



# Special Immigrant Juvenile Status (SIJS) Primer: How to Seek SIJS Findings in California Superior Courts

*Special Immigrant Juvenile Status is a unique, hybrid form of immigration relief that requires the involvement of state courts before a child is eligible to apply for a special immigrant juvenile visa with U.S. Citizenship & Immigration Services. Advocates should note that practice in state courts currently ranges broadly both between counties, and among judges. A detailed, step-by-step guide is outside of the scope of this advisory. **Advocates are encouraged to consult with local practitioners and review the court's local rules before filing a request for SIJS findings in a jurisdiction where they have not previously filed such a request.***

## What is Special Immigrant Juvenile Status?

Special Immigrant Juvenile Status is an avenue for undocumented children to obtain legal status when they cannot be reunified with one or both parents due to abuse, neglect, or abandonment and it is not in their best interest to return to their home country.<sup>1</sup> Youth who are successful in obtaining a special immigrant juvenile visa are immediately eligible to apply for adjustment of status to that of a lawful permanent resident (a green card). However, before a youth may apply for the special visa, the process for SIJS begins in state court. The federal government has tasked state courts with making three findings:

1. That the child has been declared dependent on a juvenile court or legally committed to or placed under the custody of a state agency or department or an individual or entity appointed by a state or juvenile court;
2. That reunification with one or both of the child's parents is not viable due to abuse, neglect, abandonment, or a similar basis under state law; and
3. That it is not in the child's best interest to be returned to his or her country of nationality or last habitual residence.<sup>2</sup>

These three findings must be made before a child can even apply for SIJS before the federal agency, U.S. Citizenship and Immigration Services (USCIS).

## What are the steps of an SIJS case?

The SIJS process includes two or three steps, depending on the procedural posture of the case. Very broadly, the steps are as follows:

1. Seek an order from a state juvenile court making the three findings required for SIJS;
2. Apply for a special immigrant juvenile visa with USCIS using Form I-360;

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<sup>1</sup> 8 U.S.C. § 1101(a)(27)(J).

<sup>2</sup> *Id.*

3. Apply for adjustment of status (a green card) using Form I-485 either with USCIS or in the Immigration Court.

Note that steps 2 & 3 may be done together or separately depending upon whether the youth is in removal (deportation) proceedings, and whether the attorney is able to terminate the proceedings in immigration court.

#### What is a “juvenile court” in California?

The term “juvenile court” that is used in the federal statute governing SIJS is defined by federal regulations to mean “a court located in the United States having jurisdiction under state law to make judicial determinations about the custody and care of juveniles.”<sup>3</sup> In California, this includes dependency courts, delinquency courts, family courts and probate courts.<sup>4</sup> Set forth below is a brief summary of each type of court in California that can make SIJS findings, each type of action in which those findings may be made, and practice pointers for issues to look out for in each type of proceeding.

#### **Dependency Court**

In California, dependency courts handle reports of child abuse and neglect, determining who will have care and custody of a child when court intervention is necessary. If a minor is subject to the jurisdiction of the dependency court under Section 300 of the Welfare & Institutions Code, that minor can request SIJS findings once reunification services have been terminated as to one OR both parents and if it is not in the best interest of the minor to return to his or her home country.<sup>5</sup> For purposes of SIJS, the minor will be considered “dependent” on a juvenile court.

No one can initiate a dependency case other than the government, so if a child is not already subject to dependency court jurisdiction, opening this type of case is not an option. Further, dependency jurisdiction must be established before the child turns 18 years old, but can extend past 18 once it has been established. Additionally, it is important to note that the court does not have to wait for reunification services to be terminated as to both parents in order to make the SIJS findings.

- *Practice pointer:* Some judges in dependency courts may be hesitant to make SIJS findings when reunification services have been terminated only as to one parent, but this is permissible under the federal statute.<sup>6</sup>

#### **Delinquency Court**

Delinquency courts handle alleged violations of law by individuals under 18 years of age in California. If a minor is under the jurisdiction of the delinquency court under Section 602 of the Welfare & Institutions Code, that minor can request SIJS findings if reunification is not viable with one or both parents, and if it is not in the best interest of the minor to return to his or her home country.<sup>7</sup> For

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<sup>3</sup> See 8 C.F.R. § 204.11(a).

<sup>4</sup> See Cal. Code Civ. Proc. § 155(a).

<sup>5</sup> See Cal. Code Civ. Proc. § 155(a); *In re Y.M.* (2012), 207 Cal. App. 4th 892, 915.

<sup>6</sup> For more information, see the ILRC’s Guide entitled “Special Immigrant Juvenile Status: A Primer for One-parent Cases,” available at <http://www.ilrc.org/info-on-immigration-law/remedies-for-immigrant-children-and-youth>.

<sup>7</sup> See Cal. Code Civ. Proc. § 155(a); *Leslie H. v. Superior Court* (2014), 224 Cal. App. 4th 340.

purposes of SIJS, the child will be considered to be “placed under the custody of, a state agency or department..., or an individual...appointed by [the] court,” by virtue of having been placed in the care and custody of the probation department or ordered home on placement with a parent or other individual.

Note here as well that no one other than the government can initiate delinquency proceedings, so if a child is not already subject to delinquency court jurisdiction, opening this type of case is not an option. Further, delinquency jurisdiction must be established before the child turns 18 years old, but can extend past 18 once it has been established.

- *Practice pointer:* Judges in delinquency courts may be resistant to making SIJS findings when they feel that a child does not “deserve” the immigration benefit, but such policy considerations are not relevant to the requested findings of fact.<sup>8</sup>

### **Probate Court (Guardianship of the Person)**

Guardianship of the person is a legal action that gives someone other than the minor’s parents the “care, custody, and control” of the minor. If a minor is already subject to a guardianship or is in need of an adult guardian, they may also be able to request that the court make the SIJS findings if they meet the other requirements for SIJS under federal law (reunification not being viable with one or both parents and it not being in the minor’s best interest to return to his or her home country).<sup>9</sup> A guardianship is appropriate under state law when the minor’s parents are unwilling or unable to care for the child or where parental custody is detrimental to the child. A guardianship does not permanently terminate parental rights, rather it temporarily suspends the parents’ custodial rights, giving the guardian almost complete rights to make decisions on behalf of the minor during the existence of the guardianship. For purposes of SIJS, the child is considered to have been “placed under the custody of...an individual or entity...appointed by [the] court.”

**Guardianship Notice Requirements.** Section 1511 of the California Probate Code sets out the requirements to provide notice of a hearing on a guardianship petition to certain individuals and entities. The rationale for providing notice is that certain family members (in particular, parents, grandparents and siblings) should have the opportunity to object to a guardianship before a guardian is appointed for their child, grandchild or sibling. A step-by-step analysis of the notice requirements is outside of the scope of this guide, but the most crucial things to know are: 1) parents must receive notice via personal service. If you are unable to complete personal service, provide service in any way you can and document those efforts in a declaration of due diligence; 2) grandparents and siblings must receive notice via service by mail; and 3) some government agencies, including the local agency designated to investigate guardianships for the court, must also receive notice by mail. See Cal. Prob. Code § 1516. If you are unable to comply with the notice requirements, the court may deny your guardianship petition, so it is very important to strictly follow the probate code’s requirements.

<sup>8</sup> See *Leslie H. v. Superior Court*, 224 Cal. App. 4th at 351.

<sup>9</sup> See Cal. Code Civ. Proc. § 155(a); *B.F. v. Superior Court* (2012), 207 Cal. App. 4th 621.

Many different individuals, including relatives, friends or minors 12 years of age or older may petition for guardianship.<sup>10</sup> In California, a guardianship terminates automatically when the child turns 18.<sup>11</sup> The probate court does not have jurisdiction over a guardianship petition after the minor turns 18, so any guardianship petition must be filed before the child turns 18.

- *Practice pointer:* Advocates should be aware that they must provide notice of the guardianship proceedings to the child's family members and other individuals or institutions. There are very strict requirements for notice under the Probate Code,<sup>12</sup> which can be challenging to satisfy when family members live abroad and in rural parts of Central America.<sup>13</sup>
- *Practice pointer:* If a minor is nearing the age of 18, practitioners must carefully evaluate whether it will be possible to establish a guardianship of the person before the minor's 18<sup>th</sup> birthday. Due to busy calendars and the need to allow time for an investigation into the proposed guardian,<sup>14</sup> courts often set hearings on guardianship petitions out many months. Some advocates have been successful in getting a hearing before a minor's 18<sup>th</sup> birthday either by filing for a temporary guardianship, or by filing a motion to advance the hearing on the general guardianship. However, some judges are not willing to make SIJS findings in connection with a temporary guardianship, so advocates should proceed with caution if they are handling a case where the client is close to his or her 18<sup>th</sup> birthday.<sup>15</sup>

#### **Family Court (Custody, Parentage, Divorce or Domestic Violence Proceedings)**

Family courts make decisions about domestic issues such as custody and divorce. If a minor is already subject to a custody order in California, or is in need of a custody order giving one parent sole legal and physical custody, they may also be able to petition the court to make the findings necessary for SIJS if they meet the other requirements for SIJS under federal law (reunification not being viable with one or both parents and it not being in the child's best interest to return to his or her home country). A parent may want to request legal and physical custody of a child if they want sole power to make major decisions about the child's health, education and welfare, and the right to have the child reside with them full-time. In making custody determinations, the court is guided by the "best interest of the child" standard. For purposes of SIJS, the child is considered to be "placed under the custody of...an individual...appointed by [the] court," by virtue of being placed under the sole custody of the parent with whom they reside.

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<sup>10</sup> Cal. Prob. Code § 1510(a).

<sup>11</sup> Cal. Prob. Code § 1600(a).

<sup>12</sup> See Cal. Prob. Code § 1511.

<sup>13</sup> For more detailed information on providing notice, see Public Counsel's *Guardianship of the Person Attorney Manual*, § 6, available at <http://www.publiccounsel.org/tools/publications/files/0032.pdf>.

<sup>14</sup> See Cal. Prob. Code § 1513.

<sup>15</sup> For more detailed information on temporary guardianships, see Public Counsel's *Guardianship of the Person Attorney Manual*, § 10, *supra* note 13.

In California, there are four distinct types of proceedings in which custody determinations and SIJS findings may be made:

1. **Custody:** Generally, petitions for custody are for parents who are married, or where the parental relationship with the children has already been legally established. A parent could file a custody petition to ask the court for child custody or child support orders.
2. **Parentage:** Parentage cases are appropriate when the parents of a child are not married and where the parental relationship has not yet been established. The parentage case is used to establish both parents as the child's legal parents, and to ask for child custody and potentially support.
3. **Divorce or legal separation:** Divorce or legal separation proceedings may be appropriate when the parents desire a divorce or legal separation. A parent can file a divorce or legal separation request and also ask for custody orders that give one parent legal custody over the child(ren).
4. **Domestic Violence:** In Domestic Violence Restraining Order cases, one person can ask the court for a restraining order against the other for protection. If the people asking for the orders have a child together, they can also ask for child custody orders.

As in the guardianship context, the family court will lose jurisdiction over the child custody matter when the child reaches the age of majority at 18 years old.<sup>16</sup> If a minor is close to his or her 18<sup>th</sup> birthday, please proceed with caution and contact the ILRC for further guidance.

Note that in the majority of successful requests for SIJS findings through family courts in California, the petitioner had requested the SIJS order in connection with a Petition to Establish Parental Relationship (a "parentage" case), wherein sole legal and physical custody was requested, without child support.

- *Practice pointer:* SIJS cases in family court are a newer practice area in California, so **it is highly recommended that advocates seek co-counsel or advice from experienced family law attorneys.** Advocates should be prepared to confront judges who are unfamiliar with these types of petitions. Further, practitioners should be aware that there are very strict notice requirements in family court proceedings, sometimes presenting such large hurdles that they can render a case not viable.

#### What is the process to seek SIJS findings in state courts in California?

If the child already has an open dependency, delinquency, probate or family court case, a petition can be filed in those proceedings to request that the court issue an order making the SIJS findings. If the child does not have an open case in state court but would become SIJS-eligible through a legal guardianship or custody petition, the attorney must evaluate whether there is a need for a protective action in state court, in which a request for SIJS findings might also be made (e.g. in connection with guardianship or custody).<sup>17</sup> If appropriate, the attorney would then file an action in either family or

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<sup>16</sup> Cal. Fam. Code §§ 6500, 6501.

<sup>17</sup> Note that although children may request SIJS findings in dependency, delinquency, probate or family court in California, an individual can only initiate proceedings in either probate or family court (not dependency or delinquency court, where proceedings may only be initiated by the government).

probate court, asking the court to designate one parent with sole legal and physical custody (family court), or to appoint a guardian on behalf of the minor (probate court). **Be mindful of the fact that there must be a basis under state law to seek either a guardianship or custody order, and these cannot be sought solely for immigration purposes.** Some examples of situations in which a guardianship or custody order may be necessary are:

- A child residing with his aunt in California whose father is deceased and whose mother resides in the home country, where the child was repeatedly harassed and assaulted by gang members. Because this child is residing in California without parental protection, he is in need of an adult guardian authorized to make major decisions for him, such as educational or medical decisions. In this case, it may be appropriate to petition the probate court to have the aunt appointed guardian.
- A child residing with her mother in California who was abused and then abandoned by her father in her home country, where she also suffered threats and harassment from gang members. Because this child is residing in California with her mother, but remains vulnerable to her father's abuse and abandonment because the mother does not have full legal and physical custody rights from a court, a custody order may be warranted. In this case, it may be appropriate to petition the family court to have the mother awarded full legal and physical custody.

In these proceedings, the attorney may then also request that the court make the specific factual findings necessary for a child to apply for Special Immigrant Juvenile Status with U.S. Citizenship and Immigration Services.

In California, there is currently no "form" petition to request SIJS findings. Accordingly, advocates must prepare their own petition and supporting Memorandum of Points and Authorities. The petition must also include evidence sufficient to support the factual findings being requested. In probate and family court, the evidence may often be limited to a declaration from the child regarding the parental abuse, abandonment, or neglect, and/or declarations from other family members or friends with personal knowledge.<sup>18</sup> It is recommended that advocates check with practitioners in their county to see what format requests for SIJS findings take locally, as there is currently great variability between counties.

There are form proposed orders for SIJS findings for use in dependency, delinquency and guardianship proceedings in California. In juvenile court (dependency and delinquency), the SIJS predicate order is the Judicial Council Form JV-224. In probate court, the SIJS predicate order is the Judicial Council Form GC-224. In family court, there is no Judicial Council form, so the attorney must craft a proposed order on pleading paper. Once the order has been granted, the advocate should take it to the clerk's office to be filed and request a certified copy. This certified copy of the SIJS order will later be submitted to USCIS with the Form I-360 application for special immigrant juvenile visa.

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<sup>18</sup> Cal. Code Civ. Proc. § 155(b) states that the evidence to support the findings may consist of (but is not limited to) a declaration by the child who is the subject of the proceedings.

### When is reunification not viable?

For a child to qualify for SIJS, a judge must make a finding that reunification is not viable with one or both parents due to abuse, neglect, abandonment or a similar basis under state law. A finding that reunification is not viable for purposes of an SIJS order does not require formal termination of parental rights or a determination that reunification will never be viable.<sup>19</sup> Further, a finding of the non-viability of reunification with one or both parents for purposes of an SIJS order will not affect parental rights.

### What constitutes abandonment, abuse, or neglect?

Abuse, neglect and abandonment are defined under the relevant state law and do not have to take place within the United States. In California, the law governing abandonment, abuse and neglect is set forth in section 300 et seq. of the Welfare & Institutions Code. These statutory provisions are in turn interpreted by case law in California. Advocates should note that the findings made in an SIJS order do not require that formal charges of abandonment, abuse, or neglect be brought against the parent(s).

The SIJS statute also allows for SIJS eligibility based on findings under state law “similar” to abandonment, abuse or neglect. For example, in California some practitioners have been successful in arguing that death of a parent is similar to abandonment under state law, because it also leaves the child without provision for support. Note that if the court makes a finding that reunification is not viable due to a “similar basis under state law,” the applicant for SIJS has the burden of establishing to USCIS that such a basis is in fact similar to a finding of abuse, neglect or abandonment.

### When is it not in the minor’s best interest to be returned to his or her home country?

The evidence in support of this finding should include both the downsides of the child returning to her home country and the upsides of remaining in the United States. This could include information about the availability of parents or other adults to care for the child, safety concerns, access to medical and educational services, the child’s ties to the U.S., and the like. Note that the Judicial Council Memo implementing California’s new law SB 873 states that in making the best interests determination, the state court can focus on circumstances shown by the evidence presented regarding the child’s life and relationships in the U.S. and in his or her country of origin and need not become an expert on conditions in the foreign country.<sup>20</sup>

*The **Immigrant Legal Resource Center**, founded in 1979 and based in San Francisco, California is a national resource center that provides training, technical assistance, and publications on immigration law.*

*[www.ilrc.org](http://www.ilrc.org)*

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<sup>19</sup> Nonetheless, short separations from parents typically will not suffice.

<sup>20</sup> For more information on SB 873 and the Judicial Council Memo, see the ILRC’s Fact Sheet “SB 873: How California’s New Law Benefits Unaccompanied Minors,” available at <http://www.ilrc.org/resources/sb-873-how-california-s-new-law-benefits-unaccompanied-minors>.