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2017 SYMPOSIUM LECTURE:
SPECIAL IMMIGRANT JUVENILE STATUS IN VIRGINIA

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LECTURE

Hello, everyone. Good morning. Like the speaker before me, I'm talking about just a very small piece of immigration law, but a piece that has been very professionally important to me and is also very important to the children whom the law protects, and I've been told I have twenty minutes to do it, so I'm going to get on with it.

So, Special Immigrant Juveniles Status— and the acronym that I'm going to use throughout is "SIJS"—is a federal immigration law that was created to protect a certain class of particularly vulnerable children. That class of children being children for whom reunification with one of both of their parents is not viable due to abuse, abandonment, or neglect. So this class of immigrant children, Congress carved out a special protection for them in the form of special immigrant juvenile status. What makes it unique and why I like talking about it to Virginia lawyers is that it requires a unique interplay and access both to federal immigration systems as well as state courts, and in in our case, the courts in Virginia, namely the Juvenile [and] Domestic Relations [(J&DR)] district court, as well as the circuit courts and the courts beyond that. It was created in 1990, and then expanded in a way that would allow it to protect more children in 2008, and it is a path to permanent residency, which I know is sort of a concept that has been in the news recently.

So up here on this slide are the five requirements for SIJS. And as I mentioned, there is a unique interplay between the state courts and the federal courts and this list of five requirements is what a state court would have to find in order for a child, an immigrant child, to be eligible for this federal protection. So I won't read them out to you, but the most important factual underpinnings of a special immigrant juvenile status case are the bottom two. That, for the child, reunification with one or both of their parents must not be viable due to abuse, abandonment, neglect, or similar basis under state law. And then the second factual underpinning is that it has to be in the child's best interest to remain in the United States with their parent or the caregiver instead of returning to their home country. So those two factual requirements would be required, it would be required that a state court, again in Virginia: the J&DR courts, would make that finding in order to establish the child's eligibility for SIJS.

Now we refer to the order that the child would have to obtain or the caregiver would have to obtain on behalf of the child as the predicate order, because they have to have that in order to proceed with the federal authorities in order to obtain special immigrant juvenile status. However, as I'm

sure many of us know there's nothing in Virginia law called, "special immigrant juvenile status." So one of the requirements on the page before is that the child has to be validly within the jurisdiction of the court. So there has to be some jurisdictional underpinning in the Virginia courts that would allow the child to have access to the state judge in order to obtain the order that would establish their eligibility for SIJS. So most commonly that would be a custody case or any other proceeding validly before the courts, a delinquency case, foster care proceedings, etc. And so once a child was already in the jurisdiction of a state court, they would seek those factual findings in order to proceed with an application for special immigrant juvenile status with the federal authorities and that predicate order would obtain the facts that make them eligible for that status.

So what I would like to talk about is a precedential decision that happened—that came down recently in Virginia that has affected the way in which the special immigrant juvenile status cases are adjudicated in Virginia, and we're lucky to have one of the attorneys here that argued the case before the Virginia Court of Appeals and continues to be working on it as was mentioned in my introduction. In June of 2017, the Virginia Court of Appeals made this precedential decision that has caused a bit of chaos and confusion about what Virginia courts are supposed to do with these cases and what their authority is to enter and make those factual findings about the child's eligibility for special immigrant juvenile status: so again those two factual findings regarding abuse, abandonment, or neglect, and their best interest. So there were three major findings in the [*Canales v. Torres-Orellana*] decision that I'm going to talk about in turn.

So the first one is that the Juvenile and Domestic Relations district courts and the circuits in Virginia aren't authorized to make SIJS findings as an independent matter, and for practitioners that were doing this case that didn't come as a surprise. We all knew. We read the Virginia Code—that there's nothing in Virginia Code that says, "special immigrant juvenile status." It's not an independent petition that you can file for in state courts. There's no independent authority in the state of Virginia to seek special immigrant juvenile status. So this didn't affect the status quo, and again it didn't come as a surprise. There are states, and including one of our neighbors in Maryland, that do have this as an independent case type, but in Virginia that doesn't exist. So again didn't come as a surprise.

The second finding again didn't affect status quo was that while the Juvenile and Domestic Relations district courts and circuit courts aren't required to make these findings of facts, that they may make these findings of fact when it's in the course of their regular business and again this wasn't a surprise. Practitioners who had been doing SIJS cases in the past were fa-

miliar with this concept. That they didn't just show up at the Juvenile and Domestic Relations district court and say, "I'd like special juvenile status," that it had to be validly predicated upon some other case that was within the jurisdiction of these courts. So this didn't come as a surprise. What did come as a surprise, which I'm sure I'm not hiding really, there was this third finding. I quoted some of the language up there that "a Virginia Court has no authority to answer the specific question of that last factual finding," that I put on the slide up previously that, "it would not be in the child's best interest not to return to their home country." So essentially what the court said was, that "We're comfortable making the other findings of fact, but this last one that attorneys are asking for on behalf of these children that it's not in their best interest to remain with their parent in Virginia instead of returning—or the caregiver in Virginia instead of returning—to their home country"—the courts didn't feel comfortable making that finding of fact.

Now it came as a bit of surprise to many of the attorneys doing this case that both the finding number two of the Virginia Court of Appeals and finding number three could coexist, because while the Court of Appeals said, "Sure, sometimes kids might be able to get these orders in our court," they also said, "but hold up that last finding of fact, I'm not sure we are able to do that." So it's somewhat unclear how these two findings of fact how these two findings of the court can exist at the same time and hence the confusion by the state courts since that time. So in what advocates have responded to that last finding of the Virginia Court of Appeals was that there's ample authority in the Virginia Code which would allow a judge sitting in a custody case in the Juvenile and Domestic Relations district court or in the circuit court that would allow a judge to make almost any finding that was relevant in the best interests of the child. And where that authority comes from is principally two places, as well as some jurisprudence and case law. First of all, that the Virginia Code grants judges in J&DR courts a broad amount of discretion and authority to act in the furtherance of the best interests of the child. In creating the J&DR courts the code states that they should be able to act in the furtherance both in law and equity of the child's best interests because that's the entire purpose of their existence to ensure the best interests of the child, and to make sure the orders of the courts are furthering those interests. And second of all, the Virginia Code provides a long list of factors known as the best interest factors that should be considered in any case regarding the custody of a child and that those factors are delineated specifically to address the needs of the child and also include a catchall provision.

So the factors that are considered in any custody case include things we might all imagine: the parents past relationship with the child, their willing-

ness to continue on in a relationship, the particular needs of the child, etc. And then a last factor which is the catchall provision, which is anything that is necessary or proper for the court to consider in making a determination about the best interests of the child. So what advocates have said in response to this third finding, which some judges see as limiting their ability to make the special juvenile status findings, is that they do continue to have the authority to do so, because the Code has given them broad power to make decisions in furtherance of the best interests of the child, and the Code specifically gives us a list of things to consider, including anything that is necessary or proper and relates to the best interests of the child. And so given that broad authority and the fact that the Court of Appeals decision cannot and does not strip the court of the that authority, they should continue to be able to enter these factual findings on behalf of this protected class.

Now on the ground there's been some confusion. I practice in northern Virginia, and so I'm most familiar with the sort of the five northern Virginia counties that are happening there, but judges are confused as to what to do with this decision, because while it simultaneously says that they can make these findings of facts, it also sheds some amount of doubt on their ability to do so regarding the best interests of the child. So I think that it's still in flux a great deal as to what Virginia—how everything's going to play out. And the *Canales* decision, which had these three findings is on appeal in the Supreme Court of Virginia being handled by Legal Aid Justice Center, so hopefully there will be some clarity coming up soon. Thank you very much.

