

## Chapter V-3 Quick Reference Guide

### SPECIAL IMMIGRANT JUVENILE STATUS FINDINGS IN PROCEEDINGS INVOLVING CUSTODY AND CHILD SUPPORT<sup>1</sup>

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*For Courts Hearing Custody, Divorce, Legal Separations and Child Support 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.**

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<sup>2</sup> See NAT’L IMMIGRANT WOMEN’S ADVOCACY PROJECT, SPECIAL IMMIGRANT JUVENILE STATUS BENCH BOOK: A NATIONAL GUIDE TO BEST PRACTICES FOR JUDGES AND COURTS (2017) [hereinafter SIJS BENCH BOOK], <http://niwaplibrary.wcl.american.edu/2018/03/sijs-manual-table-of-content/>.

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/>.

<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), 8 U.S.C. § 1101(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 (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 (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

<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 victims 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. 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 1-15 (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 wherever 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 Custody and Child Support Proceedings**

- There are many types of court proceedings in which courts adjudicate child custody and child support. This quick reference will be helpful to courts hearing cases in which married parties with children are seeking divorce or legal separation and the case involves determinations regarding custody, visitation and/or child support. The information is equally applicable to all other forms of custody cases including those brought by parents, grandparents or others.
- Custody is one of the primary types of state court proceedings in which state courts will encounter SIJS eligible immigrant children.
- Custody is a frequent and appropriate proceeding in which SIJS orders are issued as part of a case in which the court is determining the placement and/or visitation of the child based on factors that include abuse, abandonment, neglect, or other similar harms to the child, the history and dynamics of the child's parental relationships and the best interest of the child.
- SIJS findings are appropriate<sup>16</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 their other parent.<sup>17</sup>
- It is very common to have a child seeking SIJS orders based on the abuse, abandonment, neglect, or similar harm under state law by only one parent. For example, courts will encounter immigrant children who suffered abuse by a parent in their home country who are currently residing with a non-perpetrator parent in the United States who is seeking a custody order. These facts could be present in a divorce, legal separation or custody case in which the court applies the state definitions of abuse, abandonment, neglect or similar harm defined under state law and the state best interest factors to decide custody of a child when the perpetrator parent lives outside the country.<sup>18</sup> The abuse of the child may have occurred outside of the U.S. or in the U.S. and the perpetrator parent

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<sup>16</sup> For more information see Leslye E. Orloff, *Chapter 1: 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/>.

<sup>17</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.

<sup>18</sup> Marsha Mansfield & Stacy Tauer, *Using Family Court to Obtain Immigration Relief for Minors*, Wisconsin Access to Justice Commission (October 30, 2014), <http://repository.law.wisc.edu/items/show/127370>.

has never been to the U.S., has been deported from the U.S. or may have left the U.S. for other reasons.

- SIJS findings can be requested in both new custody proceedings where the child’s custody has never been adjudicated or in custody modification proceedings.
  - The opportune time to make SIJS findings is when the court issues its first custody orders involving the SIJS eligible child. However, in pro se custody cases and in cases in which counsel and the court did not identify the child's SIJS eligibility at the time custody was adjudicated, courts may issue SIJS findings in an amended court order:
    - Upon motion seeking to add the findings to an existing custody order without otherwise modifying the custody or visitation orders;
    - As part of a custody modification proceeding whether or not the court ultimately modifies the original custody order;
    - In a declaratory judgement proceeding that formally recognizes the existing custody order.<sup>19</sup>
- In child support proceedings, courts generally have the discretion to include determinations of custody and parenting time when issuing child support orders.<sup>20</sup> When courts address parenting time, visitation or custody as an issue addressed in a child support case, courts can enter SIJS orders in child support cases. Some states require that parenting time or custody be addressed when a child support award is issued.<sup>21</sup> Whether courts have the ability to issue SIJS orders in child support cases depends on whether the court has the discretion and flexibility under state law to address parenting time, visitation or custody at the same time the court issues child support awards.<sup>22</sup>
  - Anytime a court has the authority to address parenting time or custody in a child support case the court can include SIJS findings in its order, because parenting time or custody are before the court as part of the case.

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<sup>19</sup> For more information on issuance of SIJS orders in declaratory judgement proceedings, see Isabel LaLuna, Alina Hussain & Leslye E. Orloff, *Chapter V-4: Quick Reference Guide: Special Immigrant Juvenile Status Findings in Declaratory Judgment Cases*, in NAT’L IMMIGRANT WOMEN’S ADVOCACY PROJECT, SIJS BENCH BOOK 1-13 (2017), <http://niwaplibrary.wcl.american.edu/pubs/chapter-v-4-sijs-in-declaratory-judgment-cases-quick-reference/>.

<sup>20</sup> *Child Support and Parenting Time Orders*, NAT’L CONF. ST. LEGISLATURES (Apr. 18, 2016), <http://www.ncsl.org/research/human-services/child-support-and-parenting-time-orders.aspx>.

<sup>21</sup> Texas law employs presumptive parenting time guidelines together with presumptive child support guidelines resulting in universal inclusion of parenting time orders in all child support orders established in the state of Texas. See, e.g., TEX. FAM. CODE ANN. §§ 153.251, 153.252 (West 2017); TEX. FAM. CODE §§ 153.007- 153.3101. For additional information, see *Child Support and Parenting Time Orders*, NAT’L CONF. ST. LEGISLATURES (Apr. 18, 2016), <http://www.ncsl.org/research/human-services/child-support-and-parenting-time-orders.aspx>.

<sup>22</sup> The venue for resolving child support and parenting time may be different in each state. States vary in how they establish child support orders. If the state has an administrative process that takes place outside of the courts system, child support orders issued through that system would not be able to include SIJS findings. The National Conference of States Legislatures has developed a very useful state-by-state chart summarizing each state’s approach to the issuance of child support orders through administrative process, judicial process, or a combination of both. See *Child Support Process: Administrative vs. Judicial, 50 State Table: Child Support Process* NAT’L CONF. ST. LEGISLATURES (Apr. 20, 2017), <http://www.ncsl.org/research/human-services/child-support-process-administrative-vs-judicial.aspx#Process>; Jessica Pearson, Research Brief: Child Support, Parenting Time, and Safety Concerns (updated Aug. 2015), at 2, [https://www.acf.hhs.gov/sites/default/files/programs/css/center\\_for\\_policy\\_research\\_policy\\_brief.pdf](https://www.acf.hhs.gov/sites/default/files/programs/css/center_for_policy_research_policy_brief.pdf) (discussing how Section 303 of the Preventing Sex Trafficking and Strengthening Families Act establishes the incorporation of parenting time with strong family violence safeguards in new child support orders as an “important goal”; although nonbinding, this statement reinforces Public Law 113-183 that allows establishment of parenting time among voluntary activities in considering child support orders).

- The party seeking child support on the child’s behalf may be a parent, grandparent or other family member providing for the care of the child.<sup>23</sup>
- Common scenarios include:
  - *Prior custody order issued in the same state*– When custody has been awarded to a party in a prior court order and the custodian is seeking child support and SIJS orders, the court can consolidate the child support action with the prior custody case and issue a court order that recognizes and does not change the prior custody order, orders child support and issues SIJS findings;
  - *Prior custody order issued by a foreign country* – When a foreign country has issued a child custody award to a parent and both of the child’s parents are now living in the United States, the custodial parent may bring a child support action in the U.S.<sup>24</sup> If the custodial parent will be seeking SIJS orders as part of the child support case from the state court, in order to issue the SIJS order the court would need jurisdiction over the custody or placement of the child.<sup>25</sup> The court could obtain jurisdiction over custody or placement in addition to child support in a number of ways.<sup>26</sup> The custodial parent:
    - Files a motion to domesticate the foreign order and includes a request for child support.
    - Once the foreign order has been domesticated, the custodial parent files a motion to enforce or modify the domesticated foreign custody order and requests child support and SIJS orders
  - *Prior custody order issued in another state*— When a court in another U.S. jurisdiction has issued a child custody order and the custodian is seeking child support in a second state.<sup>27</sup> In these cases in order for courts to issue SIJS orders as part of the child support award the court could recognize and restate or modify the prior state’s custody award and add child support and SIJS findings.
- State court judges will receive requests for SIJS predicate findings in custody cases based on many different fact patterns. Some frequent scenarios include:
  - **Contested custody between an abusive and a non-abusive parent:** Custody

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<sup>23</sup> *Child Support 101: Child Support Basics*, NAT’L CONF. ST. LEGISLATURES (Aug. 2, 2012), [http://www.ncsl.org/research/human-services/child-support-basics.aspx#Who\\_Gets\\_Child\\_Support](http://www.ncsl.org/research/human-services/child-support-basics.aspx#Who_Gets_Child_Support).

<sup>24</sup> In some cases, the action the custodial parent may bring is to recognize a foreign custody order and an action to enforce a child support order issued abroad. Under the Notice of Declaration of Foreign Countries as Reciprocating Countries for the Enforcement of Family Support (Maintenance) Obligations, a court may enforce child support determinations outside of the United States in countries with whom the US has foreign reciprocating jurisdiction. These countries and provinces are Australia, Czech Republic, El Salvador, Finland, Hungary, Ireland, Israel, Netherlands, Norway, Poland, Portugal, Slovak Republic, Switzerland, the United Kingdom, and select Canadian provinces (Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Nunavut, Ontario, Prince Edward Island, Saskatchewan, and Yukon). *Department of State: Public Notice 8832*, Notice of Declaration of Foreign Countries as Reciprocating Countries for the Enforcement of Family Support (Maintenance) Obligations, 79 Fed. Reg. 49368-04 (Aug. 20, 2014).

<sup>25</sup> *In re Hei Ting C.*, 969 N.Y.S.2d 150 (N.Y. App. Div. 2013).

<sup>26</sup> State UCCJEA jurisdictional laws would apply to cases involving modification of foreign custody awards. Under the UCCJEA, foreign countries are treated in the same manner as other states who have issued custody awards. Temporary jurisdiction under the UCCJEA would likely be applicable in cases involving domestic violence and/or child abuse.

<sup>27</sup> This will commonly happen when the custodial parent has moved to a new state with the child or when the custodial parent seeks a child support order in the state where the non-custodial parent is living. The Uniform Interstate Family Support Act (UIFSA), which has been adopted by all states, out uniform rules for which states have jurisdiction to issue child support orders, continuing jurisdiction, jurisdiction for child support enforcement and modification of child support orders. *Interstate Family Support Act Amendments 2008, Enactment Status Map*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/Act.aspx?title=Interstate%20Family%20Support%20Act%20Amendments%20%282008%29>.

between parents where one parent abused, abandoned, neglected or perpetrated a similar harm under state law against the child. These cases could involve facts where the child was abused and their mother was not or where both the child and mother were abused. While many SIJS eligible children could also qualify for another form of immigration relief based on abuse, SIJS provides a faster path to legal immigration status for vulnerable children.

- **Custody cases brought by grandparents:** Custody between grandparents and parents where one or both of the child's parents abused, abandoned or neglected the child;
- **Uncontested cases where one parent abused, abandoned or neglected the child:** the child is residing with the custodial parent and
  - The child has no relationship with the other parent who abandoned the child when he was very young, or
  - The other parent abused or neglected the child;
- **Uncontested custody when the child's other parent is deceased:** The child is with a non-abusive parent and the other deceased parent abused, abandoned, neglected or perpetrated a similar harm defined by state law against the child prior to his death.
- **Uncontested custody when a parent is missing and/or living abroad:** A grandparent or family member seeks custody in a case in which one or both of the child's parents are missing and cannot be located and were last known to be living abroad. The missing parent's inactions toward the child constitute abandonment or neglect under state law.

### **Procedural Considerations**<sup>28</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 custody proceeding 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 custody case.
- 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 country that is rural with little formal infrastructure.

These circumstances pose several significant obstacles to meeting the service and notice requirements for custody adjudications. Attorneys representing parties seeking custody of 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

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<sup>28</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.

service.<sup>29</sup> 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;
  - 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>30</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>31</sup>
  - Most states have adopted the Uniform Child Custody and Jurisdiction Enforcement Act (UUCJEA), 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

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<sup>29</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/>.

<sup>30</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/>.

<sup>31</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).



having suffered abuse, abandonment or mistreatment or upon threats to the child’s non-abusive parent or the child’s sibling when<sup>32</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 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>33</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 Custody Cases**

- *Special Immigrant Juvenile Status Statute*<sup>34</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.

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<sup>32</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>33</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 6-7 (2017), <http://niwaplibrary.wcl.american.edu/pubs/appendix-d1-uscis-sijs-policy-manual-full-vol-6/>.

<sup>34</sup> INA § 101(a)(27)(J).

- *State law governs:*<sup>35</sup>
  - *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 a custody order is final.* In issuing final custody orders awarding custody, visitation and providing for the care of an SIJS child that meets the definition of a final or permanent custody order under state law, it is appropriate for courts to adjudicate and issue findings that based on the evidence before the court reunification with the abusive parent is not viable. All appealable state court orders are considered final orders. Once a state court custody order has been finally adjudicated based on a court's ruling in a contested case, by consent of the parties, or following state default judgment procedures, state law imposes requirements that parties must meet in order to secure modifications of the court's final custody and/or visitation orders. Most state laws require proof of change in circumstances not anticipated at the time the court issued its custody order.
  - *Best Interest:*<sup>36</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-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

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<sup>35</sup> See Appendix D1: USCIS SIJS Policy Manual Volume 6 – Immigrants Part J – Special Immigrant Juveniles, in NAT'L IMMIGRANT WOMEN'S ADVOCACY PROJECT, SIJS BENCH BOOK (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 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/>; 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 6-7 (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)(1) – Dependency or Custody, in NAT'L IMMIGRANT WOMEN'S ADVOCACY PROJECT, SIJS BENCH BOOK 9 n.5 (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) – Juvenile Court Order, in NAT'L IMMIGRANT WOMEN'S ADVOCACY PROJECT, SIJS BENCH BOOK 10 nn.11-14 (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 3(A)(2) – Findings, in NAT'L IMMIGRANT WOMEN'S ADVOCACY PROJECT, SIJS BENCH BOOK 12 (2017), <http://niwaplibrary.wcl.american.edu/pubs/appendix-d1-uscis-sijs-policy-manual-full-vol-6/>.

<sup>36</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/>.

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.

- *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>37</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>38</sup> under most state statutes is similar to abuse and often requires more harm to a child than neglect
  - *Domestic violence*<sup>39</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>40</sup>
  - *Forced Marriage*:<sup>41</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. State laws are also used to make each of the SIJS findings. The court order should include citations to the state laws the court relies upon in its order including the definitions of abuse, neglect, abandonment or similar harm

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<sup>37</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>38</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>39</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>40</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/>.

<sup>41</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/>.

under state law and the best interest of the child factors applied to the custody 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 Custody Orders.* In a custody case, these findings can be simply stated:
  - *Custody, Care, Placement:* Addressing the placement of the child with the petitioner for custody:
    - Example: “Petitioner, *name*, is/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]. It is in the child’s best interest to award sole care, custody, and control of *Child* to the Petitioner.”
  - *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--
    - “This court has placed the child in the custody of his 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] continues to reside 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*.”
    - “*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:* Stating reunification is not viable due to the *either* 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 such as “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.

- *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*.”
- *Abusive Parent Example:* “Reunification with the child’s parent, *Name*, is not viable due to *Name’s* abuse of the child. Findings of abuse of child include [insert some of the key abuse findings]. These findings constitute abuse under *Code Section*. *Non-Abusive Parent’s Name* has been awarded physical and legal custody *Name of Child* and *Abusive Parent’s Name* will be limited [insert the description of the visitation granted (e.g., overnight visitation every other weekend) and including all limitations on visitation with the child (e.g., supervised visitation, use of a visitation center to monitor visitation, supervised visitation exchange)].”