

## CHAPTER V-2 Quick Reference Guide

### SPECIAL IMMIGRANT JUVENILE STATUS FINDINGS IN CIVIL AND CRIMINAL PROTECTION ORDERS PROCEEDINGS<sup>1</sup>

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November 1, 2017

*For Courts Hearing Civil and Criminal Protection Order and Protection Order Enforcement Cases*

#### **What is Special Immigrant Juvenile Status (SIJS)<sup>2</sup>**

- Through the Immigration Act of 1990, Congress created Special Immigrant Juvenile Status to provide immigration relief for undocumented immigrant children who have been harmed by a parent and who are the subject of state court proceedings.<sup>3</sup> SIJS is a form of federal humanitarian immigration protection created to promote child welfare helping vulnerable immigrant children by providing them the opportunity to apply for legal permanent residence to gain stability, heal and thrive.
- SIJS protects children who cannot be reunited with one or both parents due to have suffered abuse, abandonment, neglect or similar harms perpetrated by a parent.<sup>4</sup>
- Federal law **requires** that each application for SIJS include an order from a state court.<sup>5</sup> The court must have jurisdiction under state law to make determinations about the placement, care or custody of children.

**SIJS findings do not constitute an immigration determination, rather are simply factual findings based on state law that are required to be included in the child’s immigration application.**

<sup>1</sup> This publication was also developed under grant number SJI-15-T-234 from the State Justice Institute. The points of view expressed are those of the authors and do not necessarily represent the official position or policies of the State Justice Institute.

<sup>2</sup> See Leslye E. Orloff, *Chapter I: Introduction to Special Immigrant Juvenile Status*, in NAT’L IMMIGRANT WOMEN’S ADVOCACY PROJECT, SPECIAL IMMIGRANT JUVENILE STATUS BENCH BOOK: A NATIONAL GUIDE TO BEST PRACTICES FOR JUDGES AND COURTS 1-2 (2017) [hereinafter SIJS BENCH BOOK], <http://niwaplibrary.wcl.american.edu/pubs/ch-i-intro-to-sijs/>.

<sup>3</sup> See Immigration and Nationality Act (INA) § 101(a)(27)(J)(i), 8. U.S.C. § 1101(a)(27)(J)(i) (2012).

<sup>4</sup> Parents for SIJS purposes are the child’s natural or adoptive parents and any other relationships recognized as parents under state law. State law, rather than federal law, applies with regard to the definition of parents for SIJS cases. Whomever state law recognizes as a parent, is the parent for SIJS purposes. This includes whether or not a step-parent is considered a parent under state law. U.S. immigration law that defines “parent” to include “step-parent” does not apply to SIJS cases. For children born during a marriage, state paternity laws commonly presume the child to be the child of the husband and wife and this presumption establishes paternity. This can result in the state law establishing a parent child relationship between a child and someone who is not the natural or adopted parent of the child.

<sup>5</sup> This court order containing the findings that the child applying for SIJS needs is often referred to as a “predicate order.”

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## **Federal Requirement: State Courts Apply State Law**<sup>6</sup>

- To issue a predicate order the state court applies state laws to make each of the specific findings of fact that U.S. immigration laws require that SIJS eligible children obtain from state court judges.

## **Eligibility Status for SIJS**

- To be eligible for SIJS a child must be: unmarried, in the United States and under the age of 21<sup>7</sup> at the time of filing the SIJS immigration application, and submit a state court order that contains three findings:<sup>8</sup>
  1. *Finding 1:* The court has exercised jurisdiction as authorized by state law to issue orders regarding the custody, care or placement of an immigrant child;<sup>9</sup>
    - a. Judges may encounter SIJS eligible children in a wide range of state court proceedings including, but not limited to divorce, custody, guardianship, dependency, adoption, child support, protection orders, declaratory judgments, domestication of a foreign order, or delinquency.
    - b. The court order must make findings regarding custody or placement of the child with an individual,<sup>10</sup> an agency, a department of the state, or an entity appointed by the state court. The proceeding can take place in any type of state court including, but not limited to a family, probate, or juvenile court.
  2. *Finding 2:* It is not in the child’s best interest to return to the home country, or last habitual residence, of the child or the child’s abusive parent.
    - a. This finding includes a determination by the state court using the best interest factors under state law that a placement in the child’s, or his or her parents’, country of nationality or last habitual residence is not in the child’s best interest.

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<sup>6</sup> See INA § 101(a)(27)(J) (defining Special Immigrant Juveniles); see also *Eligibility Status for SIJ*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/green-card/special-immigrant-juveniles/eligibility-sij-status/eligibility-status-sij> (last visited Mar. 30, 2018).

<sup>7</sup> Children must obtain findings from a state court that has jurisdiction to enter orders regarding their care and custody. Orders containing SIJS findings must be issued while the child is under the age of majority set by state law, which is often age eighteen. Some state laws may confer jurisdiction over a person who is older than eighteen.

<sup>8</sup> See INA § 101(a)(27)(J) (defining Special Immigrant Juveniles); see also *Eligibility Status for SIJ*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/green-card/special-immigrant-juveniles/eligibility-sij-status/eligibility-status-sij> (last visited Mar. 30, 2018).

<sup>9</sup> Menjivar, 29 Immigr. Rep. B2-37, B2-39 (1994), <http://niwaplibrary.wcl.american.edu/pubs/matter-of-menjivar/> (“The acceptance of jurisdiction 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 t[h]e court in foster care or, as here, in a guardianship situation.”).

<sup>10</sup> The original SIJS statute required that the child be dependent on the state court and eligible for long-term foster care. The statute was amended to clarify that this includes the placement of the child in the care or custody of an individual to allow children living with family or next of kin to remain in their homes. The language remains reminiscent of traditional dependency language and some courts have mistakenly interpreted that to mean they can only make SIJS findings in dependency proceedings. See Memorandum from Donald Neufeld to Field Leadership of U.S. Dep’t of Homeland Sec., *Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions 2* (Mar. 24, 2009) (<http://niwaplibrary.wcl.american.edu/pubs/imm-gov-uscismemotvpra2008-03-04-09/>) (“In short, the TVPRA 2008 removed the need for a juvenile court to deem a juvenile eligible for long-term foster care”); see also U.S. CITIZENSHIP & IMMIGRATION SERVS., IMMIGRATION RELIEF FOR ABUSED CHILDREN: INFORMATION FOR JUVENILE COURT JUDGES, CHILD WELFARE WORKERS, AND OTHERS WORKING WITH ABUSED CHILDREN (2014), [http://niwaplibrary.wcl.american.edu/pubs/uscis\\_sijs\\_brochure/](http://niwaplibrary.wcl.american.edu/pubs/uscis_sijs_brochure/) (stating that “SIJ eligible children may . . . [b]e living with a foster family, an appointed guardian, or the non-abusive parent” and noting that the highlighted examples are not an exhaustive list) (emphasis added). For immigration law purposes, therefore, a juvenile is dependent upon the state court if he or she “[h]as been the subject of judicial proceedings or administrative proceedings authorized or recognized by the juvenile court.” 8 C.F.R. § 204.11(c)(6) (2012). See also Menjivar, 29 Immigr. Rep. B2-37, B2-39 (1994), <http://niwaplibrary.wcl.american.edu/pubs/matter-of-menjivar/> (“The acceptance of jurisdiction over the custody of a child by a juvenile court . . . makes the child dependent upon the juvenile court, whether the child is placed by t[h]e court in foster care or, as here, in a guardianship situation.”).

- b. In making this finding it can be useful to include findings of fact regarding each of the state law best interest factors that the court applied in its deliberation and determination. Using the state best interest factors, the findings should include reasons why the judge granted custody, guardianship or placement to one person and not to other potential custodians. The findings should also include a comparison of services and resources available to the child in the U.S. as compared to the home country. Examples include: what types of services, actions, and orders will best serve a child, services that help the child heal from trauma, the social, medical, mental health and educational needs of the child, and who is best suited to care for the child.<sup>11</sup>
  - c. Findings must be based on state law. Therefore, include state law citations. Do not cite to federal law.
3. *Finding 3*: Reunification with one or both of the child’s parents is not viable due to either abuse, abandonment, neglect, **or** a similar basis under state law;<sup>12</sup>
- a. The federal statute<sup>13</sup> intentionally does not define abuse, abandonment, or neglect, but rather relies upon the state court judge’s expertise in applying each state law’s definition of these terms.<sup>14</sup> Some states have other provisions in state law that are a “similar basis” for protecting children and making reunification with a parent not viable. These too can serve as a basis for SIJS findings.
- The order should indicate the factual basis for the each of the state court findings.<sup>15</sup>
    - Court orders that contain detailed findings of fact regarding the harm the child suffered, that cite state laws being applied, and that discuss the application of state laws to the facts of the

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<sup>11</sup> A list of factors that are helpful when comparing what assistance, support, treatment, or other services would be available to help an immigrant child or immigrant crime victim in the United States, compared to an immigrant’s home country, can be found in the DHS policies and regulations discussing extreme hardship in VAWA self-petitioning and VAWA cancellation of removal cases. For a list of these factors and how they could be applied when courts make SIJS findings, see Leslye E. Orloff, *Chapter IV: Application of the Best Interest of the Child Standard in Special Immigrant Juvenile Status Cases*, in NAT’L IMMIGRANT WOMEN’S ADVOCACY PROJECT, SIJS BENCH BOOK 1-15 (2017), <http://niwaplibrary.wcl.american.edu/pubs/application-of-the-best-interest-of-the-child-standard-in-sijs-2/>.

<sup>12</sup> For more information to assist courts making findings regarding the viability of reunification and a discussion of how this standard differs from termination of parental rights, see Leslye E. Orloff, *Chapter II: Details about Special Immigrant Juvenile Status (SIJS) Findings*, in NAT’L IMMIGRANT WOMEN’S ADVOCACY PROJECT, SIJS BENCH BOOK 3-7 (2017), <http://niwaplibrary.wcl.american.edu/pubs/details-about-special-immigrant-juvenile-status-sijs-findings/> and Leslye E. Orloff, *Chapter IV: Application of the Best Interest of the Child Standard in Special Immigrant Juvenile Status Cases*, in NAT’L IMMIGRANT WOMEN’S ADVOCACY PROJECT, SIJS BENCH BOOK 12-15 (2017), <http://niwaplibrary.wcl.american.edu/pubs/application-of-the-best-interest-of-the-child-standard-in-sijs-2/>.

<sup>13</sup> Amendments to the INA § 101(a)(27)(J) made under the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Pub. L. No. 110-457, 122 Stat. 5044 (Dec. 23, 2008) supersede 8 C.F.R. § 204.11. See *Appendix A: Statutory Provisions Related to Special Immigrant Juvenile Status*, in NAT’L IMMIGRANT WOMEN’S ADVOCACY PROJECT, SIJS BENCH BOOK (2017), <http://niwaplibrary.wcl.american.edu/pubs/appendix-a-sijs-statutory-and-regulatory-provisions/> (discussing which parts of the regulations were issued prior to 2008 that were not superseded by the statute); see also Memorandum from Donald Neufeld to Field Leadership of U.S. Dep’t of Homeland Sec., *Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions 2* (Mar. 24, 2009) (<http://niwaplibrary.wcl.american.edu/pubs/imm-gov-uscismemotvpra2008-03-04-09/>).

<sup>14</sup> State law definitions of “abuse,” “abandonment,” and “neglect” are to be applied to the factual findings about the abuse the child suffered where ever that abuse occurred in the world, inside or outside of the United States. If the facts of the harm the child suffered would constitute “abuse” under state law, then it is abuse for SIJS findings even when the facts of the abuse occurred in another country. State law is to be used, not the laws of the country in which the abuse occurred.

<sup>15</sup> U.S. Citizenship & Immigration Servs., *Volume 6: Immigrants, Part J, Special Immigrant Juveniles*, in U.S. CITIZENSHIP & IMMIGR. SERVS. POLICY MANUAL (2017), <https://www.uscis.gov/policymanual/Print/PolicyManual-Volume6-PartJ.html>; *Appendix D1: USCIS SIJS Policy Manual Volume 6 – Immigrants Part J – Special Immigrant Juveniles – Chapter 2(D)(5) – USCIS Consent*, in NAT’L IMMIGRANT WOMEN’S ADVOCACY PROJECT, SIJS BENCH BOOK 8 (2017), <http://niwaplibrary.wcl.american.edu/pubs/appendix-d1-uscis-sijs-policy-manual-full-vol-6/>.

case help avoid both DHS requests for additional evidence and delays in the adjudication of the child's SIJS petition.

- The state court order does not confer any immigration status on the child.
- Only federal immigrant officials can grant immigration status to the child.
- However, without the state court order containing the three required findings the child cannot petition for SIJS.
  - The inability to file may have serious negative consequences for the child's health, well-being, growth, education, development and the opportunity to remain in the care of nurturing caregivers. In some cases, the inability to obtain SIJS could result in the child's deportation from the United States.

### **SIJS in Civil and Criminal Protection Order Proceedings**

- Courts issuing civil protection orders to persons who have been victims of spouse abuse, child abuse, intimate partner violence, or other criminal activities or abuse listed in the State's civil or criminal protection order statute committed against a family member or other covered individuals may encounter SIJS eligible immigrant children.
- Special Immigrant Juvenile Status imposes no additional service requirements. The rules for who must be served in a civil or criminal protection order proceeding are governed by state law. How service is to be effected in a civil protection order proceeding is also governed by state law. The civil or criminal protection order service requirements that apply in cases in which SIJS findings are being sought by a child as part of a protection order proceeding are as in any other protection order case.
- Civil and criminal protection orders are appropriate proceedings in which SIJS orders can be issued as part of a case in which the court is determining protective measures to stop an abusive family member from harming another family member when the evidence of abuse and violence before the court also includes evidence of abuse, abandonment or neglect of children by a parent;
- Most of the state protection order statutes authorize courts to issue custody awards as part of protection order proceedings<sup>16</sup> applying the state best interest of the child statutes to these determinations.
- It is best practices to include child custody as a routine part of protection order proceedings because when the parties have a child in common ongoing contact between the abuser and the victim regularly occurs on connection with custody and visitation.<sup>17</sup> In domestic violence cases, when the parties have children and when the protection order is protection a child against the child's abusive parent, structured child custody and visitation orders best promote the safety of the child and their child's non-abusive, protective parent when that are crafted with particular attention to the child's best interest, the benefits of the child of being in the custody of the non-

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<sup>16</sup> The states that do not award custody in protection order proceedings are: Arizona, Oklahoma, and Wisconsin. See *Appendix R: Custody in Protection Orders Proceedings*, in NAT'L IMMIGRANT WOMEN'S ADVOCACY PROJECT, SIJS BENCH BOOK 1-12 (2017), <http://niwaplibrary.wcl.american.edu/pubs/appendix-r-custody-in-protection-orders-proceedings/>.

<sup>17</sup> HOWARD DAVIDSON, ABA CENTER ON CHILDREN AND THE LAW, THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN: A REPORT TO THE PRESIDENT OF THE AMERICAN BAR ASSOCIATION (Aug. 1994), <http://niwaplibrary.wcl.american.edu/pubs/impact-dv-children/>.

abusive protective parent,<sup>18</sup> and the impact that witnessing domestic violence and/or experiencing child abuse have had on children's physical, emotional, and brain development.<sup>19</sup>

- Custody determinations in protection order cases provide the court an opportunity to craft custody, supervised visitation, limited visitation, and safe/supervised visitation exchange procedures. Court orders can include SIJS findings when the court makes finding about the domestic violence that has occurs between the child's parents, the abuse, abandonment, neglect, and/or similar harms as defined by state law that the child has suffered, the history and dynamics of the child's parental relationships, and the best interest of the child.<sup>20</sup>
- When the case before the court contains evidence that the child has been a victim of abuse, abandonment or neglect by one of the child's natural or adoptive parent SIJS findings can be included as part of the civil protection order that the court issues.<sup>21</sup> SIJS findings are appropriate<sup>22</sup> in cases in which the court is deciding custody of an immigrant child who is not a naturalized citizen or lawful permanent resident when the child has been a victim of abuse, abandonment, neglect, or other similar harms defined by state law and the perpetrator was one of the child's natural or adoptive parents.
- Immigrant children who are residing in the care of a non-abusive parent may apply for and be granted SIJS based on abuse, abandonment, or neglect perpetrated by the child's other parent.<sup>23</sup>
- The jurisdictional basis upon which state courts are authorized under state law to issue protection orders in civil or criminal court cases require findings of that family violence has occurred against a spouse, former spouse, a child or another relationship covered by the state protection order statute. The civil or criminal protection order must be based on findings by the court that a crime or another form of abuse, neglect, battering or harm listed in the state protection order statute has occurred. State courts issuing protection orders in civil or criminal court cases must be authorized and encouraged to enter SIJS findings when the protection order includes custody, allocation of parenting time, and/or supervised or unsupervised visitation or visitation exchange. The circumstances in which it would be appropriate for a protection order to include SIJS findings include but are not limited to the *following scenarios*:

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<sup>18</sup> See H.R. Con. Res. 172, 101st Cong. (1990) (enacted), <http://niwaplibrary.wcl.american.edu/pubs/h-con-res-172/>. This Congressional Resolution was passed unanimously by Congress. For purposes of determining child custody, it urges states that "credible evidence of physical abuse of [a] spouse should create a statutory presumption that it is detrimental to the child to be placed in the custody of the abusive spouse." Supervised visitation can still occur with the abusive parent.

<sup>19</sup> Allan R. De Jong, *Domestic Violence, Children, and Toxic Stress*, 22 WIDENER L. REV. 201, 214 (2016). See also Appendix E: *Understanding the Significance of a Minor's Trauma History in Family Court Proceedings*, in NAT'L IMMIGRANT WOMEN'S ADVOCACY PROJECT, SIJS BENCH BOOK (2017), <http://niwaplibrary.wcl.american.edu/pubs/appendix-e-effects-of-trauma-on-minors-fact-sheet/>; Dr. Linda Chamberlain: *A Trauma-Informed Approach to ACEs - Building Resilient Communities*, YOUTUBE (Nov. 12, 2014), <https://www.youtube.com/watch?v=gRTwoJsNhGE>; Lynn Hecht Schafran, *Domestic Violence, Developing Brains, and the Lifespan: New Knowledge from Neuroscience*, JUDGES' J. Summer 2014, at 32, 37; *Adverse Childhood Experiences (ACEs)*, Ctr. Disease Control & Prevention, <https://www.cdc.gov/violenceprevention/acestudy/index.html> (last visited Mar. 30, 2018).

<sup>20</sup> GABRIELLE DAVIS ET AL., PRACTICE GUIDES FOR FAMILY COURT DECISION-MAKING IN DOMESTIC ABUSE-RELATED CHILD CUSTODY MATTERS (Battered Women's Justice Project 2015), <http://www.bwjp.org/assets/documents/pdfs/practice-guides-for-family-court-decision-making-ind.pdf>.

<sup>21</sup> Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801 (1993).

<sup>22</sup> For more information, see Leslye E. Orloff, *Chapter I: Introduction to Special Immigrant Juvenile Status*, in NAT'L IMMIGRANT WOMEN'S ADVOCACY PROJECT, SIJS BENCH BOOK 9 (2017), <http://niwaplibrary.wcl.american.edu/pubs/ch-i-intro-to-sijs/>.

<sup>23</sup> Prior to 2008, to be eligible for SIJS, a child had to suffer harm perpetrated by both to the child's parents. In 2008, Congress updated the law in recognition of the importance of promoting ongoing nurturing relationships between children and their nurturing non-abusive parents. See Appendix B: *Special Immigrant Juvenile Status Legislative History*, in NAT'L IMMIGRANT WOMEN'S ADVOCACY PROJECT, SIJS BENCH BOOK (2017), <http://niwaplibrary.wcl.american.edu/pubs/appendix-b-sijs-legislative-history/>.

- **Non-abusive Parent Seeking Protection Order against Perpetrator Parent Based on Domestic Violence and Child Abuse:** Mother files for protection order alleging that she and the child have been abused by the father of the child who may or may not be the protective parent's spouse. The mother seeks for a protection order for both, herself and the child. The mother files a protection order and provides evidence that she was abused by the father and that the father abused the child.
- **Non-abusive Abused Parent Seeks a Protection Order Against a Domestic Violence Perpetrator Parent:** A mother who has experience domestic violence perpetrated by her child's father in a household where the child resides or that includes incidents of domestic violence perpetrated against the mother in the presence of the child or that the child directly witnessed. The mother seeks a protection order against the child's father, includes the child in the protection order, and seeks custody of the child and findings that impact that the domestic violence has had on the child constitutes child abuse or child neglect under state law. The protection order protects both the abused parent and the child from ongoing abuse;
- **Abused Child files Protection order:** An abused child files a protection order against their abusive parent. In the protection order case the child seeks findings regarding the facts that the harms perpetrated by the parent against the child constitutes under state law abuse and/or neglect of the child. The protection order includes a determination of who the court will grant the responsibility for the care and custody of the child;
- **Abused Child files Protection order for sexual assault:** An immigrant child files a sexual assault protection order against their sexually abusive parent. The order can issue findings for SIJS purposes.
- **Uncontested case abusive parent consents with the allegations:** the perpetrator is present at the hearing and consents to the issuance of a protection order and the court issues a protection order based on the uncontested allegations in the affidavit included in the protection order pleadings. The court can make findings that a child has been subjected to abuse and/or neglect or abandonment by the child's parent based on information contained in the affidavit. The court *must* however make additional SIJS findings. Evidence to support the SIJS finding could be obtained from the parties during testimony in a short hearing or by the parties agreeing to facts stipulated in a proposed order to the court.
- **Contested case abusive parent contests the allegations:** the perpetrator is present at the hearing but contests the allegations in the protection order pleadings and the court holds a full hearing. Based upon the testimony and evidence submitted, the court issues a protection order and appends to the standard protection order form additional findings of fact and conclusions of law that includes the required SIJS findings.
- **Uncontested case with no appearance of the parent:** the abuse occurred in the U.S. and the perpetrator is personally served with notice of the protection order, but does not appear for the hearing. The court takes evidence and issues a default protection order that includes findings of fact as the abuse the child suffered and makes each of the SIJS findings as part of the default protection order issued by the court.

#### **Extended Families:**

- **Child was abused by family member:** An immigrant child who has been abandoned by an absent parent is living with the child's other non-abusive parent in a home with extended family members. The child is abused by family members and the child's mother seeks a protection order on the child's behalf. The court enters a protection order against the abusive

family member, awards custody to the child's non-abusive mother, makes findings that the child's father abandoned the child and has not been involved in the child's life for many years and enters SIJS findings as part of the protection order.

- **Protection against abusive family member:** The child files a sexual assault protection order against the child's paternal grandfather; who has had custody or guardianship of the child. The child has been abandoned or neglected by his parents. The court enters a protection order against the grandfather, places the child in the custody of the child's maternal grandparents, makes findings about the child's abandonment by the child's parents, and includes SIJS findings in an addendum to the protection order issued.

### **Procedural Considerations**<sup>24</sup>

- *Service of Process:* Special Immigrant Juvenile Status imposes no additional service requirements. The rules for who must be served in a custody proceeding are governed by state law. How service is to be effected in protection order proceedings is also governed by state law. The same service of process requirements apply in cases involving immigrant children seeking SIJS findings as in any other proceeding.
- Many SIJS eligible children will have had little or no recent contact with the parent or parents who have perpetrated the abuse, abandonment, neglect, or similar harm defined by state law. The perpetrator parent may be still living in the home country and the child may be resettled with the other parent or with a grandparent, family member or caregiver in the United States. The location of the perpetrator parent may be:
  - In the child's country of origin;
  - Unknown to the child and other parent;
  - In a region of the home county that is rural with little formal infrastructure.

These circumstances pose several significant obstacles to meeting the service and notice requirements for protection order adjudications. Attorneys representing parties in a request for protection for an SIJS eligible child may need additional time locating the abusive parent. They may not be successful in accomplishing personal service and may need to request court orders authorizing alternative service.<sup>25</sup> State protection order laws will govern whether in a protection order proceeding avenues for alternate service are available. Generally, for protection orders to be enforceable notice of the proceeding must have been personally served. In family court cases when alternate services is available swift decisions by the court on requests for alternative service are very important to ensure that the court is authorized to take jurisdiction to enter custody orders including SIJS findings before the immigrant SIJS eligible child turns the age of majority as defined by state law. This may include:

- Enlisting assistance with service from the parent's country's embassy or consulate;

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<sup>24</sup> Children seeking SIJS orders may come before the court in creative ways that the court is not necessarily accustomed to seeing; this is in part because of funding restrictions on representation of abused immigrant children and parents. Depending on an organization's funding, the organization may be limited to whether they can represent the child, the parent, a third party filing on behalf of or in relation to the child, or any combination within. Various forms of government funding are restricted to only the abused litigant, thus barring non-abused parents and third parties from filing guardianship or custody with representation from the agency receiving the funding. The abused child is eligible for representation from the agency but due to procedural rules, the child cannot file certain cases on their own behalf and thus the attorney is limited to what kinds of cases they can seek relief for the child.

<sup>25</sup> For more information of service of process options, see Leslye E. Orloff, *Chapter VII: Service of Process in State Court: Cases Seeking Special Immigrant Juvenile Status Findings*, in NAT'L IMMIGRANT WOMEN'S ADVOCACY PROJECT, SIJS BENCH BOOK 1-6 (2017), <http://niwaplibrary.wcl.american.edu/pubs/chapter-vii-service-of-process-in-sijs/>.

- Service by publication;
- Orders that soldiers and sailors service is not required because the parent is found to be a foreign national who could not have served in the U.S. Military.
- *Guardian and Attorneys Ad Litem (GAL/AAL)*: Federal law does not impose or require any particular decision related to appointment of a *guardian ad litem*. Cases in which children are seeking SIJS should be treated in the same manner with regard to decisions to appoint guardians or attorneys *ad litem* as applies in cases of citizen children. There is no reason to appoint a GAL/AAL for a child seeking SIJS, when the court would not otherwise make such appointment in cases not involving SIJS. It is best practice to only require a GAL/AAL when the court would so order under state law in cases that do not involve immigrant parents or children or SIJS predicate findings. Appointing a GAL/AAL for SIJS cases when such appointment would not be made in a case involving citizen children causes unnecessary delay in SIJS cases, and expends limited pro bono legal resources in the community that could better serve cases involving other needy children.
- *UCCJEA AND UCCJA*: Children coming before the court seeking SIJS findings will have very different personal stories. Some may have been in the United States for a prolonged period of time. Others may have recently made the journey to flee from abuse or reunite with family. Unaccompanied minors who have been in DHS's custody may have been moved from state to state while searching for appropriate placement.<sup>26</sup> In only a small minority of the SIJS cases might there be a prior custody order in another state or country. When a custody order was issued by a foreign country, the parent granted custody may be requesting that the court recognize the foreign court's custody award. SIJS eligible children may not have been in the state long enough for the state to have become the child's home state for jurisdictional purposes.<sup>27</sup>
- Most states have adopted the Uniform Child Custody and Jurisdiction Enforcement Act (UCCJEA), which requires that a child be present in the state for 6 months to establish home state jurisdiction. Best practices in SIJS cases are:
  - Bringing the custody matter and requesting SIJS orders from the child's home state where the child has resided for more than 6 months; or
  - In custody cases involving SIJS eligible immigrant children who have been in the state for under 6 months, taking temporary emergency jurisdiction over the child under the state's UCCJEA or the UCCJA based upon the child's presence in the state and upon the child having suffered abuse, abandonment or mistreatment or upon threats to the child's non-abusive parent or the child's sibling when<sup>28</sup>
    - No prior custody order has been issued regarding the child,
    - No other state with grounds for continuing custody jurisdiction can be found, or
    - A court with continuing jurisdiction declines to take jurisdiction over the case.
- *Continuing Jurisdiction under State Law over Children 18 and Older*: Generally, the child must be under the jurisdiction of a state court order at the time he files his SIJS application. State law sets

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<sup>26</sup> See Leslye E. Orloff, *Chapter I: Introduction to Special Immigrant Juvenile Status*, in NAT'L IMMIGRANT WOMEN'S ADVOCACY PROJECT, SIJS BENCH BOOK 1-2 (2017), <http://niwaplibrary.wcl.american.edu/pubs/ch-i-intro-to-sijs/> (discussing the federal immigration adjudication process).

<sup>27</sup> *Child Custody Jurisdiction and Enforcement Act Summary*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/ActSummary.aspx?title=Child%20Custody%20Jurisdiction%20and%20Enforcement%20Act> (last visited Mar. 30, 2018).

<sup>28</sup> *Child Custody Jurisdiction and Enforcement Act Summary*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/ActSummary.aspx?title=Child%20Custody%20Jurisdiction%20and%20Enforcement%20Act> (last visited Mar. 30, 2018).

the age of majority applicable in SIJS cases. If the court has jurisdiction under state law over a child when the court issues a court order containing SIJS findings, continuing state court jurisdiction over the child is not required if the reason the court's jurisdiction ends is because the child ages out or because the child is adopted or placed in a permanent guardianship.<sup>29</sup> Some state laws allow state courts to have continuing jurisdiction over a child after the age of majority set by state law. When state law grants courts that meet certain criteria continuing jurisdiction over children who reach the age of majority, courts may issue SIJS orders in cases of children who have not turned age 21. Examples of continuing jurisdiction that would allow for issuance of SIJS orders include but are not limited to state statutes governing:

- Care of children who are incapacitated;
- Children still enrolled in school (K-12);
- Adult adoption statutes; or
- When a child is deemed a dependent of the state, including children in foster care.

### **Best Practices for SIJS Findings in Protection orders**

- *Special Immigrant Juvenile Status Statute*<sup>30</sup> requires that the immigrant child:
  - “[H]as been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States” AND
  - “[W]hose 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” AND
  - “[F]or 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”
- *Location of Harm to Child*: The abuse, abandonment, or neglect may have taken place in United States or abroad.
- *State law governs*:<sup>31</sup>

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<sup>29</sup> Appendix D1: USCIS SIJS Policy Manual Volume 6 – Immigrants Part J – Special Immigrant Juveniles – Chapter 2(D)(4) – Validity of Order, in NAT’L IMMIGRANT WOMEN’S ADVOCACY PROJECT, SIJS BENCH BOOK 7 (2017), <http://niwaplibrary.wcl.american.edu/pubs/appendix-d1-uscis-sijs-policy-manual-full-vol-6/>.

<sup>30</sup> INA § 101(a)(27)(J).

<sup>31</sup> See Appendix D1: USCIS SIJS Policy Manual Volume 6 – Immigrants Part J – Special Immigrant Juveniles – Chapter 1(A) – Purpose, in NAT’L IMMIGRANT WOMEN’S ADVOCACY PROJECT, SIJS BENCH BOOK 3 n.1 (2017), <http://niwaplibrary.wcl.american.edu/pubs/appendix-d1-uscis-sijs-policy-manual-full-vol-6/>; Appendix D1: USCIS SIJS Policy Manual Volume 6 – Immigrants Part J – Special Immigrant Juveniles – Chapter 2(A) – Determining Eligibility, in NAT’L IMMIGRANT WOMEN’S ADVOCACY PROJECT, SIJS BENCH BOOK 4 (2017), <http://niwaplibrary.wcl.american.edu/pubs/appendix-d1-uscis-sijs-policy-manual-full-vol-6/>; Appendix D1: USCIS SIJS Policy Manual Volume 6 – Immigrants Part J – Special Immigrant Juveniles – Chapter 2(D)(2) – Parental Unification, in NAT’L IMMIGRANT WOMEN’S ADVOCACY PROJECT, SIJS BENCH BOOK 6 (2017), <http://niwaplibrary.wcl.american.edu/pubs/appendix-d1-uscis-sijs-policy-manual-full-vol-6/>; Appendix D1: USCIS SIJS Policy Manual Volume 6 – Immigrants Part J – Special Immigrant Juveniles – Chapter 2(D)(3) – Best Interests, in NAT’L IMMIGRANT WOMEN’S ADVOCACY PROJECT, SIJS BENCH BOOK 6 (2017), <http://niwaplibrary.wcl.american.edu/pubs/appendix-d1-uscis-sijs-policy-manual-full-vol-6/>.

- *The types of court proceedings* in which state courts can issue orders regarding the custody, placement, or recognition of an existing placement
- *State court custody procedures* including jurisdiction, evidentiary rules, parties who are to receive notice and due process.
- *When the protection order is final.* Protection order proceedings are considered final under state law when the court issues a full protection order in a proceeding in which the perpetrator has been given notice and an opportunity to be heard. The protection order may have been issued following a contested hearing, by consent of the parties, or following state law default judgement procedures. When the court issues a full final protection order that includes an award of custody or parenting time for an immigrant child, that protection order can include an addendum containing the SIJS findings. All appealable state court orders are considered final orders. Although state statutes title custody of children issued as part of a protection order proceeding as “temporary custody,” civil protection order custody awards govern the custody of the child(ren) shared by the parents involved in the protection order proceeding.
  - A party seeking to change a custody award issued as part of a protection order would be required to initiate a separate custody action. The protection order should include specific findings as to the abuse or neglect the child suffered, how the custody placement is in the child’s best interest, why it is not in the child’s best interest to return to the child’s home country and the viability of the child’s reunification with the child’s abusive parent.
  - Temporary protection orders issued ex-parte that last for a short period of time that offer protection for victims while the respondent is being served and through the date of the full protection order hearing or the date by which a respondent is required by state law to request such a hearing would not be a final protection order. Once a full protection order is issued that order would be final. Securing changes in that protection order would require that a party to return to court to request a modification of the order. This generally occurs when there have been future incidents of abuse in violation of the order or when the parties have reunited and seek to modify the stay away provisions of the protection order to continue to protect the victim from abuse but allow the parties to reside together.
- *Best Interest.*<sup>32</sup> In all cases, the best interest of the child state laws are applied to the facts of the case before the court, and the court decides where and with whom it is in the best interest of the child to live. All state best interest of the child laws are designed to provide the care, treatment, healing, safety, stability, structure, and guidance that will help children become healthy, self-

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<sup>32</sup> For a detailed discussion of the ways that state best interests of the child laws apply in state court when issuing SIJS findings, see Leslye E. Orloff, Chapter IV: Application of the Best Interest of the Child Standard in Special Immigrant Juvenile Status Cases, in NAT’L IMMIGRANT WOMEN’S ADVOCACY PROJECT, SIJS BENCH BOOK 1-15 (2017), <http://niwaplibrary.wcl.american.edu/pubs/application-of-the-best-interest-of-the-child-standard-in-sijs-2/>.

sufficient adults. In making best interest of the child determinations in SIJS cases courts should consider the same breadth of factors that apply to all best interest of the child determinations the court adjudicates.

- *Abuse, Abandonment, Neglect or Similar Basis of Harm under State Law*: All SIJS cases will include findings using state law definitions to determine that an immigrant child has been abused, abandoned, neglected or suffered similar harm defined by state law by at least one of the child’s parents. For purposes of making SIJS findings, these state law definitions are applied to the facts of case when the harm occurred in the United States and when the harm occurred abroad. These findings will, by their nature, play an important role in the court’s application of state best interest laws in decisions regarding a child’s custody, placement, commitment, or parenting time in protection order cases and will also apply to any visitation authorized to for the parent against whom the protection order is being issued.
- *Definitions*: State law controls the definition of the terms “abuse” “abandonment” and “neglect.” The court may use *any* state definition in state law of these terms.<sup>33</sup>
- *Similar Basis Under State Law*: Judges may also issue SIJS findings when they find that reunification is not viable for harms articulated in state law that are similar to “abuse, abandonment, or neglect.” Some examples include:
  - *Child endangerment*<sup>34</sup> under most state statutes is similar to abuse and often requires more harm to a child than neglect
  - *Domestic violence*<sup>35</sup> is defined in all states to cover child abuse through the perpetration of criminal acts or attempts or threats of criminal acts, or other statutorily defined harms against a person covered by the state domestic violence statute. In all states child abuse perpetrated by a parent is covered by the state domestic violence definition used in state protection order cases. State domestic violence laws often also provide protection for the harm that occurs to children from witnessing domestic violence perpetrated against a parent and in such cases the court under state law can make findings that the presence of domestic violence in the home precludes safe reunification with one or both parents residing in a home where domestic violence is occurring<sup>36</sup>

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<sup>33</sup> For further information see Rafaela Rodrigues & Leslye E. Orloff, *Chapter III: Abuse, Abandonment, or Neglect: The Role of State Law Definitions in Special Immigrant Juvenile Status Findings*, in NAT’L IMMIGRANT WOMEN’S ADVOCACY PROJECT, SIJS BENCH BOOK 1-7 (2017), <http://niwaplibrary.wcl.american.edu/pubs/abuse-abandonment-or-neglect/>; *Appendix K: State Law Definitions of Child Abuse*, in NAT’L IMMIGRANT WOMEN’S ADVOCACY PROJECT, SIJS BENCH BOOK 1-33 (2017), <http://niwaplibrary.wcl.american.edu/pubs/appendix-k-state-law-definitions-of-child-abuse-chart/>; *Appendix L: State Law Definitions of Abandonment*, in NAT’L IMMIGRANT WOMEN’S ADVOCACY PROJECT, SIJS BENCH BOOK (2017), <http://niwaplibrary.wcl.american.edu/pubs/appendix-l-abandonment-of-children-statutes-definitions/>; *Appendix M: State Law Definitions of Child Neglect*, in NAT’L IMMIGRANT WOMEN’S ADVOCACY PROJECT, SIJS BENCH BOOK (2017), <http://niwaplibrary.wcl.american.edu/pubs/appendix-m-state-law-definitions-of-child-neglect-chart/>.

<sup>34</sup> See *Appendix O: States that Define Endangerment Higher than Neglect*, in NAT’L IMMIGRANT WOMEN’S ADVOCACY PROJECT, SIJS BENCH BOOK (2017), <http://niwaplibrary.wcl.american.edu/pubs/appendix-o-endangerment-chart/>.

<sup>35</sup> See *Appendix N: Domestic Violence Includes Child Abuse and Child Neglect*, in NAT’L IMMIGRANT WOMEN’S ADVOCACY PROJECT, SIJS BENCH BOOK (2017), <http://niwaplibrary.wcl.american.edu/pubs/appendix-n-domestic-violence-abuse-and-neglect/>.

<sup>36</sup> See *Appendix E: Understanding the Significance of a Minor’s Trauma History in Family Court Proceedings*, in NAT’L IMMIGRANT WOMEN’S ADVOCACY PROJECT, SIJS BENCH BOOK (2017), <http://niwaplibrary.wcl.american.edu/pubs/appendix-e-effects-of-trauma-on-minors-fact-sheet/>.

- *Forced Marriage*:<sup>37</sup> Several states have passed laws making forced marriage a crime. Forced marriage of children is considered child abuse and treated as a child abuse crime that involves criminal acts that include rape and sexual assault.
    - *Children present in the state without an adult able to meet their basic needs* under many states' laws is defined as neglect, including lack of adequate food, clothing, shelter, health care, education or supervision.
  - Best Practice: In SIJS cases state courts apply state law to the findings of fact regarding the child and the laws applied in awarding custody or parenting time in protection order proceedings. State laws are also used to make each of the SIJS findings. The court order should include citations to the state laws the court order relies upon in its order including the definitions of abuse, neglect, abandonment or similar harm under state law and the state law best interest of the child factors applied to the custody or parenting time determinations made in the protection order case. Do not quote or cite the federal statute as authority for the required SIJS findings.
- *Level of Detail in Court Order*: The order should contain sufficient detail to clearly state
  - The factual basis under state law for the court's jurisdiction over the child;
  - The factual basis and state laws relied upon to reach the findings and conclusions in the court's order;
  - The citations for the state laws relied upon by the court in making findings and issuing orders; and
  - Information discussing how the court's order furthers the child's welfare and best interest.
- *Examples of SIJS Findings in Protection Order*. In a protection order case, these findings can be simply stated:
  - *Custody, Care, Placement*: Addressing the placement of the child in custody of the domestic violence victim petitioner:
    - Example: "Petitioner, *name*, has been the primary caretaker for *child's name* for the past *number* of years and is a fit and proper parent. Petitioner, *name*, has been responsible for providing for [insert examples from the facts of the case may include health care, schooling, addressing special needs of the child including particularly needs related to healing from trauma and abuse]. The respondent *name* has committed the following [make findings about specific acts of abuse toward the child and if applicable the child's parent and state why is in the child's best interest not to be placed in the custody of the respondent] It is in the child's best interest to award custody of *Child* to the Petitioner. Respondent *name* shall [insert any supervised visitation, visitation restrictions, visitation exchange protections authorized to the respondent, state conditions that must be met before visitation will be granted to the respondent]";
  - *Best Interest to Not Return*: Describing why it is in the child's best interest not to return to the home country of the child or the child's parent. "After considering the totality of the circumstances in this case the Court finds that--

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<sup>37</sup> See Appendix P: *Forced Marriage as Child Abuse: State Laws*, in NAT'L IMMIGRANT WOMEN'S ADVOCACY PROJECT, SIJS BENCH BOOK 1-11 (2017), <http://niwaplibrary.wcl.american.edu/pubs/appendix-p-forced-marriage-chart/>.

- “This court has placed the child in the custody of their parent *name* who has been the primary care taker of the child and who is a fit and proper custodian. *Name* resides in the state of *State*. After having considered the totality of the evidence in the case and the findings of fact as to [refer to the details of the abuse, abandonment, neglect found] the court finds that it is not in the child’s best interest to be returned to live in *Country*.”
- “*Child’s Name* has been placed by this court in the custody of *Parent’s Name* with whom it is in the child’s best interest to reside in *State*. It would not be in the Child’s best interest to return to *Country* where there are no caregivers the court finds are fit to care for the child.”
- “*Abusive Parent’s Name* who subjected the child to [summarize abuse or neglect]
  - *When the abuser currently resides in the child’s home country add:*  
 “*Abusive Parent’s Name* resides in the child’s home country, *Country*, is an unfit parent. It is not in the child's best interest to be returned to *Country*.”
- *Address any family members residing in the home country who under state law could be potential custodians for the child.* This can include a parent or grandparent or any other family member that state law would require be considered in a best interest determination for a custody under state law. As to each potential custodian state facts as to why placement with that custodian is not in the child’s best interest under state law:
 

Example: Respondent *father’s name* perpetrated acts of abuse against *child’s name* both in *State* and in *country of origin* prior to the family’s arrival in *State*. The abuse occurring in *county or origin* occurred in the child’s grandmother’s home and the grandmother took no action to stop the abuse. [Include findings of abuse that occurred in the home country in grandmother’s house and the steps that the grandmother took or did not take to protect the child and any participation the grandmother had in the abuse.]
- “*Child’s Name* has been receiving the medical and mental health care and treatment *child’s name* needs to heal from the effects of [the trauma facts] the child suffered perpetrated by *parent’s name*. These services [list help, treatment, services being received by the child] are being offered in [city, state]. *Child’s name* has benefited from these services being offered since [date range] and the court finds that equivalent services needed to help *Child’s name* heal and thrive are not available in *Country or rural community in which the child work live if returned*].
- *Viability of Reunification:* SIJS findings must include findings stating reunification is not viable due to *either* the abuse, abandonment, neglect, similar basis, or a combination of these harms to the child. It is important that the court order clearly state which specific harm or harms the child suffered and which parent perpetrated that harm. In cases where both parents were perpetrators, the order should address the harms caused by each parent separately. Court orders should avoid statements that like “the child suffered abuse, abandonment or neglect perpetrated by *child’s parent*” and should explicitly state which definition under state law constitutes the harm the child suffered.
  - *Abusive Parent Example:* “Reunification with the child’s parent, *Name*, is not viable due to *Name’s* abuse of the *Name of Child*. Findings of abuse of *Name of Child* include [insert some of the key abuse findings, why visitation is denied or

restricted for the abusive parent and/or findings supporting the court order's limitation of contact of the abuser with the child to visitation]. These findings constitute abuse under *State Law Code Section.*"

- *Absent Parent Example:* "Reunification with the child's parent, *Name*, is not viable due to *Name's* abandonment of the *Name of Child* as defined in *Code Section.* *Parent's Name* has had no contact with *Name of Child* since approximately *Date of Last Contact* and has never/since that time has played no role in providing economic support for *Name of Child.*"