SPECIAL IMMIGRANT JUVENILE STATUS ROLE-PLAY: RESPONDING TO COMMON QUESTIONS IN STATE COURT PROCEEDINGS*

Advocates may find that some state court judges are unfamiliar with Special Immigrant Juvenile Status (SIJS), or uncomfortable with their role in helping an individual access a form of federal immigration relief. This resource is intended to help advocates address the concerns of state courts with respect to Special Immigrant Juvenile Status petitions. *Please be aware that the following role-play is fictitious and advocates will need to tailor their responses to judges based on the particular framing of questions from judges, as well as the particular facts of their case.*

General Questions that Arise in State Court Proceedings

1. ***Judge*: Doesn't this minor need to be eligible for long-term foster care in order for me to make these SIJS findings? This minor is clearly not eligible for foster care since he is residing with his mother, so I don't understand why you've requested the findings.**

Possible response: Your Honor, the requirement that children be eligible for long-term foster care is old law and is no longer a factual finding required by the state court before a child may apply with immigration authorities for Special Immigrant Juvenile Status. The Trafficking Victims Protection Reauthorization Act of 2008 amended the SIJS statute to remove the long-term foster care language and instead replaced it with the required state court finding that the child be unable to reunify with one or both parents due to abuse, abandonment or neglect or a similar basis under state law. *See* 8 U.S.C. § 1101(a)(27)(J). I would also like to point out that the court should not rely on the regulations in 8 C.F.R. § 204.11 insofar as they conflict with the current law, because the regulations have not yet been updated to reflect that change in statutory language despite the fact that the law was passed in 2008. The finding that my client is requesting today is that he is unable to reunify with his father due to abuse and abandonment, and the fact that he resides with his mother is not relevant to the determination of whether reunification is viable with his father.

Special Immigrant Juvenile Status is an avenue for undocumented children to obtain legal status when they cannot be reunified with one or both parents due to abuse, neglect, or abandonment and it is not in their best interests to return to their home country. The federal government tasks state courts with making three findings:

1) that the child has been declared dependent on a juvenile court or legally committed to or placed under the custody of a state agency or department or an individual or entity appointed by a state or juvenile court;
2) that 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; and
3) that it is not in the child's best interest to be returned to his or her country of nationality or last habitual residence.

These three findings must be made before a child can even apply for SIJS before the federal agency, U.S. Citizenship and Immigration Services (USCIS). Some state courts have been concerned about their proper role in considering SIJS petitions for these findings.

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2. *Judge*: How can I make a finding that reunification is not viable when this minor has submitted evidence that he has a loving mother in his home country?

Possible response when loving parent continues to reside with unfit parent: [Note: this scenario could be considered to be a "two-parent SIJS" case rather than a "one-parent SIJS" case as one parent's inability to protect the child from an unfit parent could lead to an inability to reunify with the loving parent due to neglect.] Your Honor, even though minor's mother is loving, she was unable to protect this child from his father, who physically abused him. My client's mother continues to reside with the unfit father, and for this reason we argue that our client's mother's failure to protect him from his father constitutes neglect such that he is unable to reunify with her either, under these circumstances.[1]

Possible response when loving parent does not reside with unfit parent: Your Honor, we are only alleging that my client is unable to reunify with his father, we are not alleging that he is unable to reunify with his mother, nor are we alleging that she is an unfit parent. The SIJS statute only requires that the child be unable to reunify with *one* parent – it does not require that the child be unable to reunify with *both* parents. In fact, the immigration agency charged with making determinations regarding SIJS eligibility, U.S. Citizenship and Immigration Services, or USCIS, consistently interprets the statute to convey eligibility for SIJS when a child is unable to reunify with only one parent, even if the child can reunify with a second, safe parent. Thus, the fact that my client has a "loving mother" in his home country is not relevant as to the reunification prong of the SIJS findings, since we are not alleging that reunification is not viable with the mother.

Nonetheless, the mother's presence in the home country may be relevant for this court's "best interest" determination. However, other factors point to it being in the child's best interest not to return to his country of origin. Foremost, Petitioner's developmental disability requires special education services unavailable to him in his home country, thus he is effectively foreclosed from receiving a meaningful education in his home country. Moreover, there is rampant violence in Petitioner's home country, including in his neighborhood, where neither his mother nor the police have been able to protect him from gang violence. Lastly, Petitioner is thriving and safe in the care of his uncle in the U.S., where he is attending school and receiving an education appropriate for his disability. Taking these factors together, we submit that it is not in the Petitioner's best interest to be returned to his home country.

3. *Judge*: Couldn't you argue that it would be in the best interest of every child in Central America to remain in the U.S.?

Possible response: Respectfully, Your Honor, no, you could not argue that. The best interests determination must be fact-specific and individualized. Throughout the United States, in cases ranging from adoption to custody disputes, courts have emphasized the need for individualized best interests determinations. This principle is also recognized in international law, in the United Nations Convention on the Rights of the Child. Although many children may be suffering in Central America at this time because of generalized violence and impunity, there could also be factors indicating that it would be in the best interests of some children to remain in those countries, where, for example, they reside with loving family members that are able to protect them from harm. In the instant case, we have included evidence indicating that it would not be in the Petitioner's best interest to return to his country of origin because Petitioner has no adult caregiver in his home country and has been threatened and harassed by gang members in his community.

[1] Depending upon the relevant law in your jurisdiction, this may be a weak argument for neglect. Although it should suffice to argue the non-viability of reunification with only one parent (in this example, the father), advocates may wish to argue that reunification is not viable with both parents if there are grounds for such an argument, in order to best protect their client's eligibility for SIJS. That way, in the event that a judge takes issue with the "1 or both parents" language of the statute, advocates may still be able to argue that the child meets the requirements for SIJS findings.

Further, in the U.S. he is residing with his maternal aunt, in whose care he is flourishing and attending school, and with whom he does not have to worry about threats to his life or well-being, or where his next meal will come from. Accordingly, we submit that it is not in the Petitioner's best interest to be returned to his country of origin.

- *California Practice Pointer*: In *Leslie H. v. Superior Court*, the Fourth District Court of Appeals held that the lower court had erred in concluding that repatriation was in the minor's best interest, noting "[t]he court based its finding on anecdotal impressions, untethered to any evidence in this case, that parents of troubled immigrant children may sometimes 'send their children back to Mexico to get them of [sic] out of the negative environment that has placed them in the juvenile court.' But the juvenile court ignored that Leslie as an unaccompanied minor had no one to return to safely in Mexico…" *Leslie H. v. Superior Court* (2014) 224 Cal.App.4th 340, 352; *see also Eddie E. v. Superior Court*, No. G049637, 2015 Cal App. LEXIS 136 (Cal. Ct. App. Feb. 11, 2015) (stating, "[t]he court's conclusion — that sending petitioner to a foreign country with no support at all is better than him remaining here — finds no support in either reason or evidence."). Advocates should cite to this language when judges make floodgates arguments like the one above.

Custody Proceedings

4. ***Judge*: I understand that the primary purpose of seeking these findings from the state court must be for the minor to protect herself from abuse, neglect, or abandonment. Could that really be the case here where the minor is already safely residing with her mother?**

Possible response: Your Honor, respectfully, immigration authorities alone, and not the state courts, make a determination as to whether a child qualifies for SIJS, including whether the applicant sought the state court's jurisdiction primarily for immigration purposes, rather than for purposes of relief from abuse, abandonment or neglect.

Even so, Your Honor, you can see here that my client and her mother are seeking this court's jurisdiction to protect her from her father's neglect and abandonment. The underlying custody case is to ensure that the child remains safely in her mother's sole custody, and that her father not have the legal authority to make decisions for the child. That it also provides a vehicle for SIJS findings does not mean that the court case was brought primarily for immigration purposes. My client is lacking any fit parental caretaker in the home country because her father abandoned her. She is also presently in immigration removal proceedings, often referred to as "deportation proceedings." If she does not obtain relief from deportation in the form of SIJS, it is extremely likely that she will be ordered removed to her home country, where she would again fall victim to her father's neglect and abandonment. Immigration authorities do not take into account the best interests of a child before deciding whether to remove a child from the United States. So, even though she currently safely resides in the United States with her mother, the only way her mother can protect her from her father's abandonment and give life to her custody rights is to seek this Court's protection.

We therefore assert, Your Honor, that our client and her mother are only motivated by concerns for my client's welfare. Moreover, as the Fourth Appellate District in California acknowledged in the *Leslie H.* decision: "The juvenile court need not determine any other issues, such as what the motivation of the juvenile in making application for the required findings might be…; and whether the USCIS, the federal administrative agency charged with enforcing the immigration laws, may or may not grant a particular application for adjustment of status as a SIJ." *Leslie H. v. Superior Court* (2014) 224 Cal.App.4th 340. Thus, immigration authorities are the proper adjudicators to make determinations about whether my client's application for SIJS is within the spirit of the statute. We are asking you, Your Honor, to make factual findings

regarding my client's welfare, which will merely enable her to have the opportunity to apply for SIJS with immigration authorities.

5. ***Judge*: How can I find that the child has been placed in the custody of an individual appointed by the court when I am just making a custody determination and the minor is already residing with his mother? In what sense would I be "appointing" his mother to the role she is already playing in his life?**

Possible response: The SIJS statute does not require that the court be *changing* anything about the physical placement of the child. In fact, the statute itself – as well as the federal *Perez-Olano* settlement agreement governing SIJS – recognizes that in many cases children may seek SIJS predicate orders without a change to the child's "custody status or placement." So the fact that the child already resides in his mother's physical custody does not bar this finding. Moreover, the court is indeed placing the child in the mother's custody in that the court is granting the mother *full* custody of the child. This is a legal alteration of the child's status vis-à-vis his mother and his father. Thus the court is creating a new role for the mother – as sole legal custodian – and then placing the child under his mother's new custody.

- *California Practice Pointer*: California's new law SB 873 makes clear that family courts in California have jurisdiction to hear SIJS petitions and make SIJS findings. Practitioners can leverage the language of this new law to argue that under California law, custody placements do satisfy the first finding required for SIJS. *See* Cal. Code Civ. Proc. § 155. The September 30, 2014 Judicial Council Memorandum on SB 873 also addresses this situation, stating that: "a child whose parent was awarded sole custody based on another parent's conduct… assuming no other impediments…" will be eligible for the finding that she has come under the supervision of the court.[2]

6. ***Judge*: I understand that you've provided notice to the child's father in this case, but I'm concerned that he has not responded and that there appears to be no incentive for him to do so in this case since these SIJS findings that you are requesting will ultimately benefit his child?**

Possible response: Respectfully your honor, we have provided proper notice to the father, allowing him to respond in this case if he wishes to retain custody of his child. He has not responded. The facts of this case are, very sadly, that the father abandoned his child, failing to provide him with financial or emotional support, and failing to protect him from the considerable harm he has suffered. The child and his mother have submitted sworn declarations attesting to the abuse and subsequent abandonment that the child suffered at the hands of his father. Further, they are both available to testify to those facts in court today if necessary. Absent an adverse credibility finding as to the child or mother, there is no reason to question the veracity of the abandonment and abuse that the child suffered. The legal standard is not heightened or altered in this case simply because the child has also requested SIJS findings.

- *California Practice Pointer*: Per the *Leslie H.* decision, the role of the juvenile court in the SIJS process is to determine discrete factual issues and not to "pre-screen" potential SIJS applications for possible abuse on behalf of USCIS. *Leslie H. v. Superior Court* (2014) 224 Cal.App.4th 340, 351; *see also Eddie E. v. Superior Court*, No. G049637, 2015 Cal App. LEXIS 136 (Cal. Ct. App. Feb. 11, 2015). Further, under Section 155(b) of the California Code of Civil Procedure, the evidence in support of a request for SIJS findings may consist of a declaration by the child who is the subject of the petition and "[i]f an order is requested from the superior court making the

[2] *See Memorandum to the Presiding Judges and Court Executive Officers of the Superior Courts: Senate Bill 873 and the Special Immigrant Juvenile Process in the Superior Courts* (Sept. 30, 2014), p. 14, *available at* http://www.ncjfcj.org/sites/default/files/SIJ%2BMemo%2Bfor%2BCourts%2BSeptember%2B2014.pdf (last visited Feb. 19, 2015).

necessary findings regarding special immigrant juvenile status…and there is evidence to support those findings…the court *shall* issue the order" (emphasis added).

Delinquency Proceedings

7. *Judge*: Does this child really deserve to get a benefit when they're in court because they've broken the law? Doesn't this incentivize bad behavior?

Possible response: Congress did not intend to bar youth in delinquency from applying for SIJS or other forms of immigration relief. In fact, juvenile delinquency adjudications are not convictions for immigration purposes and therefore, do not trigger immigration consequences in most cases. The SIJS findings will just allow the Petitioner to apply for immigration relief and assert a defense to deportation in removal proceedings, they do not guarantee that he will actually obtain immigration relief. Further, it is unlikely that a minor would be aware of the existence of SIJS without consulting with an experienced immigration attorney, and so unlikely to incentivize delinquent behavior. Moreover, advocates understand that if there is any fraud in a youth's case, immigration authorities take this very seriously and it can result in a denial of the application for SIJS and can bar the youth from future applications for other kinds of immigration relief. Acts of juvenile delinquency are also taken very seriously as negative discretionary factors in any immigration application and must be overcome in immigration proceedings. For that reason alone, committing an offense in order to obtain SIJS would be an incredibly unwise approach. This concern is also mitigated by the fact that the statute requires two additional findings beyond the custody determination. Plainly, all minors who are found delinquent would not be eligible for SIJS because reunification also must not be viable with a parent, and it must not be in the child's best interest to return to their country of origin.

- *California Practice Pointer*: In *Leslie H. v. Superior Court*, the Fourth District Court of Appeals made clear that the lower court had erred in considering whether making SIJS findings in delinquency proceedings would incentivize lawlessness. *Leslie H. v. Superior Court* (2014) 224 Cal.App.4th 340, 351 (stating, "The juvenile court need not determine any other issues, such as what the motivation of the juvenile in making application for the required findings might be…; whether allowing a particular child to remain in the United States might someday pose some unknown threat to public safety…") (quoting *Matter of Mario S.*, 954 N.Y.S.2d 843, 852-853 (N. Y. Fam. Ct. 2012)). This decision should allay any concerns of delinquency courts that making SIJS findings for delinquent youth is inappropriate.

8. *Judge*: If I understand correctly, you're arguing that this court placed your client in the custody of an agency or department of a state. How can you say that he's in the custody of the probation department when he lives at home with his father? That seems like a real stretch to interpret the statute in that manner.

Possible response: Admittedly, Your Honor, the situation would be more straightforward if the child were in the physical custody of the probation department – for example, in a juvenile hall or probation-run group home. Nonetheless, this child is still clearly eligible for SIJS because the court has placed the child in the *legal* custody of the probation department (here, an "agency or department of a State"). In establishing the child's wardship, the court removed the child from his parents' legal custody (though of course did not terminate parental rights) and placed that custody with the probation department – "legally commit[ing]" the child to the probation department. In fact, the child was committed to the "care, custody and control" of the probation department. Further, the probation department exercises control over this child's life – where he can live, what services he must participate in, that he must subject himself to swabs, fingerprints and blood tests, etc. Moreover, this is the interpretation adopted by the California Fourth

District Court of Appeals in a published decision *Leslie H. v. Superior Court* (2014) 224 Cal.App.4th 340. In *Leslie H.,* the court determined that a child who "remained subject to continued juvenile court jurisdiction and supervision on probation terms" met the "commitment" requirement for SIJS, despite the fact that the child was not in the physical custody of the probation department. This child is no different. He is subject to this court's jurisdiction, is supervised on probation terms, and thus under *Leslie H*. meets this first SIJS requirement.

Dependency Proceedings

9. *Judge*: I can't make these findings because the father still receives reunification services. Why are they being requested?

Possible response: Your Honor, the findings are being requested now because the child qualifies for SIJS findings now, as the court has already terminated reunification services for the child's mother. The previous version of the SIJS statute required a finding that a child be "eligible for long-term foster care" – which, under the regulations, meant that "a determination has been made by the juvenile court that family reunification is no longer a viable option." This may have been the statutory scheme the last time this court entertained a SIJS motion. However, the TVPRA of 2008 changed this "eligible for long-term foster care" requirement to a new requirement that the child's "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." Thus, the portion of the regulation related to "family reunification" is no longer valid because it is now in conflict with the amended statute, under clearly established federal case law governing agency regulations.

That the father still receives reunification services does not bar the court from making SIJS findings. The "1 or both" language of the statute should be read to cover this situation because the plain language of the statute requires failed reunification with either one or both parent, and to read it otherwise would be to read out the "1 or" language. Even if this court considers this language to be ambiguous, the legislative history does not contradict this reading, and the purpose on its face is to protect immigrant children (and in fact the TVPRA broadened this). Further, USCIS guidance supports this reading, and under case law this interpretation must be given weight. For example, a USCIS pamphlet on SIJS states that: "SIJS eligible children may . . . be living with . . . the non-abusive parent." Further, a national survey administered by the Immigrant Legal Resource Center demonstrates that USCIS does approve these cases. There is also an Administrative Appeals Office decision from June 2013, wherein the AAO, the administrative agency that reviews the decisions of USCIS, reversed a denial of a one-parent SIJS case. An EOIR San Antonio Immigration Court decision from 2009 also reopened a removal case where a child had an SIJS order based only on reunification not being viable with father (while the child resided with mother). Nothing in the statute or other federal guidance suggests that state courts should "pre-screen" potential applicants for SIJS, as the federal agency that is charged with interpreting this statute, U.S. Citizenship and Immigration Services, or USCIS, does its own adjudication of the SIJS petition.

- *California Practice Pointer*: Under recent California case law, both the First and Fourth Appellate Districts have held that "one or both parents" should be interpreted literally to mean that a child may be eligible for SIJS when reunification is not viable only as to one parent. *See In re Israel O.* (2015), 233 Cal. App. 4th 279; *Eddie E. v. Superior Court*, No. G049637, 2015 Cal App. LEXIS 136 (Cal. Ct. App. Feb. 11, 2015).