

Custody Cases with Requests for Findings for Special Immigrant Juvenile Status

Cheryl Howell
School of Government
October 2016

Guide for State Courts in Cases Involving Unaccompanied Migrant Children

- National Center for State Courts
- State Justice Institute
- Center for Public Policy Studies
- Immigration and the State Courts Initiative

What is Special Immigrant Juvenile Status (SIJ status)?

- ▶ A form of protection from deportation provided by federal law to non-citizen children in the US
- ▶ Criteria found in:
 - 8 USCA 1101(a)(2)(j)
 - 8 CFR 204.11
- ▶ SIJ status allows child to stay in US temporarily and allows child to apply for Lawful Permanent Residence Status

Federal Policy

- ▶ “The purpose of the requirements for special immigrant juvenile status under the Immigration and Nationality Act is to permit abused, neglected, or abandoned children to remain in the United States.”
 - *In re. Danny G.*, 117 A.3d 650 (Maryland 2015)

Who grants SIJ status?

- ▶ Application is made on behalf of child to the US Department of Homeland Security/US Citizenship and Immigration Services (USCIS)
- ▶ USCIS determines whether status is granted
- ▶ State courts do NOT determine child’s eligibility for SIJ status

SIJ status: 8 USC 1101(a)(27)(J)

Immigrant present in the United States

- ▶ (i) who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States, and whose reunification with 1 or both of the immigrant’s parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law;
- ▶ [and]
- ▶ (ii) for whom it has been determined in administrative or judicial proceedings that it would not be in the alien’s best interest to be returned to the alien’s or parent’s previous country of nationality or country of last habitual residence;

“Juvenile Court”

Court having jurisdiction under state law to make judicial determinations about the care and custody of children
8 CFR 204.11

Prerequisites for Requesting SIJ status

- ▶ Applicant has been declared dependent on a juvenile court or *placed under the custody of* an agency or *an individual* by that court;
- ▶ Reunification with *one or both* parents of the immigrant is not viable due to *abuse, neglect or abandonment*, and
- ▶ It is not in the *child's best interest* to be returned to his/her country of origin
 - *Eddie E. v. Superior Ct of Orange County California*, 183 Cal. Rptr.3d 773 (2015)

Role of State Court

- ▶ Federal government determines immigration status
- ▶ State courts address child welfare and determine best interests
- ▶ Applicant must attach state court order providing the prerequisites to the petition for SIJ status

Process

- ▶ “The SIJ status implements a two-step process for SIJ applications in which a state court makes predicate factual findings, soundly within its traditional concern for child welfare, relative to a juvenile’s eligibility, and the juvenile then presents the family court’s factual findings to the USCIS of the Department of Homeland Security, which engages in a much broader inquiry...and makes the ultimate decision as to whether SIJ status should be granted.”

• *H.S.P. v. J.K.*, 121 A.3d 849 (New Jersey 2015)

“Juvenile Courts” in NC

- ▶ Abuse, neglect and dependency proceedings
- ▶ Delinquency proceedings
- ▶ Chapter 50 custody proceedings
- ▶ Guardianship proceedings

Responsibility of State Courts

- ▶ State appellate courts across the country consistently have held trial courts must address the requested findings of fact/conclusions of law when the request is made in the context of a ‘juvenile court’ proceeding.
 - See *In re J.J.X.C.*, 734 SE2d 120 (Ga. 2012)
 - See also 67 ALR Fed.2d 299 (2012)(updated weekly)
- ▶ NC has no appellate case law yet

State courts do not.....

- ▶ Determine immigration status or eligibility of child for SIJ status

- ▶ Determine the motivation of the juvenile in asking for the required findings and conclusions
 - See e.g. *Nina L. ex. rel. Howerton*, 41 NE3rd 930 (Illinois 2015)

- ▶ “A state court’s role in the SIJ process is not to determine worthy candidates for citizenship, but simply to identify abused, neglected, or abandoned alien children who cannot reunify with a parent or be safely returned in their best interests to their country.”
 - *Leslie H. v. Superior Ct*, 168 Cal.Rptr.3d 729, 737 (2014)

Chapter 50 Custody Proceeding

- ▶ Initiated by parent, relative or other person seeking custody
 - Children apprehended by Department of Homeland Security for illegally entering US are frequently released to a “sponsor” pending deportation proceedings.
 - When released to a “sponsor”, child is no longer in federal custody
 - State court can proceed without federal approval

Chapter 50 Custody Proceeding

- ▶ NC needs jurisdiction under Chapter 50A, UCCJEA

- ▶ Plaintiff needs standing to request custody
 - Parent, relative or some other person with sufficient relationship with child.

Chapter 50 Custody Proceedings

- ▶ Parent(s) must be served with process
 - Or at least provided notice pursuant to GS 50A-205
 - Rules re: International Service of Process
 - <https://www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/aoj200407.pdf>
 - Acceptance of Service ???

- ▶ Child must be under age of 18 when order entered (probably)
 - *But see Recinos v. Escobar*, 46 NE 3rd 60 (Mass. 2016); *L.T. v. Dept of Children and Families*, 48 So. 3d 928 (Florida 2010)
 - GS 50-13.8(?)

Findings of Fact/Conclusions of Law

- ▶ Applicant has been placed under the custody of an individual;

- ▶ Reunification with one or both parents of the immigrant is not viable due to abuse, neglect or abandonment; and

- ▶ It is not in the child's best interest to be returned to his/her country of origin

No Custody by Default

- ▶ Absent consent, the trial court must hear evidence to support findings of fact
 - *See e.g. Bohannan v. McManaway*, 208 NC App 572 (2010)(final custody order cannot be entered without a hearing)
- ▶ Findings of fact must support conclusion of best interests

Consent Judgments????

Examples:

- ▶ Findings/Conclusions supported by the evidence
 - *In re Marcelina M.*, 112 A.D.3d 100 (New York 2013)
 - *H.S.P. v. J.K.*, 121 A. 3d 849 (New Jersey 2015)
- ▶ Findings/Conclusions not supported by the evidence
 - *Matter of Miguel A.G.G.*
 - 127 A.D. 3d 858 (NY Slip opinion 2015)
- ▶ *See others* in 67 ALR Fed. 2d 299 (2012)(updated weekly)

STATE OF NORTH CAROLINA
ORANGE COUNTY

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
14-CVD-_____

_____,)
Plaintiff,)
v.)
_____,)
Defendant.)
_____)

**CUSTODY COMPLAINT; MOTION
FOR FINDINGS SUPPORTING
SPECIAL IMMIGRANT JUVENILE
STATUS**

NOW COMES Plaintiff, _____ (“Plaintiff”), by and through her undersigned counsel, complaining of the Defendant, _____ and making the accompanying Motion for Factual Findings in Support of Petition for Special Immigrant Juvenile Status, and alleges and shows the Court as follows:

CUSTODY CLAIM

1. Plaintiff resides in Orange County, North Carolina, and has done so for approximately five years.
2. The Minor Child _____ was born on January 14, 1997. The Minor Child is unmarried and is a citizen of El Salvador.
3. Plaintiff is the Minor Child’s mother. Defendant is the Minor Child’s father. Plaintiff and Defendant lived together in a romantic relationship for approximately three years and had two children together, but they were never legally married.
4. A true and correct copy of the Minor Child’s Birth Certificate, with English translation, is attached hereto and marked **Exhibit A**.
5. The Minor Child presently resides with the Plaintiff, his mother, at _____ Shady Lawn Road Ext., Chapel Hill, NC 27514.
6. The Minor Child has resided in Chapel Hill for over six months.
7. Defendant, the Minor Child’s father, is a foreign national of El Salvador. Upon information and belief, Defendant currently resides at Loma Larga, Panchimalco, San Salvador, El Salvador and receives mail care of his mother, _____, at _____, Colonia Lourdes, Planes de Rendero, San Salvador, El Salvador.
8. Throughout their relationship, Defendant was physically abusive to the Plaintiff. He frequently hit her with closed fists and threw her against the wall, leaving her badly bruised.
9. When the Plaintiff left the Defendant, he retaliated by taking the Minor Child from her custody by force and refusing to let her care for him. The Defendant brought the Minor Child to live with him in his mother’s household.

10. Plaintiff felt helpless to regain custody of the Minor Child because of the physical abuse. During one incidence of violence against the Plaintiff, the Defendant handed her a phone and told her to go ahead and call the police, but by the time they arrived, he would kill her.
11. When the Minor Child was approximately four years old, the Defendant left his mother's household to live elsewhere, leaving the child in the care of the Defendant's mother.
12. Plaintiff came to the U.S. in or around March 2000, and currently has Temporary Protected Status (TPS), an immigration status available to some individuals from countries designated by the Department of Homeland Security, whose conditions prevent the country's nationals from returning safely. TPS beneficiaries are authorized to work in the United States and are not removable from the U.S. See <http://www.uscis.gov/humanitarian/temporary-protected-status-deferred-enforced-departure/temporary-protected-status>.
13. After coming to the United States in the year 2000, Plaintiff lived in the states of New York and Florida before coming to settle in North Carolina. For the last five years, Plaintiff has maintained a stable household in Chapel Hill, North Carolina.
14. Since the Plaintiff came to the United States in the year 2000, the Minor Child remained in El Salvador in the care of his grandparents, living first with his paternal grandmother from approximately age 3 to age 10, and then with his maternal grandmother from approximately age 10 to age 16.
15. While living in the U.S. and before the Minor Child joined her here, the Plaintiff has remained in regular contact with the Minor Child through weekly telephone calls.
 16. Throughout her time in the U.S., Plaintiff has regularly sent necessities such as clothing and shoes as well as financial support for the Minor Child and has provided for his care.
 17. The Defendant has not forwarded or provided support for the Minor Child since the child was approximately four years old.
 18. The Plaintiff regularly sent money to the Paternal Grandmother with the intention that it be used for the Minor Child's care and maintenance, but the Defendant frequently used a portion of the funds for his own purposes.
 19. The Defendant drinks alcohol in excessive amounts on a daily or near-daily basis. Because of this, he is unable to hold down a job.
 20. The Defendant has struck the Minor Child on a number of occasions, especially when he drinks alcohol. For example, the Minor Child remembers the Defendant striking him with a bamboo branch when he was about 7 years old. The Minor Child also remembers the Defendant hitting him with a belt and leaving bruises.
 21. The Defendant has another family, *i.e.* another female partner (other than the Plaintiff), with whom he has at least one child. The Defendant lives with that partner and

child and has never permitted the Minor Child to visit him at this home.

22. The Minor Child went to live with his maternal grandmother when he was around ten years old because the area in which he lived with his paternal grandmother had become too dangerous. Violent criminal gangs in that area had begun recruiting and threatening young children.

23. Throughout the time that the Minor Child remained in El Salvador, the Defendant would only see the Minor Child a few times a year, and only on occasions when the Defendant visited his mother's home while the child was there.

24. Because of the Defendant's unwillingness and/or inability to care for the Minor Child, the Minor Child was cared for by his grandparents in El Salvador, with the Plaintiff sending back money and other necessities for his support.

25. In or around September 2013, the Minor Child's maternal grandmother, with whom he was living, began receiving threats because of her political activities on behalf of the FMLN, a Salvadoran political party that opposes the party currently in power. These threats extended to other members of the grandmother's family, including the Minor Child.

26. When the Minor Child was 16 years old, he made his way to the United States. The Minor Child left El Salvador in or around November, 2013 and made his way to the U.S. on his own, without any adult guardian or caretaker.

27. In November 2013, the Minor Child was apprehended by U.S. immigration officers near the United States-Mexico border in Texas. He was designated an Unaccompanied Alien Child and was placed in the care of the Office of Refugee Resettlement ("ORR"), a subdivision of the federal Department of Health and Human Service's Administration for Children and Families. *See* <http://www.acf.hhs.gov/programs/orr/resource/unaccompanied-childrens-services>.

28. Following a proper investigation, the federal Office of Refugee Resettlement released the Minor Child to the care of the Plaintiff, who became his "sponsor," pending final determination of his immigration proceedings. *See* <http://www.acf.hhs.gov/programs/orr/>. A true and correct copy of the Minor Child's release to Plaintiff's care is attached hereto as **Exhibit B**.

29. The Minor Child is currently in removal proceedings (previously "deportation" proceedings) and has a court date in the Executive Office for Immigration Review's Immigration Court in Charlotte, North Carolina, on March 25, 2015. See Notice of Hearing, attached hereto and marked **Exhibit C**.

30. To date, no court in any country has exercised jurisdiction regarding the custody of [REDACTED], a Minor Child.

31. Plaintiff does not know of any other person, other than the parties herein, who has any claim to physical custody or visitation rights regarding the Minor Child.

32. In the past five years, the Minor Child has lived with:

DATE	ADDRESS	PERSON LIVED WITH
January 2014 to present	██████ Shady Lawn Road Ext., Chapel Hill, NC 27514	████████████████████ (Plaintiff), the child's mother
November 2013 to early January 2014	BCFS shelter for unaccompanied immigrant children, Baytown TX	In the care of the Office of Refugee Resettlement ("ORR," an office of the federal Department of Health and Human Service's Administration for Children and Families)
2007 to November 2013 (approximate)	Canton San Antonio, Ciudad de Triunfo, Usulután, El Salvador	████████████████████ (Plaintiff's mother; the Minor Child's grandmother)

23. A controversy has arisen between the Plaintiff and Defendant regarding the custody of the Minor Child. This action is to determine custody of the Minor Child.
24. On information and belief, the Minor Child cannot obtain government identification, i.e. a passport to be issued by the Salvadoran consulate in the United States, without both parents being present to request the passport, absent a custody order awarding sole custody to one parent.
25. Plaintiff has standing as the biological mother of the Minor Child to pursue this custody action. Given the facts and circumstances of this case, it is incumbent upon the State Court to appoint one parent to have sole legal and physical custody other than having those rights and duties shared between the biological parents.
26. Plaintiff has not participated in any other litigation concerning custody of the Minor Child in this State or in any other jurisdiction and does not know of or have any information concerning any other proceeding for custody of the Minor Child pending in this State or in any other jurisdiction.
27. Plaintiff is unaware of any person not already a party to this action with any legal right or claim to custody of the Minor Child.
28. Plaintiff is a fit and proper person to have sole physical and legal care, custody, and control of the Minor Child, and it would be in the best interest of the Minor Child that his physical and legal care, custody, and control be vested in Plaintiff.
29. Plaintiff has maintained a stable household in Chapel Hill for approximately 5 years and is able to support the Minor Child financially, ensure that the child attends school, ensure medical care, and provide proper care and supervision for the Minor Child.
30. This Court has proper jurisdiction to make a judicial determination about the custody and care of the Minor Child, because North Carolina is the home state of the Minor Child as defined by N.C. Gen. Stat. § 50A-102(7), and this Court has Initial Child Custody

Jurisdiction under the UCCJEA, N.C. Gen. Stat. § 50A-201 and authority to enter orders under § 50-13.5(c)(2).

31. Plaintiff respectfully requests that this Court determine that: (1) it has jurisdiction over the Minor Child to award of custody; (2) it is not in Minor Child's best interest to return to El Salvador; (3) reunification with the Defendant, the Minor Child's father, is not viable due to a history of abuse, neglect, abandonment, or similar basis under state law; and (4) it is in the Minor Child's best interest for legal and physical custody to be awarded to Plaintiff.
32. The Minor Child could be eligible to apply for Special Immigrant Juvenile Status ("SIJS"), which, if granted, would permit him to obtain legal status in the United States. To apply for SIJS, the Minor Child must first provide the United States Citizenship and Immigration Service ("USCIS") with evidence that a State court assumed jurisdiction of her and has made specific findings concerning the requirements under Section 101(a)(27)(j) of the Immigration and Nationality Act ("INA"), which are described more fully in Plaintiff's Motion for SIJS Findings, below.

MOTION FOR FACTUAL FINDINGS IN SUPPORT OF PETITION FOR SPECIAL IMMIGRANT JUVENILE STATUS

Plaintiff, by and through counsel, respectfully moves this Court for certain factual findings that are necessary to enable the Minor Child to petition the U.S. Citizenship and Immigration Services ("USCIS") for Special Immigrant Juvenile Status ("SIJS") pursuant to § 101(a)(27)(j) of the INA, 8 U.S.C. § 1101(a)(27)(J), as well as 8 C.F.R. § 204.11, as amended by the Trafficking Victims Protection Reauthorization Act ("TVPRA") on December 23, 2008 (effective March 23, 2009), Pub. L. No. 110-457, § 235(d)(1)-(3), 112 Stat. 5044, and the regulations codifying the prior statute, 8 C.F.R. § 204.11(a), (c). In support of his motion, Plaintiff alleges as follows:

1. Plaintiff has filed this action seeking the Court's determination that it is in the Minor Child's best interest for Plaintiff to be awarded sole physical and legal custody.
2. The Minor Child is presently undocumented. He meets the eligibility requirements for SIJS under the INA and applicable regulations. Plaintiff believes that it is in the Minor Child's best interest to petition USCIS for SIJS.
3. Reunification of the Minor Child with one of his parents, his father, [REDACTED] is not viable due to abuse, abandonment and neglect, as follows:
 - a. When the Minor Child was a tender age, the Defendant struck him on a number of occasions with various objects, including a bamboo branch and a belt, leaving bruises.
 - b. Defendant has made no effort to exercise any custodial rights over the Minor Child for approximately 15 years, since the child was about one year old.
 - c. Defendant has not visited with the Minor Child for approximately 11 years, since the child was about four years old.
 - d. Defendant has not forwarded or supplied financial support (money, clothing, school supplies, etc.) for the Minor Child since the Child was approximately four years old.

- e. Defendant took money that the Plaintiff sent for the Paternal Grandmother, for use in caring for the Minor Child, and instead used it to his own ends.
 - f. Since the Minor Child came to the United States, the Defendant's contact with him has been limited to one telephone call in which the Defendant asked the Minor Child to send him money.
4. It is not in the Minor Child's best interest to return to his country of origin, El Salvador, due to:
 - a. The abuse and neglect he suffered at the hands of the Defendant, his father.
 - b. The disruption it would cause to the Minor Child's current placement with the Plaintiff, his mother.
 - c. The disruption it would cause to the Minor Child's education, in that he has completed the ninth grade since coming to live with his mother in North Carolina and is currently in the tenth grade in East Chapel Hill High School.
 - d. The fact that the Minor Child would likely be unable to continue his schooling in his home country and would have to go to work to support himself.
 - e. The extraordinarily high levels of crime and violence in El Salvador, which pose a particular threat to youngsters such as [REDACTED] who lack stable homes and families.
 - f. Since the Minor Child came to the United States, at least two of his friends in El Salvador have been killed by the violent criminal gangs.
 - g. The Minor Child and his family have received threats due to their participation in a minority political party.
5. Under the amended INA, SIJS permits a child who has been placed under the custody of "an individual or entity appointed by a state or juvenile court located in the United States," to remain in the United States if an appropriate court determines that: (1) reunification with one or both parents is not viable due to a history of abuse, neglect, abandonment, or similar basis under state law and (2) it is not in the juvenile's best interests to return to his or her country of nationality. See 8 U.S.C. § 1255(A), (H).
6. Under the INA, the Minor Child cannot file his Petition for SIJS with USCIS until this Court, as the Court having jurisdiction over his custody, makes the following factual findings establishing her eligibility to submit the Petition:
 - a. That this Court has jurisdiction under North Carolina law to make judicial determinations about the custody and care of juveniles within the meaning of § 101(a)(27)(J) of the INA, 8 U.S.C. § 1101(a)(27)(J)(i), and 8 C.F.R. § 204.11(a),(c);
 - b. That the Minor Child is under the jurisdiction of this Court and has been placed in the legal custody of Plaintiff by this Court within the meaning of Section 101(a)(27)(J) of the INA, 8 U.S.C. § 1101(a)(27)(J)(i), and 8 C.F.R. § 204.11(a)(c);
 - c. That reunification with one of the Minor Child's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under North Carolina law within the meaning of Section 101(a)(27)(J) of the INA, 8 U.S.C. § 1101(a)(27)(J)(i); and
 - d. That it is not in the best interest of the Minor Child to be returned to El Salvador, his previous country of last habitual residence within the meaning of Section 101(a)(27)(J) of the INA, 8 U.S.C. § 1101(a)(27)(J)(ii).

WHEREFORE, Plaintiff, on her own behalf and on behalf of the Minor Child, respectfully prays
to this Court:

1. That Plaintiff's Verified Complaint for Custody of the sworn factual allegations in the accompanying Motion for Custody and Motion for SIJS Findings of Fact be allowed and taken as an affidavit upon which the Court may base its orders in this case;
2. That the requirement of custody mediation be waived due to language issues and the Defendant's residence in another country,
3. That the Court enter a permanent order granting Plaintiff the sole physical and legal care, custody, and control of the Minor Child;
4. That the Court make findings of fact that would enable the Minor Child to apply for Special Immigrant Juvenile Status; and
5. That Plaintiff be granted such and other further relief as the Court deems just and proper.

This the 18th day of September, 2014.

THE LAW OFFICE OF [REDACTED]

By:

[REDACTED]
Attorney for Plaintiff
[REDACTED]

STATE OF NORTH CAROLINA
ORANGE COUNTY

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
14-CVD-_____

_____,)
Plaintiff,)
v.)
_____,)
Defendant.)
_____)

VERIFICATION

Know all ye men by these presents that _____, Plaintiff, having been duly sworn, deposes and says:

That _____ is the Plaintiff named herein; that the foregoing Complaint, with Motion for Custody, and Motion for Factual Findings in Support of Special Immigrant Juvenile Status, and the same has been interpreted for her in Spanish, her native language, and that she knows the contents thereof; and that the same is true to the best of her own knowledge, except as to those matters therein alleged upon information and belief; and as to those matters, she believes them to be true. Further, the attached **Exhibits A-C** are true and accurate copies of originals in her possession and the contents are accurate to the best of her knowledge and belief.

This the the 18th day of September, 2014.

Affiant, Plaintiff

Sworn to and subscribed before me in Durham, North Carolina on the 18th day of September, 2014.

Signature of Notary Public

Printed Name of Notary Public

My Commission expires: 09/21/2016