Cal.App.4th at p. 629 (suggesting that requiring a juvenile to bring an SIJ petition in a separate proceeding would impose an unnecessary burden on the child and the court); cf. *Y.M.*, *supra* note 4, 207 Cal.App.4th at p. 916 (child potentially eligible for SIJ classification was entitled to a hearing where the court would determine whether grounds for findings exist). *B.F.* indicates that such a hearing should occur in the context of an existing proceeding and need not be conducted separately.

³⁷ Fam. Code, § 3421(a)–(b); *In re Nelson B.* (2013) 215 Cal.App.4th 1121, 1128–1129. A child custody determination is "a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child." (Fam. Code, § 3402(c).) In the absence of any evidence of contrary legislative intent, SB 873's jurisdictional provisions, Code Civ. Proc., § 155(a)–(b), operate concurrently with the UCCJEA. See *Prof. Engineers in Cal. Government v. Kempton* (2007) 40 Cal.4th 1016, 1038.

³⁸ Fam. Code, § 3402(d); *In re Nelson B.* (2013) 215 Cal.App.4th 1121, 1128. Juvenile delinquency proceedings are not expressly included in the UCCJEA's definition. Although the superior courts may derive their authority to hear delinquency proceedings from another source, they unquestionably make determinations about the custody and care

necessary nor sufficient for a state court to have jurisdiction under the UCCJEA. (Fam. Code, § 3421(c).) What is crucial for jurisdiction to make a child custody determination is that California is the child’s “home state” or, if not, that no other court in another state³⁹ is willing or able to take jurisdiction. (*Nelson B.*, *supra*, 215 Cal.App.4th at pp. 1128–1129.) This requirement ensures that custody issues are litigated in the state with the closest connection to the child and avoids jurisdictional conflict among states. In a juvenile court proceeding in which a youth sought continued juvenile court jurisdiction so he could request SIJ predicate findings, the *Nelson B.* court held that the youth’s home state was Maryland, the California court did not have jurisdiction over the case under state law, and that the court therefore could not make the determinations on which SIJ findings would have depended. The full complexities of the UCCJEA are beyond the scope of this memorandum. It is sufficient to note that, to make the SIJ predicate findings, a state court must have jurisdiction under state law to make child custody determinations and the UCCJEA is a necessary source of that jurisdiction in California.

If California is the home state of a child seeking SIJ predicate findings, then the superior court has jurisdiction under both the UCCJEA and SB 873 to make SIJ predicate findings. But that jurisdiction may not be enough to give a particular court or judge a legal basis under state law to make the relevant findings. Courts resolve issues and controversies by applying specific laws in specific procedural contexts. Although the SIJ predicate findings may use language different from determinations under state law, the findings depend on or document various state law determinations. For example, an SIJ finding that a child has been committed to or placed in the custody of an individual appointed by the state or the court could document several different state law determinations, findings, or orders, e.g., the finalization of an adoption, the issuance of letters of guardianship, the award of sole physical custody to a nonabusive parent, or the placement of a dependent or ward in foster care. Just as the federal statute merges the various state courts and proceedings that address child welfare and child custody into the single term “juvenile court,” it also seeks to encompass the variety of terms used in the laws of the 50 states to make child welfare and child custody determinations.⁴⁰

With the possible exception of the juvenile court,⁴¹ the superior courts are divided into departments only “as a matter of convenience” and that the subject matter jurisdiction of the

of children in those proceedings and make SIJ predicate findings in that context. (*Leslie H.*, *supra* note 4, 224 Cal.App.4th at pp. 349–350; *Eddie E.*, *supra* note 4, 223 Cal.App.4th 622.)

³⁹ For purposes of the UCCJEA, a “state” includes a foreign country. Fam. Code, § 3405.

⁴⁰ In this sense, the SIJ statute may be analogous to the federal Indian Child Welfare Act (ICWA), which uses the term “Indian child custody proceeding” to include a variety of proceedings under state law. 25 U.S.C. § 1903(1).

⁴¹ See *In re Chantal S.* (1996) 13 Cal.4th 196, 200–201, which held that the juvenile court is a superior court exercising limited jurisdiction in “special proceedings with their own set of rules,” but the family court “is not a

superior court is vested in the court as a whole.⁴² Based on this proposition alone, the Court of Appeal in *B.F.*, *supra* note 4, 207 Cal.App.4th at pp. 628–629, was still unable to determine whether the superior court, sitting as a probate court, met the federal definition of a juvenile court.⁴³ Needing further guidance, the court looked to the statutory grant of jurisdiction over the specific proceedings before the court to determine whether that court was a juvenile court within the meaning of the federal regulations.

In *B.F.*, undocumented children had petitioned the court under the Probate Code for appointment of a guardian. The court found that provisions of the Probate Code subjecting a guardian to the regulation and control of the court (Prob. Code, § 2102), granting the superior court jurisdiction over guardianship proceedings (*id.*, § 2200), and charging a guardian with the care, custody, and control of his or her ward (*id.*, § 2351) constituted a grant of jurisdiction under California law to make judicial determinations about the custody and care of children.⁴⁴ The court concluded that a “superior court sitting as a probate court” adjudicating a petition for appointment of a guardian was therefore a juvenile court as defined by the federal regulations. (*B.F.*, *supra* note 4, at p. 629.)

Based on the *B.F.* court’s reasoning and the specific language in SB 873, any division of the superior court that hears proceedings under a specific statutory grant of jurisdiction to make a determination about the custody and care of a child is a “juvenile court” for purposes of the SIJ process. In addition to juvenile dependency,⁴⁵ juvenile delinquency,⁴⁶ and probate guardianship proceedings, these include at least family court proceedings affecting child custody and parent-child relationships.

Findings

This section examines in detail the three state court findings, incorporated into Code of Civil Procedure section 155(b)(1) by SB 873, needed to enable a child to apply for SIJ classification.

separate court with special jurisdiction, but is instead the superior court performing one of its general duties.” *Id.* (citation omitted).

⁴² *Estate of Bowles*, 169 Cal.App.4th at p. 695.

⁴³ SB 873 has resolved the broad jurisdictional question under California law. See also *B.F.*, *supra* note 4, at pp. 628–629. The analysis in *B.F.* points out, however, that the superior court does not make determinations about the custody and care of children in the context of every action or under every statute it is charged with applying. *Id.*

⁴⁴ The court did not discuss the UCCJEA as a source of jurisdiction, even though the UCCJEA expressly includes guardianship proceedings within its scope.

⁴⁵ *Y.M.*, *supra* note 4, 207 Cal.App.4th 892.

⁴⁶ *Leslie H.*, *supra* note 4, 224 Cal.App.4th 340; *Eddie E.*, *supra* note 4, 223 Cal.App.4th 622.

The discussion addresses the elements of each finding, the challenges of making the findings in different legal contexts, and the issues left open for resolution by case law or rule of court.

The state court order accompanying a child's petition for federal SIJ classification must show (1) that a juvenile court has declared the petitioning child to be a dependent of the court *or* that the court has legally committed the child to, or placed him or her under the custody of, a state agency or department or an individual or entity appointed by a state or juvenile court; (2) that reunification of the child with one or both parents is not viable because of abuse, neglect, abandonment, or a similar basis under California law; and (3) that it has been determined in administrative or judicial proceedings that it would not be in the child's best interest to be returned to his or her country of nationality or last habitual residence.⁴⁷

A superior court with jurisdiction to make child custody determinations under California law "has the authority and duty to make [SIJ predicate] findings" if the record or the evidence before it supports them. (Code Civ. Proc., § 155(a); *B.F.*, *supra* note 4, 207 Cal.App.4th at p. 630.) All findings are to be based on California state law.⁴⁸ The state court order must be in effect on the filing date of the petition for SIJ classification and continue in effect when USCIS makes a decision on the child's SIJ application, unless the child has "aged out" of the state court's jurisdiction.⁴⁹

An important further consideration related to the predicate findings is their effect on federal approval of the petition for SIJ classification. Although this issue was discussed above, it deserves emphasis. USCIS approval of the petition and consent to SIJ classification are contingent on a determination that the child is seeking SIJ classification "primarily for the purpose of obtaining relief from abuse, neglect, abandonment, or some similar basis under [s]tate law, and not primarily for the purpose of obtaining lawful immigration status."⁵⁰ The petitioner bears the burden of providing sufficient evidence that the petition is bona fide.⁵¹ A state "court

⁴⁷ The state court is not asked to make findings regarding the other eligibility requirements, such as that the child is under the age of 21 and unmarried. The petitioner must present evidence in the federal immigration proceeding that the child meets these criteria. 8 C.F.R. § 204.11(d)(1).

⁴⁸ USCIS, Special Immigrant Juvenile Status, *supra* note 13, at § 3 ("the role of the court is to make factual findings based on state law").

⁴⁹ 8 C.F.R. § 204.11(c)(5); 76 Fed. Reg. at 54980 (supplementary information); TVPRA 2008, Pub.L. No. 110-457, § 235(d)(6) (Dec. 23, 2008), 122 Stat. 5044, 5080 (an immigrant may not be denied SIJ classification under 8 U.S.C. § 1101(a)(27)(J) based solely on age if the immigrant was under 21 on the date he or she applied for SIJ classification); Neufeld Memo, *supra* note 18, at pp. 2-3.

⁵⁰ 76 Fed. Reg. at 54981 (supplementary information); *id.*, at p. 54985 (proposed 8 C.F.R. § 204.11(c)(1)); see Neufeld Memo, *supra* note 18, at p. 3 (quoting H.R. Rep. No. 105-405, at 130 (1997)).

⁵¹ Scialabba Memo, *supra* note 20, at p. 4; see Yates Memo, *supra* note 10, at pp. 4-5.

order that includes specific findings of fact regarding the basis for a finding of abuse, abandonment, or neglect is usually sufficient” to meet this burden. An order lacking specific factual findings or not accompanied by supporting evidence may not be sufficient. In that case, USCIS may request additional evidence from the petitioner to establish a “reasonable factual basis” for the state court determinations.⁵² For a superior court order making SIJ predicate findings to have its intended effect, therefore, it is recommended that the court include the factual basis for its findings to the extent permitted by the confidentiality requirements in section 155(c)–(d) of the Code of Civil Procedure.

Dependency, Commitment, or Custody

The first necessary element of the state court order is a confirmation that the child is under court supervision.⁵³ The TVPRA 2008 amended the definition of a special immigrant juvenile in 8 U.S.C. § 1101(a)(27)(J)(i) to expand the number of ways that a child can be under state court supervision for purposes of this finding. An eligible child now includes either (1) a child who has been declared a dependent of a juvenile court; (2) a child who has been legally committed to or placed under the custody of an agency or department of a state or an individual or entity appointed by a state or juvenile court. In *Eddie E.*, *supra* note 4, 223 Cal.App.4th at pp. 627–628, the Court of Appeal held that either of these categories provides an independent basis for a child to satisfy the requirement that he or she come under the supervision of the court. For example, a child adjudged a ward of the court under Welfare and Institutions Code section 602 and committed to juvenile hall, a child whose parent was awarded sole custody based on another parent’s conduct, or a ward whose guardianship was established based on parental conduct each could, assuming no other impediments, be eligible for this finding.

The order of dependency, commitment, or custody must be in effect at the time the SIJ petition is filed. It must continue in force until USCIS adjudicates the petition, unless the child’s age triggers the order’s expiration under state law.⁵⁴

⁵² *Id.*; see *In re Petitioner [Redacted]*, 2012 WL 8593695, at p. *4 (AAO May 14, 2012) (USCIS reviews relevant evidence to ensure that record contains reasonable factual basis for state court findings); *In re Petitioner [Redacted]*, 2011 WL 9082177, at p. *4 (AAO Nov. 8, 2011) (same). “USCIS recognizes that it does not have the jurisdiction or expertise to evaluate a child’s claim of parental abuse, neglect, or abandonment under the relevant state law.” Scialabba Memo, *supra* note 20, at p. 4.

⁵³ Under 8 C.F.R. § 204.11(a) and proposed 8 C.F.R. § 204.11(b)(2), 76 Fed. Reg. at 54985, a child adopted or placed in guardianship after having been declared a dependent of the court continues to be considered a juvenile court dependent based on the original dependency order. The proposed rule would also clarify that adoption and guardianship qualify as commitment to or placement under the custody of an individual appointed by the court.

⁵⁴ See discussion *supra* note 49 and accompanying text. Under *In re Perez-Quintanilla* (AAO 2007) A97 383 010, [2007 WL 2410060], at pp. 8–10, a juvenile court may, if authorized by state law, retain jurisdiction after the child turns 18 for the sole purpose of maintaining the child’s eligibility to seek SIJ classification.

Nonviability of reunification due to abuse, neglect, or abandonment

Second, the court must document its determination that reunification of the child with one or both of the child's parents is not viable due to abuse, neglect, abandonment, or a similar basis under California law. The maltreatment may have occurred in the United States or before the child's arrival in the United States. This finding may present challenges for courts unaccustomed to addressing issues of child abuse and neglect that nevertheless have jurisdiction to hear a request for SIJ predicate findings and to make those findings. As explained *supra*, federal law uses language common in California juvenile court proceedings to encompass a broader variety of conduct, events, and circumstances than that language denotes under California law. A request for an order making SIJ predicate findings could come before a family court or probate court, requiring that court to determine whether "reunification" of the child with one or both parents is not viable due to "abuse, neglect, abandonment," or another legal basis. For example, a family court award of sole custody of an undocumented child to one parent based on the other parent's maltreatment of the child might serve as the basis for this finding.

Some uncertainty exists about what facts and circumstances would constitute sufficient grounds for these findings. That uncertainty may be caused by trying to force state law conclusions to fit into federal categories. Federal guidance indicates that an order specifying the exact legal ground, under state law, of the court's determination and including supporting factual findings will usually be sufficient to establish eligibility.⁵⁵ At the same time, if uncertainty persists and the probate court or family court has reason to believe that a child in a guardianship or custody proceeding has been abused, neglected, or abandoned, either court has statutory authority to refer the matter to the local child welfare agency for an investigation under sections 328 and 329 of the Welfare and Institutions Code. (Prob. Code, § 1513(b); Fam. Code, § 3027(b).) Either court may also take appropriate, reasonable steps to protect the child's safety pending the completion of the investigation. (*Id.*)

Determination of best interest

Finally, the court or an administrative body approved by the court must find that it would not be in the child's best interest to be returned to his or her country of origin. Congress has left to juvenile and other state courts the authority to use their expertise in determining the best interests of the children in their respective jurisdictions. Because best interest findings are within the expertise of the state court, immigration officials are generally reluctant to second-guess them as long as they appear supported by sufficient evidence. (See 76 Fed. Reg. at 54980.) The facts and circumstances of each case will determine whether the court has a basis for this finding. (See, e.g., Fam. Code, § 3011.) It is not necessary for the superior courts to develop expertise on the

⁵⁵ Scialabba Memo, *supra* note 20, at p. 4; Yates Memo, *supra* note 10, at 5; see, e.g., *In re Self-Petitioner [Redacted]* 2013 WL 8117603, at p. *2 (AAO Dec. 4, 2013); *In re Self-Petitioner [Redacted]* 2012 WL 8524275 (AAO Aug. 2, 2012), at p 3 (by itself, order that "merely repeats the language of the [INA] is insufficient").

living conditions in multiple foreign countries. The court can focus on circumstances shown by the evidence presented to be directly connected to the child's life and relationships in the United States and in his or country of origin.⁵⁶

Other California Law

As discussed throughout, SB 873 codifies California superior court jurisdiction to make the SIJ predicate findings. The legislation also authorizes the courts, consistent with existing law and policy, to provide an interpreter for a hearing on a request for the predicate findings and requires the Judicial Council to adopt any rules and forms needed to implement its requirements.

Earlier legislation, the Reuniting Immigrant Families Act (SB 1064; Stats. 2012, ch. 845), amended various sections of the Family Code, the Probate Code, and the Welfare and Institutions Code to recognize the needs and circumstances of immigrant families and children. With respect to special immigrant juvenile classification, the bill added section 10609.97 to the Welfare and Institutions Code to require the California Department of Social Services (CDSS) to provide guidance on best practices and facilitate an exchange of information among counties about helping children who are eligible for SIJ classification.⁵⁷ SB 1064 also amended section 16501.1 of the Welfare and Institutions Code to require each case plan for a youth in foster care who is 16 years old and older or a nonminor dependent to discuss whether the youth has an application pending for classification as an SIJ.

Judicial Council Rules and Forms

Effective 2007, the Judicial Council adopted form JV-224, *Order Regarding Eligibility for Special Immigrant Juvenile Status*. This form, as revised in 2011, is intended for use by the juvenile court to document the SIJ predicate findings necessary for children in dependency and delinquency proceedings to petition for special immigrant juvenile status (SIJS) under federal law.

In response to the California Fostering Connections to Success Act (Assem. Bill 12; Stats. 2010, ch. 559) and related legislation, the Judicial Council adopted rules 5.707(c) and 5.812(d) of the California Rules of Court, effective January 1, 2012, to specify new requirements for judicial review of the status of dependents or wards approaching majority. In an effort to avoid inadvertently rendering an application for federal SIJ classification invalid, rules 5.707(c)(1)(E)

⁵⁶ See, e.g., *In re [Redacted]* (2009) AAO 09 093 50006, [2009 WL 6520661], at p. *4 (appointment of guardian in U.S., under state statute authorizing such appointment if the court finds it "in the best interests of the child," necessarily implies judicial determination that return to home country where child had been abandoned by parents and had no relatives was not in child's best interests).

⁵⁷ See SB 1064 web page, www.childsworld.ca.gov/PG3466.htm.

and 5.812(d)(2)(D) require the court to inquire and enter a finding as to whether the dependent or ward has an application for SIJ or other status pending, and whether an active juvenile court case is required for that application's validity.

In 2013, following the decision in *B.F.*, *supra* note 4, the Judicial Council approved form GC-224, *Order Regarding Eligibility for Special Immigrant Juvenile Status—Probate Guardianship*, to assist courts in making the SIJ predicate findings in guardianship proceedings.

Section 155(e) of the Code of Civil Procedure expressly directs the Judicial Council to adopt any rules and forms needed to implement section 155's requirements. After reviewing the statute and existing rules and forms, the council will develop, through its public rulemaking process, any rules and forms needed to facilitate the superior courts' role in making SIJ predicate findings.

Primary Resources

Judicial Council staff, especially staff in the Center for Families, Children & the Courts (CFCC) and the Center for Judiciary Education & Research (CJER), has received inquiries from judges, court staff, and justice partners about resources available to help the courts address issues related to the SIJ process. Staff has created or identified several resources to assist the superior courts in implementing SB 873 and exercising jurisdiction over unaccompanied, undocumented children.

Immigration Considerations in Juvenile Court video.

This 64-minute video, available at [CJER Online](#), answers many questions regarding the state court role in making predicate findings for applications for special immigrant juvenile (SIJ) classification and other visa options for undocumented youth. The impact of the Reuniting Immigrant Families Act (SB 1064) and the Immigration and Customs Enforcement (ICE) Parental Interests Directive on dependency cases is also discussed. Resource documents are included with the video.

Immigration Issues in Domestic Violence Cases training.

CFCC staff delivered, in conjunction with CJER's Fall 2014 Primary Assignment Orientations, a judicial education program entitled *Immigration Issues in Domestic Violence Cases* on September 18–19, 2014, in Anaheim. This course addressed, among other topics, the state court role in the special immigrant juvenile (SIJ) process. Course materials are posted at [CJER Online](#).

California Dependency Online Guide (CalDOG).

This grant-funded resource website for juvenile dependency judicial officers, attorneys, and other child welfare professionals, run by the Center for Families, Children & the Courts includes case law, sample motions, training materials, publications, and links to other resources related to

the topic of “Special Immigrant Juvenile.” Staff continually adds relevant materials to the site. If you do not already subscribe to CalDOG, you may do so at www.courts.ca.gov/dependencyonlineguide or by emailing dependencyguide@jud.ca.gov.

Other Resources

CFCC and CJER continue to develop materials and trainings in house and collect and disseminate resources developed by other governmental and private entities. Staff will post relevant resources on [CJER Online](#) and [CalDOG](#), as appropriate.

Publications:

- *CJER Bench Tool: Immigration Consequences of Juvenile Delinquency*
- A page on the Judicial Council self-help website dedicated to guiding immigrant youth through the state court part of the SIJ process, at www.courts.ca.gov/selfhelp-sijs.htm.
- Translation of forms and other publications into Spanish

Trainings. In addition to the events discussed above, education on the state court role in the SIJ process will be included in the following trainings for California judicial officers:

- Live training, *Advanced Issues in Probate and Mental Health*, October 6–8, 2014
- Live training, *Juvenile Law Institute*, November 3–5, 2014
- Live training, *Dependency Primary Assignment Orientation*, January 26–30, 2015
- Live training, *Family Law Primary Assignment Orientation*, January 26–30, 2015
- Broadcast, *Updates in Dependency, Delinquency, and Family Courts*, Spring 2015
- Live training, *Family Law Educational Program*, Spring 2015
- Live training, *Cow County Institute*, June 2015
- Live training, *Probate and Mental Health Institute*, scheduled Fall 2015

Executive branch websites. CDSS, in response to SB 1064, developed a webpage with links to resources for immigrant children and families at www.childsworld.ca.gov/PG3466.htm. The website of Latino Practice Advisory Committee (LPAC), a collaboration between DSS and the County Welfare Directors’ Association (CWDA), also provides an extensive collection of legal and policy materials related to SIJ classification at http://cssr.berkeley.edu/ucb_childwelfare/lpac/.

Attachments

1. Senate Bill 873 (Stats. 2014, ch. 685) §§ 1–2, 12–13
2. 8 U.S.C. § 1101(a)(27)(J)
3. U.S. Citizenship and Immigration Services, Special Immigrant Juvenile Status: Information for Juvenile Courts

Presiding Judges of the Superior Courts
Court Executive Officers of the Superior Courts
September 30, 2014
Page 19

CC/ls

cc: Hon. Tani G. Cantil-Sakauye, Chief Justice of California
Administrative Presiding Justices of the Courts of Appeal
Mr. Frank A. McGuire, Clerk of the Supreme Court
Clerk/Administrators of the Courts of Appeal
Members of the Judicial Council
Mr. Martin Hoshino, Administrative Director, Judicial Council
Ms. Jody Patel, Chief of Staff, Judicial Council
Mr. Curt Soderlund, Chief Administrative Officer, Judicial Council

Glossary of Acronyms Used

AAO: Administrative Appeals Office, USCIS

BIA: Board of Immigration Appeals

CalDOG: California Dependency Online Guide

CDSS: California Department of Social Services

CFCC: Center for Families, Children & the Courts, Judicial Council of California

CJER: Center for Judiciary Education & Research, Judicial Council of California

CWDA: County Welfare Directors Association of California

DHS: United States Department of Homeland Security

HHS: United States Department of Health and Human Services

ICE: United States Immigration and Customs Enforcement

INA: Immigration and Nationality Act

LPAC: Latino Practice Advisory Committee

LPR: Lawful Permanent Resident

NCSC: National Center for State Courts

ORR: Office of Refugee Resettlement

SIJ: Special Immigrant Juvenile

TVPRA: Trafficking Victims Protection Reauthorization Act of 2008

UCCJEA: Uniform Child Custody Jurisdiction and Enforcement Act

USCIS: United States Citizenship and Immigration Services

RELEVANT LEGAL AUTHORITIES

A. California Statutes

1. Senate Bill 873 (Stats. 2014, ch. 685) §§ 1–2, 12–13 [attached]
2. Code Civ. Proc., § 155 (special immigrant juvenile findings)
3. Evid. Code, § 757 (interpreter in proceeding to request SIJ findings)
4. Fam. Code, §§ 200 (jurisdiction), 3000–3465 (child custody), 6200–6409 (domestic violence prevention), 7500–7895 (parent-child relationship), 8500–9212 (adoption)
5. Prob. Code, §§ 1400–1490, 1500–1611, 2100–2360 (guardianships)
6. Welf. & Inst. Code, §§ 200–987 (juvenile court law), 10609.97 (child welfare and SIJ), 13300–13302 (legal representation)

B. Federal Statutes

1. Immigration and Nationality Act, 8 U.S.C. § 1101 et seq.
2. 8 U.S.C. § 1101(a)(27)(J) (definition of special immigrant juvenile) [attached]
3. 8 U.S.C. § 1154(a)(1)(G)(i) (petition process for SIJ classification)
4. 8 U.S.C. § 1153(b)(4) (allocation of special immigrant visas)
5. 8 U.S.C. § 1182 (grounds for inadmissibility)
6. 8 U.S.C. § 1232 (TVPRAs 2008)
7. 8 U.S.C. § 1255(h) (adjustment of status to lawful permanent resident)
8. 8 U.S.C. § 1421 (naturalization authority)

C. Federal Regulations

1. 8 C.F.R. § 103.2 (submission and adjudication of benefit requests)
2. 8 C.F.R. § 103.3 (denials, appeals, and precedent decisions)
3. 8 C.F.R. § 103.5 (reopening and reconsideration)
4. 8 C.F.R. § 103.7 (fees)
5. 8 C.F.R. § 204.11 (special immigrant juvenile classification)
6. 8 C.F.R. § 205.1 (revocation of approval)
7. 8 C.F.R. § 245.1 (adjustment of status to lawful permanent resident)
8. Special Immigrant Juvenile Petitions, 76 Fed. Reg. 54978 (Sept. 6, 2011)
9. *U.S. Citizenship and Immigration Services, Special Immigrant Juvenile Status: Information for Juvenile Courts* [attached]

D. California Cases

1. *In re Jose C* (2009) 45 Cal.4th 534 (state-federal relations; immigration)
2. *Leslie H v. Superior Court* (2014) 224 Cal.App.4th 340 (SIJ in delinquency)
3. *Eddie E. v. Superior Court* (2013) 223 Cal.App.4th 622 (SIJ in delinquency)
4. *B.F. v. Superior Court* (2012) 207 Cal.App.4th 621 (SIJ in probate)
5. *In re Y.M.* (2012) 207 Cal.App.4th 892 (SIJ in dependency)
6. *In re Nelson B.* (2013) 215 Cal.App.4th 1121 (UCCJEA and SIJ)

E. Federal Cases

1. *Arizona v. United States* (2012) 132 S.Ct. 2492 (state-federal relations; immigration)
2. *Printz v. United States* (1997) 521 U.S. 898 (state-federal relations; immigration)
3. *De Canas v. Bica* (1976) 424 U.S. 351 (state-federal relations; immigration)
4. *Testa v. Katt* (1947) 330 U.S. 386 (state-federal relations; judicial power)
5. *Holmgren v. United States* (1910) 217 U.S. 509 (state-federal relations; immigration; judicial power)
6. *Garcia v. Holder* (9th Cir. 2011) 659 F.3d 1261 (SIJ classification)
7. *Gao v. Jenifer* (6th Cir. 1999) 185 F.3d 548 (SIJ classification)
8. *Yeboah v. United States Dep't of Justice* (3d Cir. 2003) 345 F.3d 216 (SIJ classification)
9. *Perez-Olano v. Gonzalez* (C.D. Cal. 2008) 248 F.R.D. 248 (SIJ; state-federal relations)
10. *In re Perez-Quintanilla* (AAO 2007) A97 383 010 (specific consent; retention of juvenile court jurisdiction), 2007 WL 2410060

F. USCIS Policy Memorandums

1. *Donald Neufeld & Pearl Chang, Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions (USCIS Mar. 24, 2009)*, 2009 WL 1028912
2. *William R. Yates, Memorandum #3: Field Guidance on Special Immigrant Juvenile Status Petitions (USCIS May 27, 2004)*, 2004 WL 1638268

G. Other State Cases

1. *In re Mario S.* (N.Y. Fam. Ct. 2012) 38 Misc.3d 444, 954 N.Y.S.2d 843 (SIJ)

Senate Bill No. 873

CHAPTER 685

An act to add Chapter 7 (commencing with Section 155) to Title 1 of Part 1 of the Code of Civil Procedure, to add Section 757 to the Evidence Code ..., and to add Chapter 5.6 (commencing with Section 13300) to Part 3 of Division 9 of, the Welfare and Institutions Code ..., to take effect immediately, [as a] bill related to the budget.

[**Approved by Governor** September 27, 2014. **Filed with Secretary of State** September 27, 2014.]

LEGISLATIVE COUNSEL'S DIGEST

SB 873, Committee on Budget and Fiscal Review. Human services.

(1) Existing federal law, the Immigration and Nationality Act, establishes a procedure for classification of certain aliens as special immigrants who have been declared dependent on a juvenile court, and authorizes those aliens who have been granted special immigrant juvenile status to apply for an adjustment of status to that of a lawful permanent resident within the United States. Under federal regulations, state juvenile courts are charged with making a preliminary determination of the child's dependency, as specified. Existing federal regulations define juvenile court to mean a court located in the United States having jurisdiction under state law to make judicial determinations about the custody and care of juveniles.

Existing law establishes the jurisdiction of the juvenile court, which may adjudge a minor to be a dependent or ward of the court. Existing law also establishes the jurisdiction of the probate court. Existing law regulates the establishment and termination of guardianships in probate court, and specifies that a guardian has the care, custody, and control of a ward. Existing law establishes the jurisdiction of the family court, which may make determinations about the custody of children.

This bill would provide that the superior court, including the juvenile, probate, or family court division of the superior court, has jurisdiction to make judicial determinations regarding the custody and care of juveniles within the meaning of the federal Immigration and Nationality Act. The bill would require the superior court to make an order containing the necessary findings regarding special immigrant juvenile status pursuant to federal law, if there is evidence to support those findings. The bill would require records of these proceedings that are not otherwise

¹ SB 873; Stats. 2014, ch. 685, §§ 1–2, 12–13, 15–16, 20. This abridged version of SB 873 includes the full text of all sections directly related to undocumented children in the legal process. Not all of these sections are discussed in the covering memo.

protected by state confidentiality laws to remain confidential, and would also authorize the sealing of these records. The bill would require the Judicial Council to adopt any rules and forms needed to implement these provisions.

(2) Existing federal law, Title VI of the federal Civil Rights Act of 1964 and the Safe Streets Act of 1968, prohibit national origin discrimination by recipients of federal assistance.

The California Constitution provides that a person unable to understand English who is charged with a crime has the right to an interpreter throughout the proceedings. Existing law requires that court interpreters' fees or other compensation be paid by the court in criminal cases, and by the litigants in civil cases, as specified. Existing law requires, in any action or proceeding under specified provisions of the Family Code relating to domestic violence, an interpreter to be provided by the court for a party who does not proficiently speak or understand the English language to interpret the proceedings in a language that the party understands and to assist communication between the party and his or her attorney.

This bill would state that existing law and authority to provide interpreters in civil court includes providing an interpreter for a child in a proceeding in which a petitioner requests an order from the superior court to make the findings regarding special immigrant juvenile status.

(3)–(7) * * *

(8) Existing federal law, the Homeland Security Act of 2002, empowers the Director of the Office of Refugee Resettlement of the federal Department of Health and Human Services with functions under the immigration laws of the United States with respect to the care of unaccompanied alien children, as defined, including, but not limited to, coordinating and implementing the care and placement of unaccompanied alien children who are in federal custody by reason of their immigration status, including developing a plan to be submitted to Congress on how to ensure that qualified and independent legal counsel is timely appointed to represent the interests of each child, as provided. Existing law designates the State Department of Social Services as the single agency with full power to supervise every phase of the administration of public social services, except health care services and medical assistance.

This bill would require the State Department of Social Services, subject to the availability of funding, to contract with qualified nonprofit legal services organizations to provide legal services to unaccompanied undocumented minors, as defined, who are transferred to the care and custody of the federal Office of Refugee Resettlement and who are present in this state. The bill would require that the contracts awarded meet certain conditions.

(9) * * *

(10) This bill would provide that its provisions are severable.

(11) Existing constitutional provisions require that a statute that limits the right of access to the meetings of public bodies or the writings of public officials and agencies be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.

This bill would make legislative findings to that effect.

(12)–(14) * * *

(15) This bill would declare that it is to take effect immediately as a bill providing for appropriations related to the Budget Bill.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Chapter 7 (commencing with Section 155) is added to Title 1 of Part 1 of the Code of Civil Procedure, to read:

CHAPTER 7. Special Immigrant Juvenile Findings

155. (a) A superior court has jurisdiction under California law to make judicial determinations regarding the custody and care of children within the meaning of the federal Immigration and Nationality Act (8 U.S.C. Sec. 1101(a)(27)(J) and 8 C.F.R. Sec. 204.11), which includes, but is not limited to, the juvenile, probate, and family court divisions of the superior court. These courts may make the findings necessary to enable a child to petition the United States Citizenship and Immigration Service[s] for classification as a special immigrant juvenile pursuant to Section 1101(a)(27)(J) of Title 8 of the United States Code.

(b)(1) If an order is requested from the superior court making the necessary findings regarding special immigrant juvenile status pursuant to Section 1101(a)(27)(J) of Title 8 of the United States Code, and there is evidence to support those findings, which may consist of, but is not limited to, a declaration by the child who is the subject of the petition, the court shall issue the order, which shall include all of the following findings:

(A) The child was either of the following:

- (i) Declared a dependent of the court.
- (ii) Legally committed to, or placed under the custody of, a state agency or department, or an individual or entity appointed by the court. The court shall indicate the date on which the dependency, commitment, or custody was ordered.

(B) That reunification of the child with one or both of the child's parents was determined not to be viable because of abuse, neglect, abandonment, or a similar basis pursuant to California law. The court shall indicate the date on which reunification was determined not to be viable.

(C) That it is not in the best interest of the child to be returned to the child's, or his or her parent's, previous country of nationality or country of last habitual residence.

(2) If requested by a party, the court may make additional findings that are supported by evidence.

(c) In any judicial proceedings in response to a request that the superior court make the findings necessary to support a petition for classification as a special immigrant juvenile, information regarding the child's immigration status that is not otherwise protected by state confidentiality laws shall remain confidential and shall be available for inspection only by the court, the child who is the subject of the proceeding, the parties, the attorneys for the parties, the child's counsel, and the child's guardian.

(d) In any judicial proceedings in response to a request that the superior court make the findings necessary to support a petition for classification as a special immigrant juvenile, records of the proceedings that are not otherwise protected by state confidentiality laws may be sealed using the procedure set forth in California Rules of Court 2.550 and 2.551.

(e) The Judicial Council shall adopt any rules and forms needed to implement this section.

SEC. 2. Section 757 is added to the Evidence Code, to read:

757. Pursuant to this chapter, other applicable law, and existing Judicial Council policy, including the policy adopted on January 23, 2014, existing authority to provide interpreters in civil court includes the authority to provide an interpreter in a proceeding in which a petitioner requests an order from the superior court to make the findings regarding special immigrant juvenile status pursuant to Section 1101(a)(27)(J) of Title 8 of the United States Code.

SECS. 3–11. * * *

SEC. 12. The Legislature finds and declares that the number of unaccompanied, undocumented minors in California has surged in recent months, often overwhelming the agencies and organizations that care for these minors and help to determine their immigration status. Legal representation for unaccompanied undocumented minors in California is important to assist these

minors in navigating through federal immigration proceedings as well as related state court actions.

SEC. 13. Chapter 5.6 (commencing with Section 13300) is added to Part 3 of Division 9 of the Welfare and Institutions Code, to read:

CHAPTER 5.6. Legal Counsel for Unaccompanied Undocumented Minors

13300. (a) Subject to the availability of funding in the act that added this chapter or the annual Budget Act, the department shall contract, as described in Section 13301, with qualified nonprofit legal services organizations to provide legal services to unaccompanied undocumented minors who are transferred to the care and custody of the federal Office of Refugee Resettlement and who are present in this state.

(b) Legal services provided in accordance with subdivision (a) shall be for the sole purpose of providing legal representation to unaccompanied undocumented minors who are in the physical custody of the federal Office of Refugee Resettlement or who are residing with a family member or other sponsor.

(c) For purposes of this chapter, the term “unaccompanied undocumented minors” means unaccompanied alien children as defined in Section 279(g)(2) of Title 6 of the United States Code.

(d) For purposes of this chapter, the term “legal services” includes culturally and linguistically appropriate services provided by attorneys, paralegals, interpreters and other support staff for state court proceedings, federal immigration proceedings, and any appeals arising from those proceedings.

13301. Contracts awarded pursuant to Section 13300 shall fulfill all of the following:

(a) Be executed only with nonprofit legal services organizations that meet all of the following requirements:

- (1) Have at least three years of experience handling asylum, T-Visa, U-Visa, or special immigrant juvenile status cases and have represented at least 25 individuals in these matters.
- (2) Have experience in representing individuals in removal proceedings and asylum applications.
- (3) Have conducted trainings on these issues for practitioners beyond their staff.

- (4) Have experience guiding and supervising the work of attorneys whom themselves do not regularly participate in this area of the law but nevertheless work pro bono on the types of cases described in paragraph (1).
 - (5) Are accredited by the Board of Immigration Appeals under the United States Department of Justice's Executive Office for Immigration Review or meet the requirements to receive funding from the Trust Fund Program administered by the State Bar of California.
- (b) Provide for legal services to unaccompanied undocumented minors on a fee-per-case basis, as determined by the department, which shall include all administrative and supervisory costs and court fees.
- (c) Require reporting, monitoring, or audits of services provided, as determined by the department.
- (d) Require contractors to coordinate efforts with the federal Office of Refugee Resettlement Legal Access Project in order to respond to and assist or represent unaccompanied undocumented minors who could benefit from the services provided under this chapter.
- (e) Require contractors to maintain adequate legal malpractice insurance and to indemnify and hold the state harmless from any claims that arise from the legal services provided pursuant to this chapter.

13302. Notwithstanding any other law:

- (a) Contracts awarded pursuant to this chapter shall be exempt from the personal services contracting requirements of Article 4 (commencing with Section 19130) of Chapter 5 of Part 2 of Division 5 of Title 2 of the Government Code.
- (b) Contracts awarded pursuant to this chapter shall be exempt from the Public Contract Code and the State Contracting Manual, and shall not be subject to the approval of the Department of General Services.
- (c) The client information and records of legal services provided pursuant to this chapter shall be subject to the requirements of Section 10850 and shall be exempt from inspection under the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Part 1 of the Government Code).
- (d) The state shall be immune from any liability resulting from the implementation of this chapter.

SEC. 14. * * *

SEC. 15. The provisions of this act are severable. If any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

SEC. 16. The Legislature finds and declares that Section 1 of this act, which adds Chapter 7 (commencing with Section 155) to Part 1 of Title 1 to the Code of Civil Procedure, and Section 13 of this act, which adds Chapter 5.6 (commencing with Section 13300) to Part 3 of Division 9 of the Welfare and Institutions Code, impose a limitation on the public's right of access to the meetings of public bodies or the writings of public officials and agencies within the meaning of Section 3 of Article I of the California Constitution. Pursuant to that constitutional provision, the Legislature makes the following findings to demonstrate the interest protected by this limitation and the need for protecting that interest:

(a) In order to protect the privacy interests of those minors who are seeking special immigrant juvenile status, it is essential to maintain the confidentiality of the records described in Section 1 of this act.

(b) In order to protect the privacy interests of unaccompanied undocumented minors and to protect records covered by the attorney client privilege, it is essential to maintain the confidentiality of the records described in Section 13 of this act.

SECS. 17–19. * * *

SEC. 20. This act is a bill providing for appropriations related to the Budget Bill within the meaning of subdivision (e) of Section 12 of Article IV of the California Constitution, has been identified as related to the budget in the Budget Bill, and shall take effect immediately.

8 U.S.C. § 1101

(a) As used in this chapter—

(1)–(26) * * *

(27) The term “special immigrant” means—

(A)–(I) * * *

(J) an immigrant who is present in the United States—

(i) who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States,

and whose reunification with 1 or both of the immigrant’s parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law;

(ii) for whom it has been determined in administrative or judicial proceedings that it would not be in the alien’s best interest to be returned to the alien’s or parent’s previous country of nationality or country of last habitual residence; and

(iii) in whose case the Secretary of Homeland Security consents to the grant of special immigrant juvenile status, except that—

(I) no juvenile court has jurisdiction to determine the custody status or placement of an alien in the custody of the Secretary of Health and Human Services unless the Secretary of Health and Human Services specifically consents to such jurisdiction; and

(II) no natural parent or prior adoptive parent of any alien provided special immigrant status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter;

(K)–(M) * * *

(31)–(42) * * *



U.S. Citizenship and Immigration Services

Special Immigrant Juvenile Status: Information for Juvenile Courts

What is Special Immigrant Juvenile Status?

Some children present in the United States without legal immigration status may be in need of humanitarian protection because they have been abused, abandoned, or neglected by a parent. Special Immigrant Juvenile (SIJ) status is an immigration classification that may allow for these vulnerable children to immediately apply for lawful permanent resident status (“LPR” status or a “Green Card”).

Who is Eligible?

A child must be unmarried, under 21 years of age at the time of filing with U.S. Citizenship and Immigration Services (USCIS), physically present in the United States, and have a qualifying juvenile court order. SIJ-eligible children may come from a variety of circumstances, including, but not limited to, children in federal custody in the U.S. without parents or legal guardians, children in a state’s child welfare system (for example, foster care), and children in the court-ordered custody of a state agency or individual. This can include adoption or guardianship.

What is the Role of the Juvenile Court?

Juvenile courts issue orders that help determine a child’s eligibility for SIJ status. A child cannot apply to USCIS for SIJ status without an order from a juvenile court. However, juvenile judges should note that providing an order does not grant SIJ status or a “Green Card” - only USCIS can grant or deny these benefits. The role of the court is to make factual findings based on state law about the abuse, neglect, or abandonment; family reunification; and best interests of the child.



Which Courts May Issue the Order?

A juvenile court is a court in the United States that has jurisdiction under state law to make judicial determinations about the custody and care of children. Examples include: juvenile, family, orphans, dependency, guardianship, probate and delinquency courts.

What is the Role of USCIS?

USCIS determines eligibility for SIJ status by adjudicating the **Form I-360**, Petition for Amerasian, Widow(er), or Special Immigrant, which includes review of supporting documentation and the juvenile court order. USCIS may also determine a special immigrant juvenile’s eligibility for lawful permanent resident status by adjudicating **Form I-485**, Application to Register Permanent Residence or Adjust Status.

Helpful Tips for Juvenile Courts

- **Be familiar with current immigration law.** The Immigration and Nationality Act (INA) section 101(a)(27)(f) establishes the definition of a Special Immigrant Juvenile. This definition can change by acts of Congress. For example, the Trafficking Victims Protection Reauthorization Act of 2008, **Pub. L. 110-457** amended the SIJ **definition**. These statutory changes supersede portions of the Code of Federal Regulations relating to SIJ status (**8 CFR 204.11**). Note: All findings must be based on state law.
- **Ensure HHS consent has been obtained if it is necessary.** If a child currently in the custody of the U.S. Department of Health and Human Services (HHS), Office of Refugee Resettlement (ORR) seeks a juvenile court order that also alters his or her custody status or placement, HHS must specifically consent to the court's jurisdiction. If the order simply restates the child's current ORR placement, HHS consent is not required. See ORR's website at <http://www.acf.hhs.gov/programs/orr/programs/ucs>.
- **Be timely.** A child must obtain a juvenile court order and apply to USCIS for SIJ status before the child ages out of the juvenile court's jurisdiction (usually before 18 years of age), and before he or she turns 21 (even in states where juvenile court jurisdiction extends beyond age 21). In some cases, children may need to obtain SIJ status prior to turning 18 years of age to access certain benefits (such as federally-funded foster care).
- **Ensure the court order makes all required findings.** The order must make the following findings:
 - o Declares the child dependent on the court, or legally commits or places the child under the custody of either a state agency or department or an individual or entity appointed by a juvenile court.
 - o Reunification with one or both of the child's parents is not viable due to abuse, neglect, abandonment, or a similar basis under state law. Note: The abuse may have occurred in the United States or prior to the child's arrival in the United States.
 - o It would not be in the child's best interest to be returned to his or her country of origin.
- **Provide a detailed court order.** The Secretary of Homeland Security, through USCIS, must consent to the grant of SIJ status. This means that for a child to be eligible for SIJ status, USCIS must determine that the juvenile court order was sought primarily to obtain relief from abuse, neglect or abandonment, rather than primarily to obtain an immigration benefit. Template orders are usually not sufficient to establish this. The court order should include the factual basis for the findings on parental reunification, dependency or custody, and best interests. Alternatively, the child or the child's attorney may submit separate findings of fact, records from the judicial proceedings, or affidavits summarizing the evidence presented to the court. The court order need not be overly detailed, and need not recount all of the circumstances of the abuse, abandonment or neglect, but must show the factual basis for the court's findings.

