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A NEW LEGAL FRAMEWORK FOR CHILDREN SEEKING SPECIAL IMMIGRANT JUVENILE STATUS

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ABSTRACT

Special Immigrant Juvenile status allows children who would otherwise be deported to remain in the United States when state law has assigned a legal guardian who legally resides in the U.S. The requisite interdependency of federal immigration law and state family law creates unique challenges which many lawyers and judges struggle to deal with in ways which benefit children as the law intends. This Article sheds light on difficulties posed by the need for federal interpretations of state law and reliance on state court decisions as lawyers, judges, children and parents attempt to resolve complex cases fairly in the best interests of juvenile immigrants.

INTRODUCTION

In 1990, Congress created Special Immigrant Juvenile status as a path to legalization for undocumented children in state foster care.¹ Twenty-seven years later, Special Immigrant Juvenile status continues to be a humanitarian-based immigration option for children who require state court intervention for their protection, but the population of children eligible under the statute has expanded.² Before the law was substantially amended in 2008, only children who were found dependent on a state court or whom such a court legally committed to, or placed under the custody of, a state agency or department and who were deemed eligible for long-term foster care qualified for this protection.³ Now there are children applying for Special Immigrant Juvenile status who live with a parent and have had no contact with the state foster care system,⁴ yet require the state court's involvement to ad-

¹ Special Immigrant Status; Certain Aliens Dependent on a Juvenile Court; Revocation of Approval of Petitions; Bona Fide Marriage Exemption to Marriage Fraud Amendments; Adjustment of Status, 58 Fed. Reg. 42,843 (proposed Aug. 12, 1993) (to be codified at 8 C.F.R. pts. 101, 103, 204, 205, and 245) (“No method existed for most court-dependent juvenile aliens to regularize their immigration status and become lawful permanent residents of this country, even though a United States juvenile court had found them dependent upon the court and eligible for long-term foster care, and it had determined that it was not in the children’s best interest to be returned to their home countries or the home countries of their parents.”).

² Donald Neufeld, *Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (March 24, 2009), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files/Memoranda/2009/TVP_RA_SIJ.pdf (“[I]t expanded the group of aliens eligible for SIJ status.”); see 8 U.S.C. § 1101 (a)(27)(J) (2016) (corresponds to the Immigration Act of 1997, Pub. L. No. 105-119, § 113, 111 Stat. 2440, 2460).

³ Immigration Act of 1997, Pub. L. No. 105-119, § 113, 111 Stat. 2440, 2460, amended by William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(d)(1), 122 Stat. 5044 (2008); 8 C.F.R. 204.11, (“Eligible for long-term foster care means that a determination has been made by the juvenile court that family reunification is no longer a viable option.”).

⁴ See, e.g., *Matter of B-M-D-*, ID# 15250, (AAO April 15, 2016) (finding petition of special immigrant

dress parental mistreatment. The amendments to the statute have led to protection for a greater number of vulnerable children.⁵

Special Immigrant Juvenile status implicates a unique interplay of state and federal law. Whereas immigration benefits are handled exclusively by the federal government,⁶ in this case, a state's determination regarding a child's need for protection is what determines eligibility for classification as a Special Immigrant Juvenile.⁷ It is well established that state courts are best suited to make determinations regarding the placement and best interest of the child.⁸ Still, the unique involvement of state courts in the federal process may explain why, despite the fact that the federal statute has contemplated state court participation since its creation in 1990, this area of practice continues to evolve among advocates, state court judges, and immigration adjudicators.

The manner in which the necessary determinations or findings can be sought varies greatly from state to state, as do state appellate court interpretations of the federal requirements.⁹ Furthermore, United States Citizenship and Immigration Services, the immigration adjudicating agency, as well as its respective appellate body, have sometimes questioned whether a state court has properly applied state law.¹⁰ Accordingly, it has been difficult for practitioners to simultaneously meet the requirements under a state's laws governing a child's placement and best interest, as well as meet the requirements of the federal adjudicators interpreting the federal Special Immigrant Juvenile statute.

juvenile residing with her mother was *bona fide* and merited USCIS consent); see also *Matter of [Redacted]*, 2015 WL 4061566 (DHS), (AAO June 3, 2015), (approving petition of special immigrant juvenile residing with her mother). Both non-precedent decisions are available at https://www.uscis.gov/laws/admin-decisions?topic_id=1&newdir=C6+-+Dependent+of+Juvenile+Court.

⁵ See Memo, Neufeld, Acting Assoc. Dir., Domestic Operations, USCIS HQOPS 70/8.5 at p. 2 (Mar. 24, 2009) ("First, it expanded the group of aliens eligible for SIJ status.").

⁶ The federal government has plenary power over immigration. *Texas v. U.S.*, 86 F. Supp. 3d 591, 651-52 (S.D. Tex. Feb. 16, 2015); see also, *Fiallo v. Bell*, 430 U.S. 787, 792 (1977).

⁷ 8 C.F.R. § 204.11(d)(2)(i)(2009) (stating SIJ status requires a state court order).

⁸ The *parens patriae* doctrine is a long-guiding principle used in the protection of the child by the states. See *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. U.S.*, 10 S. Ct. 792, 808 (1890) (noting the *parens patriae* doctrine "is a most beneficent function, and often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves.").

⁹ Laila L. Hlass, *States and Status: A Study of Geographical Disparities for Immigrant Youth*, 46 COLUM. HUM. RTS. L. REV. 266, 321 (Fall 2014) (describing how factors such as states' family laws and child welfare policies affect access to the special immigrant juvenile status).

¹⁰ See, e.g., *Matter of J-E-R-T*, ID# 16142 (AAO Apr. 20, 2016), available at https://www.uscis.gov/laws/admin-decisions?topic_id=1&newdir=C6+-+Dependent+of+Juvenile+Court (dismissing appeal where immigration adjudicating agency found state court order to be deficient because it did not cite to any state law on which juvenile court assumed jurisdiction over petitioner after he turned 18).

Though those currently eligible for Special Immigrant Juvenile status include children in a variety of placement settings (for example, with one parent, with a non-parent relative, or with a state department or agency), this Article will focus on child custody cases for children living with one parent who have suffered parental mistreatment by the other parent.¹¹ Part I looks at the history of and changes to the federal statute that made Special Immigrant Juvenile status possible for a greater number of children who require state court intervention. Part II provides an alternative way of conceptualizing the findings required by the federal statute; not as static, word-for-word findings required of a state court, but as concepts from a state's laws that substantively meet the federal definition of a Special Immigrant Juvenile. Part III illustrates how three threshold concepts in child custody cases align with the statutory requirements of the definition of a Special Immigrant Juvenile. This Article ultimately concludes that stakeholders must evolve to adequately protect vulnerable children residing with a parent yet requiring state court intervention.

I. HISTORY AND EVOLUTION OF SPECIAL IMMIGRANT JUVENILE

A. Status

Special Immigrant Juvenile (SIJ) status is a type of humanitarian-based immigration option under U.S. law for children who require state court intervention for their protection.¹² A grant of SIJ status by federal immigration adjudicators at U.S. Citizenship and Immigration Services (USCIS) means that the individual is granted classification as a Special Immigrant Juvenile and thereby eligible for an immigrant visa¹³ which can be used to apply for lawful permanent resident status, or a "green card."¹⁴ An individual who receives lawful permanent residency through SIJ status can apply for U.S. citizenship after five years as a lawful permanent resident if other require-

¹¹ See *Immigration Relief for Abused Children*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, https://www.uscis.gov/sites/default/files/USCIS/Green%20Card/Green%20Card%20Through%20a%20Job/Immigration_Relief_for_Abused_Children-FINAL.pdf.

¹² 8 U.S.C. § 1101(a)(27)(J) (2016); See also *Special Immigrant Juveniles (SIJ) Status*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <https://www.uscis.gov/humanitarian>.

¹³ The ability to apply for Lawful Permanent Residency is not always immediate. An immigrant visa must be available, and per statute, only a certain number of special immigrant visas are allocated each year. See 8 U.S.C. § 1153(b)(4) (2016).

¹⁴ See 8 U.S.C. § 1255(h) (2016) (outlining process for transitioning from Special Immigrant Juvenile Status to Permanent Lawful Resident Status); see also *U.S. Citizenship and Immigration Services, Special Immigrant Juvenile Status: Information for Juvenile Courts*, https://www.uscis.gov/sites/default/files/USCIS/Green%20Card/Green%20Card%20Through%20a%20Job/Information_for_Juvenile_Courts_-FINAL.pdf.

ments are met, such as good moral character and a basic understanding of English.¹⁵

The original statutory definition of a Special Immigrant Juvenile protected those who were declared dependent on a juvenile court, deemed eligible for long-term foster care, and had a determination by the court or an administrative body that it would not be in their best interest to return to their home country.¹⁶ The law was intended to benefit children in the state's foster care system who would otherwise be unable to legalize their immigration status.¹⁷

In the child welfare system the term dependency is used to describe a state's intervention when needed for the child's protection.¹⁸ Each state handles this system differently.¹⁹ The corresponding federal regulations state that a child "is eligible for classification as a special immigrant" if the child "has been declared dependent upon a juvenile court located in the United States in accordance with state law governing such declarations of dependency, while [...] under the jurisdiction of the court."²⁰

¹⁵ 8 U.S.C. § 1427(a)(1) (2012) (requiring lawful permanent residents seeking to become United States citizens to reside in United States at least five years before application); 8 U.S.C. § 1427(a)(3) (2012) (requiring lawful permanent residents seeking to become United States citizens to be ". . . a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States."); 8 U.S.C. §§ 1423(a)(1)-(2) (2012) (requiring lawful permanent residents seeking to become United States citizens to demonstrate (1) an understanding of the English language and (2) a knowledge and understanding of the ". . . fundamentals of the history, and of the principles and form of government, of the United States.").

¹⁶ Immigration Act of 1990, Pub. L. No. 101-649 § 153, 104 Stat. 4978.

¹⁷ Special Immigrant Status, 58 Fed. Reg. 42,843 (Aug. 12, 1993) (codified at 8 C.F.R. pts. 101, 103, 204, 205, and 245) ("Although many dependent alien juveniles were eligible for the legalization provisions of the Immigration Reform and Control Act of 1986 (IRCA), those benefits were only available for a limited period of time to certain aliens who had been in the United States since before 1982."); RUTH ELLEN WASEM, CONG. RESEARCH SERV., R43703, SPECIAL IMMIGRANT JUVENILES: IN BRIEF (2014)(indicating that "[P]rior to the statutory provisions added to the Immigration and Nationality Act (INA) in 1990, unauthorized minors who were declared dependent on state juvenile courts were akin to stateless individuals in that there was no home where they could return. They were perceived as a particularly vulnerable group within the child welfare system, given the unique difficulties they faced as they transitioned into adulthood. For example, because they were not legally present in the United States, they could not be employed when they reached a legal working age. They would be subject to removal proceedings and deportation to a country where they might have little attachment or familiarity."), available at <https://www.fas.org/sgp/crs/homesec/R43703.pdf>.

¹⁸ Marvin Ventrell, *Evolution of the Dependency Component of the Juvenile Court*, 49 JUV. & FAM. CT. J. 17, 34 (1998), ("Dependency refers to that portion of the juvenile court which handles the victimization of children through child abuse and neglect. Some jurisdictions refer to the dependency component as abuse and neglect, dependency and neglect, child welfare or child protection.") (reprinted with permission from the National Council of Juvenile and Family Court Judges).

¹⁹ See *id.* at 18; See, e.g., TEX. FAM. CODE ANN. §261.001 (2015) (demonstrating that the term "dependency" or "declared dependent on the court" does not appear in the Texas Family Code).

²⁰ 8 C.F.R. § 204.11 (2016). The requirement of being "declared dependent" is vague and in 1994 the Administrative Appeals Unit, the agency that hears appeals for denial of applications from USCIS (then INS), ruled in *Matter of Jose A. Menjivar*: "[T]here is no requirement that the State court decree contain the specific statement that the beneficiary is dependent upon the court. The acceptance of jurisdiction

In the Immigration and Nationality Technical Corrections Act of 1994, Congress added “or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State” to those declared dependent on a juvenile court.²¹ This constituted the first expansion of the statutory definition. Several years later, in 1997, the definition of Special Immigrant Juvenile was amended after some in Congress felt that this protection was being misused by foreign students.²² Accordingly, Congress limited the protection to those deemed eligible for “long-term foster care *due to abuse, neglect, or abandonment.*”²³ The amendment also added a consent requirement, providing that the Attorney General “expressly consent to the dependency order serving as a precondition to the grant of special immigrant juvenile status.”²⁴

Most recently, in 2008, Congress passed the Trafficking Victims Protection Reauthorization Act (TVPRA)²⁵ which again amended the SIJ statute.²⁶

over the custody of a child by a juvenile court, when the child’s parents have effectively relinquished control of the child, makes the child dependent upon the juvenile court, whether the child is placed by te [sic] court in foster care, or, as here, in a guardianship situation.” See *Matter of Menjivar*, 1995 WL 18235939, (AAO Jan. 3, 1995) at *2.

²¹ Pub. L. No. 103-416, § 219(a), 108 Stat. 4316, (1994).

²² See Rodrigo Bacus, *Defending One-Parent SIJS*, 42 FORDHAM URB. L.J. 921, 930 (2016).

²³ Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-119, § 113, 111 Stat. 2460, 2461 (emphasis added); 143 CONG. REC. H10844 (1997) (“The language has been modified in order to limit the beneficiaries of this provision to those juveniles for whom it was created, namely abandoned, neglected, or abused children, by requiring the Attorney General to determine that neither the dependency order nor the administrative or judicial determination of the alien’s best interest was sought primarily for the purpose of obtaining the status of an alien lawfully admitted for permanent residence, rather than for the purpose of obtaining relief from abuse or neglect.”).

²⁴ 143 CONG. REC. H10844 (1997) (“The conferees intend that the involvement of the Attorney General is for the purposes of determining special immigrant juvenile status and not for making determinations of dependency status.”).

²⁵ William Wilberforce Trafficking Victims Protection and Reauthorization Act of 2008, Pub. L. No. 110-457, § 235, 122 Stat. 5079.

²⁶ The current statutory definition reads as follows:

(J) an immigrant who is present in the United States—
 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 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;
 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
 in whose case the Secretary of Homeland Security consents to the grant of special immigrant juvenile status, except that—
 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
 no natural parent or prior adoptive parent of any alien provided special immigrant juvenile status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status

The TVPRA of 2008 expanded eligibility for SIJ status in two key ways: (1) by allowing children placed under the custody of an individual, and not otherwise declared dependent or legally committed to, or placed under the custody of, a state agency or department, to apply and (2) by eliminating the requirement that an individual be found eligible for long-term foster care and instead requiring that the individual's reunification with one or both parent's not be viable due to abuse, neglect, abandonment, or a similar basis under state law.²⁷ Additionally, the consent requirement changed so that the Secretary of Homeland Security need only consent to the grant of SIJ status, not the dependency order.²⁸

Regarding the first change, the added reference to custody placement with an individual provided for eligibility in cases where a parent or non-parent is seeking formal custody over a child. As to the second change, although the 1993 federal regulations already pointed out that "eligible for long-term foster care" meant "that a determination has been made by the juvenile court that family reunification is no longer a viable option,"²⁹ striking the language made clear that placement in state foster care was not required. In addition, changing the language from "family reunification" to "one or both of the immigrant's parents" extended eligibility to children able to show parental mistreatment by just one parent.³⁰

II. ALTERNATIVE LEGAL FRAMEWORK

In light of the expansion of SIJ status, previously reserved almost exclusively for children in the state foster care system, but now encompassing a larger population of victims of child abuse, neglect, or abandonment, an alternative approach for assessing eligibility for the protection is warranted. That alternative requires the participation of attorneys, state court judges, and immigration adjudicators. First, attorneys should present custody cases and related orders in such a way as to allow state court judges to make findings based in state, rather than federal, law. Second, state court judges

under this Act. 8 U.S.C.A. § 1101(a)(27)(J)(i) (2016).

²⁷ See Memorandum from Donald Neufeld, Acting Assoc. Dir. of Domestic Operations to Field Leadership (Mar. 24, 2009) (describing the two ways in which the law was expanded); see also 8 U.S.C. § 1101(a)(27)(J)(i) (2016).

²⁸ 8 U.S.C. § 1101(a)(27)(J)(iii) (2016).

²⁹ 8 C.F.R. § 204.11(a) (2012).

³⁰ Memorandum from Donald Neufeld, Acting Assoc. Director, Domestic Operations & Pearl Chang, Acting Chief of Policy and Strategy, to Field Leadership, U.S. Citizenship and Immigration Services (Mar. 24, 2009), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/TVPRA_SIJ.pdf ("In short, the TVPRA 2008 removed the need for a juvenile court to deem a juvenile eligible for long-term foster care and replaced it with a requirement that the juvenile court find reunification with one or both parents not viable.").

should make determinations in cases involving SIJ status findings as they would in any other custody case before them, aiming above all to protect the child, and free from the concern that they are making an immigration decision. Finally, immigration adjudicators should accept state court orders that do not explicitly recite the findings from the statutory definition, but rather include language embodying the findings in state law terms.

The initial definition of a SIJ in the Immigration Act of 1990 required determinations made in the normal course of a child's placement in the state's foster care system.³¹ A state court's involvement in the care and custody of a child due to child protection concerns was required before the state agency or department could remove the child from their parents.³² A determination regarding eligibility for long-term foster care was made by the state court when assessing the placement of a child.³³ Finally, if a state's child welfare system became involved with an abused and/or neglected child, the state agency or department investigated whether that child, if foreign, should return to their previous country of nationality or residence.³⁴ Once a child went through the child welfare system where a state court found that they would not reunify with their parents, the child could apply for SIJ status with minimal additional steps required to prove eligibility. Arguably, the substance of the state court's determinations in those three areas in the normal course of the case were enough to qualify a child for SIJ status without having the state court make explicit word-for-word findings that mirrored the federal statute.³⁵

The initial statutory framework focused on children in the child welfare system and did not contemplate children residing with a parent.³⁶ The 2008 changes to the statute created a way for mistreated children living with a non-offending parent to also qualify for protection.³⁷ Due to the manner in

³¹ See Immigration Act of 1990, Pub. L. No. 101-649, § 153, 104 Stat. 5005, 5006 (1990).

³² Ventrell, *supra* note 18 (“Cases begin with the filing of a petition alleging a child is dependent.”).

³³ Ventrell, *supra* note 18, at 31 (“The dispositional process may conclude with successful completion of the case plan, dismissal of the case and return of the child home. Other disposition options include long term foster or kinship care, continued supervision of the family with the child in the family's care or custody to the state.”).

³⁴ Amity R. Boye, *Making Sure Children Find Their Way Home: Obligating States Under International Law to Return Dependent Children to Family Members Abroad*, 69 BROOK. L. REV. 1515, 1530 (2004) (“Most states require child welfare agencies to exercise some qualified effort in attempting to return a child to her family.”).

³⁵ See Shannon Aimee Daugherty, *Special Immigrant Juvenile Status: The Need to Expand Relief*, 80 BROOK L. REV. 1087, 1099 (2015) (discussing the sufficiency of a guardianship petition to grant a special findings order).

³⁶ Immigration Act of 1990, Pub. L. No. 101-649 § 153, 104 Stat. 4978.

³⁷ Memorandum from Donald Neufeld, Acting Assoc. Director, Domestic Operations & Pearl Chang, Acting Chief of Policy and Strategy, to Field Leadership, U.S. Citizenship and Immigration Services (Mar. 24, 2009), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/TVP

which the statute evolved, however, stakeholders today are dealing with a hybrid provision that encompasses two very unique sets of vulnerable children: children involved in the child welfare system and other mistreated children. Although the language relates directly to the child welfare system, that does not mean children outside that system but in need of protection from parental mistreatment should not have access to SIJ status. The substantive determinations required by the federal statute can still be made in the normal course of a private custody case (i.e. not involving a state department or agency), though they sometimes may not mirror the SIJ definition exactly.

If USCIS required verbatim findings from the state court making determinations about a child's placement and best interest, however, USCIS would presumably have created a form to be completed by the state courts. As a comparison, another type of humanitarian-based immigration protection is U nonimmigrant status.³⁸ U nonimmigrant status is granted to individuals in the U.S. who have been victims of certain crimes and who have cooperated with law enforcement officials in the investigation of the crime.³⁹ Even when the applicant's victimization and cooperation can be shown through police reports or criminal prosecution records, USCIS requires a form to be completed by the law enforcement agency involved in the case.⁴⁰ Since USCIS has not created a form for the state court judge to complete, confirming that each determination required under federal statute is made, an applicant for SIJ status should be able to show through the record of proceedings that they are SIJ-eligible. A state court judge may feel uncomfortable making word-for-word determinations that track the federal definition because they are not required to apply such language in other custody cases. USCIS recently introduced new policy guidance in line with this assertion. It states in relevant part: "The order (or orders) should not just mirror or cite to immigration law and regulations. The juvenile court order may use different legal terms than those found in the INA [Immigration and Nationality Act] as long as the findings have the same meaning as the requirement for SIJ classification."⁴¹

RA_SIJ.pdf.

³⁸ 8 U.S.C. § 1101(a)(15)(U) (2012).

³⁹ 8 U.S.C. § 1101(a)(15)(U)(i)(I), (III) (2012).

⁴⁰ See 8 C.F.R. § 214.14 (2016) ("The certification must state that . . . the agency is a Federal, State, or local law enforcement agency . . . that has responsibility for the . . . investigation . . .").

⁴¹ See *Special Immigrant Juvenile Status*, DOCUMENTATION AND EVIDENCE, PART J, VOLUME 6, CHAPTER 3, PART A, POLICY MANUAL, USCIS, <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume6-PartJ-Chapter3.html> (last visited January 18, 2017).

CUSTODY DETERMINATIONS IN SIJ CASES

Because children residing in a one-parent household are able to apply for SIJ status, state court orders resolving private custody cases have increasingly been submitted in filings for SIJ status.⁴² Child custody laws exist in every state to determine who will exercise the duties and responsibilities over minor children when there is an issue to resolve among parents.⁴³ In the normal course of a child custody suit between parents, the judge must decide what is in the best interest of the child with regard to legal and physical custody and visitation rights.⁴⁴ When the state court's intervention also protects the child from parental mistreatment, the court's resolution of the custody issues, with minimal modifications in language, should be enough to meet the eligibility requirements for SIJ status.

Three key concepts are similarly treated across state lines in custody cases: (1) jurisdiction, required before a court can appropriately exercise its power over persons and subject matter;⁴⁵ (2) determinations of custody, assessing who will have rights and access to the child;⁴⁶ and (3) the best interest of the child, at the heart of any custody determination and involving a number of factors.⁴⁷ These key concepts are present regardless of whether a custody suit implicates findings required for SIJ status. In a case involving SIJ findings, these concepts may simply be embodied in slightly modified language in order to satisfy USCIS.

A. Custody Jurisdiction

The first question in any custody dispute is whether the court has jurisdiction, or power to make a legal decision, over the case.⁴⁸ The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) is a uniform law adopted in every state except Massachusetts,⁴⁹ establishing jurisdiction-

⁴² See *Special Immigrant Juvenile Status: A Primer For One-Parent Cases*, IMMIGRANT LEGAL RESOURCE COUNCIL 1, 1 (2015), https://www.ilrc.org/sites/default/files/resources/one-parent_sijs_primer_final.pdf (discussing the change in the law that broadens the eligibility requirements for special immigrant juveniles and thus making it easier to qualify for Special Immigrant Juvenile Status).

⁴³ See UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT REFS & ANNOS ULA (1997) (seeking uniformity in child custody cases across all 50 states).

⁴⁴ See *id.*

⁴⁵ See Jurisdiction, BLACK'S LAW DICTIONARY (10th ed. 2014).

⁴⁶ Custody, BLACK'S LAW DICTIONARY (10th ed. 2014).

⁴⁷ Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J. L. & FAM. STUD. 337 (2008) ("The best interests of the child doctrine is at once the most heralded, derided and relied upon standard in family law today.")

⁴⁸ Kathleen A. Hogan, *Custody Jurisdiction*, 26 FAM. ADVOC. 22, 22 (2004) ("Custody jurisdiction is considered 'subject-matter jurisdiction' —a jurisdictional requirement that cannot be waived by the parties.")

⁴⁹ *But see* H.R. 36, 189th Gen. Court (Mass. 2016); S. Res. 2392, 189th Gen. Court (Mass. 2016) (show-

al priorities among states to avoid competing child custody orders.⁵⁰ There are four bases to establish jurisdiction for initial custody determinations, including home state jurisdiction, which is given priority.⁵¹ These bases provide a state court *in rem*, or subject-matter, jurisdiction over custody cases.⁵² Although children eligible for SIJ status may be new arrivals to the U.S., once subject-matter jurisdiction is established for the initial custody determination, the court should resolve the custody issues presented in the case.⁵³

B. Reunification Determinations and Best Interest of the Child

Once jurisdiction is established and service of process is effectuated on the appropriate parties, the court makes a determination about custody based on the principle of the best interest of the child.⁵⁴ Child custody encompasses legal custody, physical custody, and visitation rights over the child.⁵⁵ The determination by a state court that a parent should not have legal custody, physical custody, or limited visitation rights as to their child is serious in nature. If a parent requests sole or physical custody of the child, the parent must show the court the reasons why this would be in the child's best interest.⁵⁶

For cases involving a child eligible for SIJ status, parental mistreatment is at the center of the custody dispute. The child must have suffered abandonment, abuse, or neglect by at least one parent in order to be eligible as a Special Immigrant Juvenile.⁵⁷ In these cases, the non-offending parent will

ing that Massachusetts introduced bills S.B. 2392 and H.B. 36 in 2016 to adopt the Uniform Child Custody Jurisdiction and Enforcement Act in the Commonwealth).

⁵⁰ See UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT REFS & ANNOS ULA (1997).

⁵¹ See *id.* at § 201(a)(1)-(4). Home state means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. See § 102(7).

⁵² See *id.* at § 201, Comment.

⁵³ See *Cohens v. Virginia*, 19 U.S. 264, 404, 5 L.Ed. 257, 6 Wheat. 264 (1821) ("It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful."). Beyond subject-matter jurisdiction, attorneys must also consider that some determinations require the court to exercise personal jurisdiction over the affected party. For example, child support cannot be ordered without personal jurisdiction over the individual who will be legally obligated to pay. See UNIF. INTERSTATE FAMILY SUPPORT ACT § 201 ULA (2008).

⁵⁴ See Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J. L. & FAM. STUD. 337, 337 (2008) (tracing the best interest of the child as the legal standard in family law cases).

⁵⁵ See UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT § 102(3) ULA (1997).

⁵⁶ See Allen M. Bailey, *Prioritizing Child Safety as the Prime Best-Interest Factor*, 47 FAM. L.Q. 35, 54-55 (2013).

⁵⁷ 8 U.S.C. § 1101(a)(27)(J)(i).

request legal and physical custody of the child with no or limited visitation rights for the other parent.⁵⁸

The USCIS Policy Manual states in relevant part: “The temporary unavailability of a child’s parent does not meet the eligibility requirement that family reunification is not viable. However, actual termination of parental rights is not required.”⁵⁹ Since termination of parental rights is not required, and without it, state courts will not typically wholly limit access to a child, USCIS must be flexible in reviewing custody orders. Where a court does not completely limit access to a child, a judge may be uncomfortable with finding that “reunification” is not viable, as required by the federal statute. Accordingly, orders that otherwise satisfy the SIJ definition may be lacking in explicit language regarding non-reunification.

As an example, under Texas law, reunification is not defined by statute and a finding that reunification is not viable is not typically made outside the child welfare context.⁶⁰ Accordingly, it would be appropriate for a Texas state court to award a child’s mother sole custody, while providing that the father retain certain non-custodial rights, and never reference reunification. It is implicit that reunification with the child’s father is not viable. USCIS should therefore not require an explicit non-reunification finding in such cases.

C. Best Interest Not to Return

The third statutory provision in the federal definition of SIJ, that it would not be in the child’s best interest to return to their previous country of nationality or last residence, is arguably the most controversial.⁶¹ USCIS requires this specific finding be made by the state court unnecessarily. The court’s decision to place the custody of the child with a parent that resides in the U.S. should be enough to meet this requirement. However, the USCIS Policy Manual states: “The court’s finding that a particular custodial placement is the best alternative available to the petitioner in the United States does not necessarily establish that a placement in the petitioner’s country of nationality would not be in the child’s best interest.”⁶²

⁵⁸ *Id.* at (ii); *see also* Bailey, *supra* note 56, at 56.

⁵⁹ *See Special Immigrant Juvenile Status*, DOCUMENTATION AND EVIDENCE, PART J, VOLUME 6, CHAPTER 2, PART D, POLICY MANUAL, USCIS, <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume6-PartJ-Chapter2.html> (last visited January 18, 2017).

⁶⁰ *See* Ventrell, *supra* note 18.

⁶¹ 8 U.S.C. § 1101(a)(27)(J)(i).

⁶² *See Special Immigrant Juvenile Status*, DOCUMENTATION AND EVIDENCE, PART J, VOLUME 6, CHAPTER 2, PART D, POLICY MANUAL, USCIS, <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume6-PartJ-Chapter2.html> (last visited January 18, 2017).

Where a child's non-offending parent is residing in the U.S., it is implicit that it is not in the child's best interest to return to their home country. The state court has, in such a case, determined that the placement remain with the non-offending parent who is in the U.S. State courts are tasked with deciding the person, not the location, that is the best placement for the child. A rigid system of adjudication will only be to the detriment of child victims of parental mistreatment. If a state court, those most apt to make decisions of the care and custody of a child, awards custody of a child to a resident of the state in order to avoid further trauma to the child, immigration adjudicators should also accept the court's findings without placing additional burdens on the family.

CONCLUSION

Special Immigrant Juvenile status is an increasingly utilized form of humanitarian-based immigration protection for child victims of parental abuse, abandonment, and neglect. Attorneys working on SIJ status cases are often immigration law practitioners with little or no experience in family court. State court judges struggle to make sense of cases where modifications to traditional custody orders are requested in order to apply for SIJ status. Even USCIS, the federal agency responsible for adjudicating petitions for SIJ status classification, currently operates without updated federal regulations for these cases.⁶³

No longer a form of protection only available to children in the state's foster care system, all parties involved in determining a child's qualification for the status need to evolve to meet the reality of current applicants. These applicants are often residing with one parent and deserve careful consideration of their claims, made within a complex framework of state and federal law, by attorneys, state court judges, and immigration adjudicators.

⁶³ The regulations found at 8 C.F.R. 204.11 were promulgated in 1994. New regulations were proposed, but have yet to be adopted. *See* Special Immigrant Juvenile Petitions, 76 Fed. Reg. 54,978 (proposed Sept. 6, 2011) (to be codified at 8 C.F.R. pt. 204, 205 & 245); *Adjudicator's Field Manual* ch. 22.3(q).