



# Special Immigrant Juvenile Status and its Intersection with Guardianship Law

BY MELISSA CORRAL ESQ., AND ALISSA COOLEY, ESQ.

**Although many people don't realize it, there's an intersection between two completely different areas of law. When a noncitizen child seeks Special Immigrant Juvenile Status (SIJS), immigration and guardianship law intersect to provide a pathway to lawful permanent resident (LPR) status for children who cannot be reunited with their parents due to abuse, abandonment, and/or neglect, when it's not in their best interest to return to their home country. SIJS is a form of humanitarian immigration relief that, if granted, offers stability and safety to vulnerable immigrant children in the U.S.<sup>1</sup>**

SIJS is unique in several respects. First, it is the only provision in federal immigration law that expressly incorporates a best interest of the child standard into its eligibility criteria. Second, it utilizes a hybrid system of state and federal collaboration, drawing on the state child welfare system and best interest expertise of state court judges to inform federal adjudication of immigration status.<sup>2</sup> Congress delegated to state court judges the issuance of factual determinations about children's best interest because state courts have particularized expertise in the area of child care and custody.<sup>3</sup> The statute requires state court findings on issues that are inherent in state court decisions about child care, custody, and placement, including the best interests of the child and viability of parental reunification.

To submit an application for SIJS, a child must submit a predicate order from a state "juvenile" court to the U.S. Citizenship and Immigration Services (USCIS) Office. For the purposes of SIJS cases, federal immigration law defines a state "juvenile court" as any "court located in the U.S. having jurisdiction under state law to make judicial determinations about custody and care of juveniles." Examples of state courts that may meet this definition include: juvenile, family, dependency, orphans, *guardianship*, probate, and delinquency courts.<sup>4</sup>

After years of inconsistent treatment or rejection of SIJS-related family court cases throughout Nevada, the legislature passed AB142 in 2017, which codified the federal SIJS statute under NRS 3.2203. This statute explicitly confers district court

jurisdiction to make judicial determinations regarding the custody and care of juveniles, and therefore the court may make the factual findings necessary to enable a child to apply for SIJS. NRS 3.2203(1). Nevada's family and guardianship courts are considered juvenile courts, and with the passage of AB142, a child in Nevada can obtain the necessary order with findings from either court, depending on the child's individual situation.

To represent a child in an SIJS case, the first critical step is to obtain an order from a state court making the requisite findings, often referred to as a "predicate order."<sup>5</sup> It is important for judges and attorneys to know that the state court's role in the immigration process does not extend beyond these factual findings, and the determination of whether the child obtains legal status is within the sole discretion of USCIS.<sup>6</sup>

For SIJS purposes, a child means an unmarried person who is less than 21 years of age. NRS 3.2203(8)(c). With this in mind, an attorney may either obtain a minor guardianship if the immigrant child is 18 years old or under, or an adult guardianship if the child is 18 years old or older. At times, this presents difficulty as normally, for state purposes, a court no longer has jurisdiction upon a child when they turn 18 or if they remain in high school, upon turning 19. However, in SIJS-related matters, NRS 3.2203 specifically extends jurisdiction over the child until age 21. Unlike with typical adult guardianships, those that are SIJS-related need not prove a lack of capacity or inability to care for themselves.

Rather, SIJS-related guardianships for persons over 18 but under 21 are handled in largely the same manner as minor guardianships. The only differences are (1) the terminology—a "Protected Person" instead of a protected minor, (2) citing to NRS 159 instead of NRS 159A, and (3) checking "adult" on the family court coversheet.

Typically, a child is eligible for SIJS if living in Nevada with a non-parent family member. As such, the guardianship becomes extremely helpful for the family member, as that person is often in charge of the child and can use the letters of guardianship for decisions

regarding education and healthcare. The guardianship is therefore necessary to ensure the guardian is able to continue to care for the child until they are able to care for themselves, while also providing a potential avenue to obtain legal status in the U.S. Importantly, the non-abusive, abandoning, or neglecting parent can be the proposed guardian in Nevada, as a parent is "preferred over all others for the appointment of a guardian." NRS 159A.061(1).

In Nevada, anyone can petition for the appointment of a guardian, including the child themselves. NRS 159A.044(1). For an attorney who represents a child in their immigration proceedings, it is best practice for the child to petition for the appointment of guardian. This practice will help avoid any potential conflict of interest. And, because the attorney already represents the child, there is no need for the state to appoint a guardian ad litem to represent the child's interests.

In addition to complying with the requirements of NRS 159A.044 regarding the content of the petition, an attorney should also include the legal and factual basis for the request for SIJS findings. This procedure includes citing relevant Nevada law and the specific circumstances in the child's case that warrant a factual finding of abuse, abandonment, or neglect. In Nevada, the burden of proof is clear and convincing evidence. A sworn affidavit or declaration by the child (if they are aware if age appropriate or known to them) and/or the proposed guardian (if they are aware) that details the abuse, abandonment, or neglect

suffices. Note that an attorney must include specific language in their petitions and proposed orders to denote SIJS eligibility. For example, the order must state that reunification is not viable with the child's parent due to a specific basis and cite to the state law regarding that basis (e.g., abandonment). Further, USCIS does not like barebone orders that do not include a factual basis for the family court's findings.

Once a guardianship is granted, the guardian has all the same responsibilities as a regular guardianship. The guardian receives letters of acknowledgment, must

file acknowledgments and responsibilities, and also needs to file a yearly report with the state court. The child can then file a petition for SIJS with USCIS with a copy of the guardianship order. If granted, once a visa becomes available, the child is able to apply for LPR status and later, citizenship. Importantly, as a safe harbor built into the federal statute, the child is barred from ever petitioning for a parent, even if only one parent served as the basis for the finding of abuse, abandonment, and/or neglect.

SIJS is a critical form of relief for children who have suffered mistreatment by one or both parents and it is not in the best interest to return to their home country. For those in deportation proceedings, their prima facie eligibility for SIJS often results in dismissal of their case so they can seek the visa before USCIS. Through SIJS and our family courts, one of our most vulnerable populations can find stability and safety.

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## ENDNOTES:

1. <https://niwaplibrary.wcl.american.edu/wp-content/uploads/SIJS-Bench-book-complete-with-correct-cover-page.pdf>
2. *Id.*
3. Gregory Zhong Tian Chen, "Elian or Alien? The Contradictions of Protecting Undocumented Children Under the Special Immigrant Juvenile Statute," 27 HASTINGS CONST. L.Q. 597, 609, 611 (2000).
4. Appendix D1: USCIS SIJS Policy Manual Volume 6 – Immigrants Part J – Special Immigrant Juveniles – Chapter 3(A) – Juvenile Court Orders and Administrative Documents, in NAT'L IMMIGRANT WOMEN'S ADVOCACY PROJECT, SIJS BENCH BOOK 11 (2017), <http://niwaplibrary.wcl.american.edu/pubs/appendix-d1-uscis-sijs-policy-manual-full-vol-6/>.
5. *In re M.C.*, N.Y.L.J., at 25 (noting that "the ultimate determination as to an immigrant juvenile's status rests squarely within the purview of the federal government"); *In re D.A.M.*, No. A12-0427, 2012 WL 6097225, at \*7 (Minn.Ct. App. Dec. 10, 2012) ("[T]hese findings by the state court do not bestow any immigration status on SIJS applicants.").
6. *Id.*

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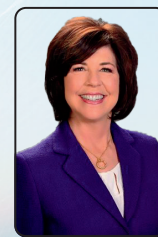
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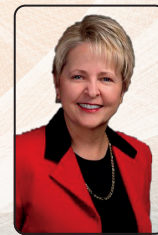
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