Unequal Access to Special Immigrant Juvenile Status: State Court Adjudication of One-Parent Cases
By Meghan Johnson and Kete Stewart – July 14, 2014

The past few years have marked a tidal wave of unaccompanied children entering the United States. The Office of Refugee Resettlement (ORR) reports that in 2013, 24,668 unaccompanied youth—that is, youth unaccompanied by a parent or legal guardian—were apprehended by U.S. immigration authorities and passed over to ORR care for the duration of their immigration detention. This number has jumped from an average of about 8,000 in 2011 and years prior, and current official projections show the number continues to rapidly climb. For some of these children, the United States provides not only economic opportunity but safety from abuse, abandonment, and neglect. The Immigration Act of 1990 established a path to lawful permanent residency, known as Special Immigrant Juvenile Status (SIJS), for this vulnerable subset of immigrant children.

The process for obtaining SIJS relief involves a unique two-tiered system in which a state juvenile or family court must first make factual findings related to the child’s familial situation and best interests. Federal immigration officials then use the state court’s predicate findings to determine eligibility for immigration relief. Congress delegated the first phase of the process to state courts in order to benefit from state expertise in fact finding on family and juvenile issues, and to provide for the safety and welfare of abused, abandoned, and neglected children. In serving this role, state courts act within their usual function of ensuring the safety, well-being, and appropriate custody of children. This structure, however, has allowed variation within and among states in interpreting certain provisions of the SIJS law. Although immigration officials retain exclusive authority to make immigration decisions, significant discrepancies among state courts has created a situation in which state courts are sometimes serving as gatekeepers for immigration relief.

One issue that recently has been subject to divergent interpretations by state courts is whether facts of abuse, abandonment, or neglect by one parent alone are sufficient to make one of the required SIJS findings. This issue often arises where one parent has been the source of abuse, neglect, or abandonment but there is another parent with whom the child lives or reunification is viable. While some aspects of the SIJS statutory scheme accommodate diversity between states—for example in what defines “abuse” or “neglect”—that comfort with disparity is limited and not intended to create wide divides between the states or vastly different immigration outcomes for similarly situated children. In light of the overarching principle guiding SIJS relief to provide humanitarian relief to children who experienced abuse or neglect and are unable to safely return to their home countries, this disparate result amounts to impermissible immigration adjudication by state courts. This article examines this issue, termed “one-parent SIJS,” and offers arguments and strategies to address the issue at the state and federal level.

The SIJS Process
State courts must first make predicate findings showing that the child meets the federal definition of a special immigrant juvenile. The state court must make the following findings: (1) the child is dependent on the court or the court has placed the child in the custody of an individual or entity; (2) reunification with one or both parents is not viable due to abandonment, abuse, neglect, or similar basis; and (3) it is not in the best interests of the juvenile to be returned to his or her country of origin. The findings may be made in a wide variety of state proceedings including custody, child welfare, guardianship, adoption, and delinquency cases. Congress chose to rely on state courts to make those findings because of their special expertise in making determinations as to abuse and neglect issues, evaluating best interest factors, and ensuring safe and appropriate custodial arrangements.

During the second phase of the process, the applicant must submit a certified copy of the order containing the state court predicate findings, along with a Petition for Amerasian, Widow(er) or Special Immigrant (Form I-360) to the United States Citizenship and Immigration Services (USCIS). It is at this stage that a decision is made that the child qualifies for SIJS immigration relief. If Form I-360 is approved, the child has attained SIJS status and is immediately eligible to apply for adjustment of status to lawful permanent
resident by filing an Application to Adjust Status (Form I-485). Due to this immediate eligibility, immigration officials recommend filing both the SIJS petition and the adjustment of status application at the same time. Adjudication of Form I-485 involves a background check, questionnaire, and possible interview to screen for grounds of inadmissibility that would foreclose one's ability to become a lawful permanent resident, such as criminal history or medical conditions.

**Split in State Courts on One-Parent SIJS Issue**

In 2008, the Trafficking Victims Protection Reauthorization Act (TVPRA) revised an SIJS predicate finding, now requiring a state court to find that "reunification with 1 or both parents is not viable due to abuse, abandonment, neglect or a similar basis." Pub. L. 110-457, 122 Stat. 5044 (2008), INA § 101(a)(27)(J). State courts routinely read this requirement to mean that a child is eligible for SIJS as long as there are abuse allegations against one parent. See, e.g., In the Matter of Karen C, 111 A.D.3d 622, (N.Y. App. 2013); In re Welfare of D.A.M, 2012 WL 6097225 (Minn. App. 2012). Acknowledging their limited role in making the requisite predicate findings, these courts read the plain language of the statute to mean that facts of abuse that prevent reunification with one parent are not sufficient to support the finding, even if there is the possibility of reunification with another parent. Courts also explain that their reading is consistent with the legislative history of the federal SIJS law, which expanded SIJS eligibility with enactment of the TVPRA and specifically removed earlier language that required a finding that reunification with both parents was not an option.

Some courts, however, have interpreted this language to require a finding that both parents have abused, abandoned, or neglected the child. The two most notable published decisions come out of Nebraska and New Jersey and represent the law in those states.

In *In re Erick M*, 820 N.W.2d 639 (Neb. 2012), the trial court denied the motion for SIJS findings based on the fact that Erick had been removed from his mother as a result of delinquency, not abuse, abandonment, or neglect, and the mother remained actively involved while Erick was in state custody. The court was thus unable to determine whether or not the motion to return the child to his father was reasonable. The court argued that while reunification with the mother was anticipated and perhaps viable, he was unable to reunify with his father, who had abandoned him and stopped that alone, the court could make the required SIJS finding as to nonviability of reunification with one or both parents. The Nebraska Supreme Court held that the statutory language "one or both parents" is susceptible to more than one reasonable interpretation. Although it conceded that Erick's interpretation is reasonable, the court found it could also mean that the court must find that "either reunification with one parent is not feasible or reunification with both parents is not viable." In other words, the court believed that the child could have one parent for whom reunification is at issue or two parents for whom reunification is at issue, depending on who was involved in the child's life prior to removal. The court determined that both parents were at issue, and that Erick had to demonstrate that reunification was not viable with *either* parent. The court's opinion indicates that it was preoccupied with the widespread consequences of providing SIJS findings to children who present facts of a viable placement with a parent, appearing to read that situation to mean that the child is not really in need of U.S. immigration protection.

The New Jersey appellate decision in *H.S.P. v. J.K.*, 2014 WL 1238739 (N.J. Super. 2014), followed the Nebraska Supreme Court’s decision and has statewide applicability and is being considered for appeal to New Jersey’s highest court. The court in *H.S.P.* determined that it could not make the required SIJS finding without facts demonstrating that both parents were unavailable for reunification due to abuse, abandonment, or neglect. It found that the child in question had demonstrated abandonment by his father but that the mother had not abused, abandoned, or neglected him. The court also looked at the purpose of granting SIJS relief and what immigration officials and federal immigration policy said about SIJS, and then determined that the child was not the kind of child that federal immigration legislators had in mind when it provided SIJS relief.

The Nebraska and New Jersey decisions are alarming for child advocates because they interpret a narrow interpretation of the SIJS statute that appears inconsistent with the generally understood, broad meaning of the statute and the purpose underlying the law. If adopted by other courts, it would foreclose SIJS relief for many children that are arguably eligible and create a situation where access to SIJS relief is significantly different across states and even within the same state.

**Legislative History Supports One-Parent SIJS**

When Congress added the language in 2008 that reunification is not viable with one parent, it intended to expand SIJS eligibility and specifically eliminated language that had previously been interpreted to foreclose one-parent SIJS applications. The original statute provided relief to children declared dependent on a U.S. Juvenile court, who had been "deemed eligible for long-term foster care" and for whom the court determined that it was not in the child's best interests to return to his or her home country. Immigration Act of 1990, 1990 Pub. L. No. 101-649, 104 Stat. 4978 § 358 (Nov. 29, 1990). Under applicable federal regulations, "eligible for long-term foster care" meant that family reunification—whether both parents—was not a viable option and the child was expected to stay in foster care until the age of majority. The law was amended in 1997 to make clear that it applied only to those juveniles eligible for long-term foster care as a result of abuse, abandonment, or neglect. Department of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1998 Pub. L. No. 105-119, § 113,111 Stat. 2440 (1997).

In 2008, the TVPRA expanded SIJS eligibility in several ways. It replaced "eligible for long-term foster care due to abandonment, abuse or neglect" with a finding that "reunification with one or both parents is not viable due to abandonment, abuse, neglect or a similar basis." By eliminating the long-term foster care requirement, the TVPRA broadened the eligibility for SIJS from those with reunification with "both parents is not viable" to only one parent. It also expanded the protected grounds from abandoned, abused, and neglected children to those with family reunification that is not viable with either parent.

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to include "a similar basis" under state law; and by removing the language about eligibility for long-term foster care, explicitly included children who are placed in guardianship, adoption, or other custody arrangements.

**SIJS Protection Where Reunification Is Not Viable with One Parent**

In enacting the SIJS law, Congress sought to provide special protection to immigrant children who suffered abuse, abandonment, or neglect. It understood that these children need special protections and, without an independent path to immigration, are vulnerable to further exploitation and instability. The need for unique immigration relief applies even when there is a possibility of reunification with one parent. The child may be fleeing an abusive parent in the home country and migrated in an effort to reunify with the other parent. Unless the child has an independent right to relief, he or she could be deported to an abusive parent. In other situations, the abuse may have occurred in the United States and, although there is a parent with whom the child could theoretically return, that parent may not be able to provide consistent care for the child or adequately protect the child from further abuse. If the "non-abusing" parent is in fact a safe option for the child, then both child welfare and immigration policies governing children in detention favor reunification with that parent. Indeed, the ORR, tasked with the care of unaccompanied minors, must incorporate child welfare principles when making placement and release decisions. Release to a parent or legal guardian is the first priority. Stipulated Settlement Agreement, Flores v. Reno, No. CV 95-4544-JJK (Pkr.) (D.C. Cal. Jan. 17, 1997). Reunification with a parent where there is a history of abuse, abandonment, or neglect does not obviate the need for the child to petition for immigration relief.

The facts in the following two cases granting one-parent SIJS exemplify why Congress may have intended to afford relief in one-parent cases. In Matter of D.A.M., the child came to the United States at age six and initially lived with both parents. As a result of domestic violence by the father and alcohol abuse by the mother, the child was placed in foster care on two different occasions and experienced instability and homelessness throughout his life. The motion for SIJS findings was denied in a delinquency case when the child was 17. The trial court made no factual findings with respect to the father, and denied the motion because the child would be released to the mother after completion of the delinquency program. The appellate court reversed the lower court's decision.

In Matter of Marcella M.G. v. Israel S., 112 A.D.3d 100 (2013), Susy's mother traveled to the United States and left Susy in Honduras where she was physically abused by her aunt. Susy eventually arranged to travel to the United States because life with her aunt was "unbearable." She was detained at the border and ultimately released to an uncle. Susy never had a relationship with her father, and the mother reported that he was an alcoholic and violent towards the mother. The uncle sought guardianship of Susy and petitioned for SIJS findings. Although the mother initially supported the uncle's guardianship application, saying that she could not afford to support Susy, she subsequently contested the application and was awarded custody of Susy. The family court denied the SIJS motion because the mother was awarded custody. The appellate court reversed.

Based on the facts, there is no question that both D.A.M. and Susy experienced abuse, abandonment, or neglect at the hands of one or both parents. At the time the SIJS motion was filed, one parent was able to provide a safe environment for the child. But the underlying reasons for SIJS relief remained present—as it would if the safe haven was provided by a guardian or adoptive parent instead. These children cannot safely return to their home countries and, while in the United States, cannot make independent decisions about their care or where to live. In enacting the SIJS law, Congress gave minors in these situations the independent ability to petition for legal immigration status regardless of their current custodial arrangement.

**State Court Overreaching and Unequal Immigration Gatekeeping**

The appellate decisions holding that there must be allegations against both parents to grant a SIJS motion go against a literal reading of the statute and overstep the courts' delegated authority. In re Erick M., 820 N.W.2d 639 (Neb. 2012); H.S.P. v. J.K., 2014 WL 1238739 (N.J. Super. 2014). In interpreting "one or both" to mean that applicants had to demonstrate that reunification with both parents was not feasible, the courts' reading seems to have not only departed from the plain language of the statute but also nullified the 2008 amendment and reintroduced a finding that family reunification is not an option.

The courts also seem to have been improperly concerned about opening the floodgates of immigration relief to children abandoned by one parent. For example, while the Nebraska court agreed that the effect of the 2008 amendment was to expand the pool of children eligible for SIJS, its decision focused on the 1997 amendment to conclude that despite these expansions, juveniles must still be seeking relief from parental abuse, abandonment, or neglect. The court also looked to USCIS policy guidance noting that the primary concern of USCIS is to protect the child from abuse, abandonment, or neglect, not for the purpose of obtaining lawful permanent residence. While some attention to the purpose of the statute is important, the court's concerns reveal misunderstanding as to the limited role that state courts play in SIJS determinations. For a discussion on the specific flaws in the Eck decision's reasoning, see Useion Uneven Access to Special Immigration Juvenile Status: How the Nebraska Supreme Court Became an Immigration Gatekeeper. The New Jersey decision relies heavily on the reasoning of Erick and conducts the same analysis into child's purpose in pursuing relief.

The purpose of state court is to enter discrete factual findings as to abuse, abandonment, and neglect based on the court's expertise in child welfare considerations. These findings will be reviewed by federal immigration officials, along with a broader inquiry about the child's eligibility for immigration relief, and it is only these federal officials who can confer an immigration benefit. Thus, the juvenile court need not determine issues such as the juvenile's motivation in applying or whether the application constitutes abuse of the immigration process. In re Mario S., 954 N.Y.S.2d 843, 853 (2012). By concluding that "one
or both” effectively means “both,” the Nebraska and New Jersey courts, whose function in the SIJS statutory scheme is to deploy its expertise in child protection, ends up applying a more conservative approach to the SIJS law than even immigration authorities themselves apply. In fact, in an unpublished decision from June 2013, the Administrative Appeals Office (AAO), which hears appeals from USCIS, reviewed facts from a one-parent case out of New Jersey and determined that the child was eligible for relief. In that case, custody was awarded to the mother in New Jersey, and the child and mother presented facts that the father in the home country was violent and threatening to kill the mother and take away her children. Despite reunification with the mother and a custody order in her favor, the AAO determined that the child qualified for SIJS, having demonstrated that she pursued the state court order to obtain relief from her father’s abuse and abandonment.

The Nebraska and New Jersey courts’ approach to these decisions is problematic in the context of the SIJS adjudication as a whole. Federal immigration authorities review the state court orders submitted as part of SIJS applications. That review accords due deference to state court expertise on particular matters regarding child welfare and custody, but it nevertheless examines each SIJS petitioner’s motive and means of pursuing SIJS relief, including at the state court level. That is, USCIS adjudication of SIJS petitions involves exactly the type of analysis the Nebraska and New Jersey courts conducted: what the petitioner’s primary purpose was for pursuing relief and whether Congress intended to provide relief for that particular individual. For state courts to engage in that type of review usurps the decision-making function of USCIS, the policy-making function of USCIS, and the SIJS relief across state lines. In short, state courts involve themselves in these cases in analysis best left to immigration authorities, who do in fact conduct that analysis on a regular basis. See, e.g., In re Redacted, 2013 WL 5176036 (AAO Apr. 15, 2013); In re Redacted, 2012 WL 8524275 (AAO Aug. 2, 2012); In re Redacted, 2012 WL 8501275 (AAO Feb. 22, 2012); In re Redacted, 2011 WL 10877979 (AAO Oct. 25, 2011). Immigration authorities consider this review of the state court process and the child’s purpose for pursuing relief as its main function in deciding whether to grant SIJS relief. See Memorandum from Donald Neufeld for USCIS Field Leadership, Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Petitions (Mar. 29, 2009).

The other cause for concern stems from the variation among state court interpretations. The effect of state court overreach is to cut off immigration relief to one class of immigrants that might get relief in a different state court. Immigration policymaking is the exclusive province of the federal government, in part because it involves treatment of foreign nationals who should receive uniform treatment nationwide.

Federal Solutions
To be sure, in defense of state courts involved in this hybrid adjudication process, federal authorities have yet to clarify this statutory language that has caused significant confusion and misapplication of SIJS law. The issue is not discussed in USCIS policy memoraandum promulgated since the TVPRA was passed. The issue is not even squarely addressed by the proposed regulations published in September 2011. To address these inconsistencies, USCIS should promulgate rules implementing the 2008 amendments or issue an official legal memorandum articulating its policy on the validity of attorney SIJS petitions. In its commentary to the proposed regulations, USCIS seemed to recognize the “one or both parents’ language to mean “expanded eligibility” for SIJS. But without an explicit recognition of the validity of one-parent SIJS cases, there is the risk that even more state court judges will close the door to eligible youth before their petitions can be considered by USCIS.

Congress should also amend the statute to clarify that it intended to include one-parent SIJS status. SIJS is an important form of relief for children who have been abused, abandoned, or neglected, even when there is one parent in the picture. Children who have suffered abuse, abandonment, or neglect are vulnerable and often at risk for further exploitation or continued instability. These children cannot safely return to their home countries, and while they are in need of safe caregivers in the United States, they also cannot make decisions about where they live or independently access legal relief. Congress extended SIJS relief so that these children would have an independent path to legal status and be able to move out of the shadows of society, regardless of their current custodial arrangement.

Keywords: litigation, children’s rights, one-parent SIJS, state court adjudication, immigration, abuse, abandonment, neglect

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