Children's Rights Project/Immigrant Rights Project

SEEKING SPECIAL IMMIGRANT JUVENILE FINDINGS THROUGH CALIFORNIA FAMILY COURTS

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CHAPTER 1: INTRODUCTION TO SPECIAL IMMIGRANT JUVENILE STATUS AND CALIFORNIA

Special Immigrant Juvenile Status ("SIJS") is one of the few child-specific benefits that exists in United States immigration law. Congress initially created SIJS to provide humanitarian protection for abused, neglected, or abandoned immigrant children eligible for long-term foster care, but since its creation, Congress has continually expanded the scope of SIJS.[1] Today, SIJS is available to children who cannot reunify with one or both parents due to abuse, abandonment, neglect, or a similar basis found under state law.[2] Congress has eliminated the requirement that a child be found eligible for long-term foster care, and instead requires that a state juvenile court declare the child dependent on the court or place them in the custody of an individual or entity appointed by the court.[3] The court must then make predicate findings regarding parental reunification, abuse, abandonment, or neglect, and the child's best interests. These Special Immigrant Juvenile findings ("SIJ findings") can be made in a wide range of state courts, including family, probate, dependency, and delinquency courts.[4]

The process to obtain SIJS on behalf of a child client begins with a state court proceeding where the court makes requested custody orders and SIJ findings, which the child can then use to petition for SIJS with U.S. Citizenship and Immigration Services ("USCIS"). In California, the probate, family, juvenile dependency, and juvenile delinquency divisions of the superior court can make these required initial findings.[5] This manual will focus specifically on obtaining SIJ findings in the family division of the superior court ("family court"). The nature of family law proceedings creates unique challenges getting into court and obtaining the required findings for a child client. The goal of this manual is to provide a guide for practitioners on how to obtain SIJ findings in family court from start to finish – from the very first meeting with a new client to the final hearing before a family court judge, and then taking the case to judgment, which makes the orders in the case permanent.

This manual begins with an introduction to the federal SIJS laws and regulations and California laws and family court actions related to SIJS. Chapter 2 then discusses how to assess a potential case in family court, including legal and client-specific considerations prior to filing an action. The next two chapters discuss the two most important types of family court actions for purposes of obtaining SIJ findings: Chapter 3 provides an overview of filing a parentage

[1] *See* Immigration and Technical Corrections Act of 1994, Pub. L. No. 103-416, § 219, 108 Stat. 4316 (1994); Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA 2008"), Pub. L. No. 110-457, § 235, 122 Stat. 5080 (2008); *see also* USCIS Policy Manual, Volume 6, Part. J, Chapter 1.A.
[2] 8 USC § 1101(a)(27)(J).
[3] *See* TVPRA 2008, § 235(d)(1); 8 USC § 1101(a)(27)(J)(i).
[4] *See* 8 CFR § 204.11(a) (Defining a juvenile court as a U.S. court "having jurisdiction under state law to make judicial determinations about the custody and care of children"); USCIS Policy Manual, Volume 6, Part J, Chapter 3.A.1. ("The title and the type of court that may meet the definition of a juvenile court will vary from state to state. Examples of state courts that may meet this definition include: juvenile, family, dependency, orphans, guardianship, probate, and delinquency courts.").
[5] *See* Code Civ. Proc. § 155(a)(1).

action, while Chapter 4 outlines the filing of a custody action.[6] Chapter 5 talks about preparing for a Request for Order ("RFO") hearing, and then getting final orders by taking a case to judgment. Chapter 6 describes in detail how to obtain SIJ findings, including what it will take both for a judge to issue the findings and for USCIS to accept those findings as sufficient for federal immigration purposes. Finally, Chapter 7 discusses when and how to file a writ or appeal. The manual ends with samples and checklists for practitioners to use throughout the course of a family court case for easy reference and to make sure that the case remains on track when seeking SIJ findings.

I. Federal Law Related to SIJS

Congress initially created the SIJ immigrant visa classification as a means for immigrant children in state foster care systems to obtain lawful immigration status.[7] Congress subsequently expanded the classes of children eligible for SIJS. The Trafficking Victims Protection Reauthorization Act ("TVPRA") of 2008 created the most important changes for purposes of obtaining SIJ findings in family court proceedings.[8] Among the TVPRA's most important changes are:

- The possibility of SIJ findings when reunification with one *or* both parents is not viable due to abuse, abandonment, neglect, or a similar basis under state law. This replaced the long-term foster care requirement and enabled children that reside with one parent to obtain SIJ findings based on the actions of the other parent.[9]

- The expansion of SIJS eligibility to include children placed under the custody of a person or entity appointed by a state or juvenile court, which made clear that children placed with a custodial parent or legal guardian can qualify for SIJS.[10]

- The simplification of the Department of Homeland Security consent function, which is necessary in order for USCIS to grant a petition for SIJS. USCIS now utilizes the consent requirement to "review the juvenile court order to conclude that the request for SIJ classification is bona fide…"[11]

- Age-out protections for SIJS classified children; as long as a child is under 21 years of age upon filing the petition for classification as a Special Immigrant Juvenile, USCIS cannot deny the petition solely because the child is older than 21 at the time the petition is adjudicated.[12]

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[6] Please note that Chapters 3 and 4 are intended to guide practitioners through parentage and custody actions, respectively, from start to finish – and therefore contain repetitive information for those steps that are common to both actions.

[7] *See* Immigration Act of 1990, Pub. L. 101-649 (Nov. 29, 1990).

[8] *See* TVPRA 2008, § 235.

[9] *See* TVPRA 2008, § 235(d)(1)(A).

[10] *See id.*

[11] USCIS Policy Manual, Volume 6, Part J, Chapter 2.D.5.

[12] USCIS Policy Manual, Volume 6, Part J, Chapter 2.C.

- A 180-day timeframe for the adjudication of a SIJS petition.[13]

Under federal law, a child is eligible for SIJS if they are:

- Under 21 years of age on the date they filed the SIJS petition[14]
- Unmarried[15]
- Declared dependent on a state juvenile court, or placed in the custody of a state agency or individual appointed by such a court (such as being placed in the custody of one parent)[16]
- The subject of specific findings that reunification with one or both parents is not viable due to abuse, abandonment, or neglect, and that it is not in the child's best interest to return to their home country[17]
- Subject to DHS's consent to the SIJ classification[18]

PRACTICE TIP: Department of Homeland Security Consent Function. Practitioners might be tempted to ignore the USCIS consent function, but it should not be taken for granted. USCIS utilizes the consent function to review the juvenile court order solely to determine that the SIJS request is "bona fide" – in other words, that it is "sought to obtain relief from abuse, neglect, abandonment, or a similar basis under law."[19] In order to make this determination, "USCIS requires that the juvenile court order or other supporting evidence contain or provide a reasonable factual basis for each of the findings necessary for classification as a SIJ."[20]

To increase the odds that USCIS will approve a SIJS petition, advocates should clearly lay the record with a bona fide reason for seeking the custody order and include those reasons in the SIJ findings. They should also ensure that the SIJ findings include a factual description of the child's situation that supports the findings.

[13] *See* TVPRA 2008, § 235(d)(2).
[14] 8 CFR § 204.11(c)(1); 8 USC § 1101(b)(1); 8 USC § 1232(d)(6) (creating age-out protections for SIJS classified juveniles. As long as a child is under 21 years old when they file for SIJS, they remain eligible past their 21st birthday). Note that the regulations implementing SIJS have not been updated to reflect the 2008 amendments to the SIJS statute.
[15] 8 CFR § 204.11(c)(2). An individual must remain unmarried through the adjudication of the I-360. Note that regulations were updated in 2022 to allow individuals to marry after their I-360 was approved, but before their priority date becomes current.
[16] 8 USC § 1101(a)(27)(J)(i).
[17] 8 USC § 1101(a)(27)(J)(ii).
[18] 8 USC § 1101(a)(27)(J)(iii).
[19] *See* USCIS Policy Manual, Volume 6, Part J, Chapter 2.D.5.
[20] *Id.*

The required first step to obtain SIJS is seeking SIJ findings from a state juvenile court, defined under the federal regulations as any court with the ability to make determinations about the care or custody of juveniles.[21] Federal law requires that the state juvenile court declare the child dependent on the court or place the child in the custody of an individual or entity appointed by the court.[22] Then, the state court must make certain findings regarding the child's abuse, abandonment, or neglect, potential parental reunification, and best interests as a necessary predicate for a child to qualify the SIJS process.[23] In other words, without a state court proceeding to get these findings, there is no way to petition for federal SIJ classification.

The proceedings that occur in state court must result in the court declaring the child dependent on the court itself or placing the child in the custody of an individual or state agency.[24] Once the court has made that placement, it can then move on to make the required SIJ findings.

The findings that a state court makes must consist of the following:

- The child is dependent on the court itself or the child is placed in the custody of an individual that the court appoints – which could include one of the child's parents.[25]

- Reunification with one or both parents is not viable due to abuse, abandonment, neglect, or a similar basis under state law.[26]

- It is in the child's best interest to remain in the United States and not be returned to their or their parents' country of origin or of last habitual residence.[27]

USCIS should give deference to state court determinations, as long as the state court provides a factual basis to support its legal conclusions. USCIS's policy guidelines state that:

> USCIS relies on the expertise of the juvenile court in making child welfare decisions and does not reweigh the evidence to determine if the child was subjected to abuse, neglect, abandonment, or a similar basis under state law. In order to exercise the statutorily mandated DHS consent function, USCIS requires that the juvenile court order or other supporting evidence contain or provide a reasonable factual basis for each of the findings necessary for classification as a SIJ. The evidence needed does not have to be overly detailed, but must confirm that the juvenile court made an informed decision in order to be considered "reasonable."[28]

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[21] *See* 8 C.F.R. § 204.11(a).
[22] 8 USC § 1101(a)(27)(J)(i).
[23] 8 USC § 1101(a)(27)(J)(ii)-(iii).
[24] 8 USC § 1101(a)(27)(J)(i).
[25] *Id.*
[26] 8 USC § 1101(a)(27)(J)(ii).
[27] 8 USC § 1101(a)(27)(J)(iii).
[28] USCIS Policy Manual, Volume 6, Part J, Chapter 2.D.5.

USCIS interprets this deference to require an adequate factual basis to show that a custody order was not sought primarily for immigration purposes, but rather for relief from abuse, abandonment, or neglect. Practitioners must therefore develop and lay the record for the need for the custody order in order for USCIS to exercise its consent function.[29] The SIJ findings themselves should reflect that the state court considered this factual basis when it made the custody determination and findings regarding abuse, abandonment, or neglect and best interests. See **Appendix H** for a sample state predicate order.

II. California Law Related to SIJS

California has several laws specific to SIJS that serve to benefit immigrant youth. For purposes of this manual, the most important of those laws is Senate Bill (SB) 873, which passed in 2014.[30] SB 873 added section 155 to the California Code of Civil Procedure in order to protect vulnerable children and codify the procedures for them to seek SIJ findings in state juvenile courts. SB 873 added provisions to the Code of Civil Procedure clarifying which branches of the superior court are "juvenile courts" and can make SIJ findings,[31] requiring courts to make SIJ findings if so requested and there is evidence to support the findings,[32] and specifying that such evidence can "consist of, but is not limited to, a declaration by the child who is the subject of the petition."[33] Section 155 is a powerful tool that practitioners can use to obtain SIJ findings on behalf of their clients. The statute not only clarifies which California courts have jurisdiction to make SIJ findings, but also requires the courts to make those findings if a petitioner submits sufficient evidence to support them.

PRACTICE TIP: Confidentiality of State Court Documents. Section 155 of the California Code of Civil Procedure also contains broad confidentiality protections for children seeking SIJ findings through any branch of the superior court. Section 155(c) states that in any judicial proceedings in response to a request to make SIJ findings, "information regarding the child's immigration status that is not otherwise protected by state confidentiality laws shall remain confidential and shall be available for inspection only by the court, the child who is the subject of the proceedings, the parties, the attorneys for the parties, the child's counsel, and the child's guardian."[34]

[29] *See* discussion of the USCIS consent function, *supra*.

[30] Another important California law related to SIJS is Assembly Bill ("AB") 900, which allows immigrant youth ages 18 to 20, Other important California laws related to SIJS are Assembly Bill ("AB") 900, which allows immigrant youth ages 18 to 20, who are living with neither parent in the United States, to obtain SIJ findings through probate guardianship proceedings and AB 2090, which allows immigrant youth ages 18 to 20 who are living with a parent to obtain SIJ findings through probate guardianship proceedings. For further information on AB 900 and AB 2090, see Public Counsel's Guardianship Manual, available at https://publiccounsel.org/wp-content/uploads/2022/01/Guardianship-Attorney-Manual_2021.pdf

[31] *See* Code Civ. Proc. § 155(a)(1).

[32] *See id*.

[33] Code Civ. Proc. § 155(c). SB 873 also added provisions to § 155 allowing petitioners to seal records of proceedings that include a request for SIJ findings if they are not otherwise protected by state confidentiality laws and requiring the Judicial Council of California to adopt any rules necessary to implement the other provisions of § 155 *See* Code Civ. Proc. § 155(d), (e).

[34] Code Civ. Proc. § 155(c).

Yet jurisdiction and evidence are only half the battle in obtaining SIJ findings. Deciding what constitutes *abuse, abandonment, neglect, or a similar basis under state law* in California is an entirely separate question, requiring a familiarity with a broad range of California laws.

The primary definitions of abuse, abandonment, and neglect in California come from both the Family Code and the Welfare and Institutions Code:

- **Abuse:** Family Code section 6203(a) defines abuse as intentionally or recklessly causing or attempting to cause bodily injury, sexual assault, or placing a person in reasonable apprehension of imminent serious bodily injury to that person or to another.[35] Welfare and Institutions Code section 300(a) states that abuse is when "[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm inflicted nonaccidentally upon the child by the child's parent or guardian."[36]

- **Abandonment:** Family Code section 3402(a) states that, "'[a]bandoned' means left without provision for reasonable and necessary care or supervision."[37] Welfare and Institutions Code section 300(g) defines abandonment as being "left without any provision for support."[38]

- **Neglect:** Welfare & Institutions Code section 300(b) defines general neglect as "the negligent failure of a parent/guardian or caretaker to provide adequate food, clothing, shelter, or supervision where no physical injury to the child has occurred," while severe neglect is "where the child's health is endangered, including severe malnutrition."[39]

There have also been a number of appellate cases in California specific to SIJ findings. These cases involve the definition of abandonment within the SIJ context, the factors a juvenile court can consider when deciding whether to make SIJ findings, and perhaps most importantly for purposes of this manual, procedures in family court relating to the joinder of absent parents and other important family court-specific issues.

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[35] *See* Fam. Code § 6203(a).

[36] Welf. & Inst. Code § 300(a).

[37] Fam. Code § 3402(a).

[38] Welf. & Inst. Code § 300(g). It is important to note that only one of the clauses of § 300(g) – relating to voluntary surrender – has an element of parental intent; all other subsections look at the *child's* situation of having been left without provision for support. *See id*.; *D.M. v. Superior Court* (2009) 173 Cal.App.4th 1117, 1128-29. The Court of Appeal has also found abandonment under Family Code section 3402(a) absent the intent of the parents to abandon the child. *In re Jorge G.* (2008) 164 Cal.App.4th 125, 132-33 (finding that a child was abandoned by incarcerated parents).

[39] *See* Welf. & Inst. Code § 300(b). *See also* Pen. Code § 11165.2 (Child neglect is "the negligent treatment or the maltreatment of a child by a person responsible for the child's welfare under circumstances indicating harm or threatened harm to the child's health or welfare. The term includes both acts and omissions on the part of the responsible person."); Fam. Code § 3200.5(b) (involving the appointment of professional supervised visitations services in situations that include neglect as defined in Penal Code section 11165.6, which in turn references Penal Code section 11165.2); Ed. Code §§ 48200, 49160 (detailing the conditions under which children can seek employment and work).

The following are some of the most important appellate decisions[40] in California relating to SIJ findings:

- ***Guardianship of Saul H., 13 Cal. 5th 827 (2022)***
  In Saul H., the California Supreme Court overturned the probate judge and Court of Appeals' denial of the petitioner's request for SIJ findings. The ruling is highly consequential for those seeking SIJ findings in California state courts.

  First, the Court held that a denial of SIJ findings is appealable because it "completely disposes" of the petition, rendering the order "the equivalent of a final, appealable judgment." Saul H. 13 Cal. 5th at 841, fn. 2 (internal quotations and citations omitted). This clarifies that the appropriate method to challenge a denial of an SIJ findings request is appeal, rather than writ review.

  Furthermore, the Court held that the default burden of proof standard for civil cases, preponderance of the evidence, applies to requests for SIJ findings. Id. at 842. The declaration of the youth seeking SIJ findings can, on its own, be sufficient to prove the requisite facts to support SIJ findings. Id. at 843. If the youth's declaration fails to provide sufficient factual basis for SIJ findings, a state court judge can require further evidence or an evidentiary hearing, but must be mindful of the "unique features and challenges of such proceedings." Id. at 844. Moreover, a state court judge "may not ignore or discredit facts shown by a child's declaration based on surmise or on evidence outside the record or draw speculative inferences against the child." Id. The Court found that California Code of Civil Procedure § 155 and appellate precedent impose a "mandatory duty" on trial courts to issue SIJ findings where there is a preponderance of the evidence to support them. Id. at 845-846.

  In its decision on the merits, the Court held that the purpose of the "nonviability" requirement is to "identify children whom it would not be viable—meaning not workable or practical—to return to live with a parent." Id. at 848. The "nonviability" inquiry does not require a showing that it is literally impossible for a child to return to their parents' care, but rather that, under the circumstances, it would not be "workable or practical" to do so. Id. at fn. 5. In assessing "nonviability," a state court should consider "all relevant circumstances, including the ongoing psychological and emotional impact on the child of the past relations between the child and the parent, how forced reunification would affect the child's welfare, the parent's ability and willingness to protect and care for the child, and the parent's living conditions." Id. at 848. Furthermore, the Court held that the probate court erred in failing to consider whether Saul had shown it would not be workable or practical for him to live with his parents based on the provisions to which Saul had cited which do not define "abuse," "neglect" or "abandonment" but that may nevertheless provide a "similar basis" for a nonviability of reunification determination.

  With this in mind, the Court rejected the lower courts' focus on parental "blameworthiness" in the context of SIJ findings. State court judges should not focus not

on parental "blameworthiness," but "effect of [the] harm [the child experienced] on the workability or practicality of returning the child to live with the parent." Id. at 849.

- ***Leslie H. v. Superior Court* (2014) 224 Cal.App.4th 340**
  The appellate court in *Leslie H.* clarified that a state court's role is solely to identify children that have been abused, abandoned, or neglected, and in whose best interest it is to remain in the United States. The court stated that "[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 [] children under its jurisdiction who cannot reunify with a parent or be safely returned in their best interests to their home country."[41]

- ***Eddie E. v. Superior Court* (2015) 234 Cal.App.4th 319**
  Here, the appellate court clarified that a child can obtain SIJ findings based on the abuse, abandonment, or neglect of *one* or both parents. The appellate court also held that a child whose parent abandoned him and subsequently died is still unable to reunify with that parent due to abandonment. "It would be a particularly parsimonious reading of the statute, however, to deny relief to a petitioner who had been fully abandoned just because his or her parents, by dint of circumstance, died after the abandonment…The facts here amply demonstrate that petitioner's mother permanently abandoned him. That she died only cemented the permanent abandonment already in place."[42]

- ***In Re Israel O* (2015) 233 Cal.App.4th 279**
  This appellate case confirmed that SIJ findings are possible in California when a child resides with a custodial parent. In Israel O's case, the juvenile court had declined to make SIJ findings for him because returning to live with his mother remained a feasible option, even though the court acknowledged that his father had abandoned him. The juvenile court based its decision on a Nebraska Supreme Court case that held that the "1 or both" language of the federal SIJS statute prohibited SIJ findings for children who could reunify with a custodial parent. The Court of Appeals disagreed, holding that although the language "1 or both" in the federal statute was ambiguous, the fact that USCIS itself acknowledged that a child could live with a custodial parent and qualify for SIJS carried considerable weight and clarified any ambiguity in the statute.[43]

- ***Bianka M. v. Superior Court* (2018) 5 Cal. 5th 1004**
  The California Supreme Court held that the juvenile court erred when it concluded that it could not issue a custody order or SIJ findings unless the petitioner first established a basis for exercising personal jurisdiction over her absent father and then joined him as a

[40] For a more complete list of California appellate cases related to SIJ findings, see Immigrant Legal Resource Center, *California Appellate Law on Special Immigrant Juvenile Status*, available at https://www.ilrc.org/sites/default/files/resources/california_appellate_law_on_sijs_ilrc_oct_2016.pdf.

[41] *Leslie H.*, *supra*, 224 Cal.App.4th at344.

[42] *Eddie E.*, *supra*, 234 Cal.App.4th at 332.

[43] *Israel O*, *supra*, 233 Cal.App.4th at 290-91.

party to the action. The Supreme Court also held that the juvenile court erred when it presumed that the primary purpose behind the family court proceeding was to obtain SIJ findings. "We granted review to determine whether the superior court properly required the child's nonresident, noncustodial parent to be joined as a party in her parentage action seeking special immigrant juvenile findings. We also consider whether, as certain language in the Court of Appeal's opinion might suggest, the child's perceived immigration-related motivations for filing the action have any bearing on whether the action may proceed. Our answer to both questions is no…The action may also proceed regardless of whether the court believes it was filed primarily for the purpose of obtaining the protections from abuse, neglect, or abandonment that federal immigration law provides."[44] As a result of *Bianka M*, a child may seek and receive SIJ findings in family court even when one of their parents resides outside of the state of California and beyond the personal jurisdiction of the court.

III. Family Court Proceedings Related to SIJS

There are several potential family court actions through which a petitioner can obtain SIJ findings. This manual will focus on two of those potential actions – parentage and custody actions – which are the most common means of obtaining SIJ findings in family court. The decision of whether to file a parentage or a custody action depends on whether the child's parents were married and cohabitating at the time of the child's birth.

a. Parentage Actions

If a child's parents were not married and living together when the child was born, a parentage action is the appropriate means of obtaining SIJ findings in family court. A parentage action is an action to establish an individual as a child's legal parent. In California, a family court can only place a child in the custody of a parent, which means that parentage must be established before the court can grant custody orders or SIJ findings.[45] Although in most cases a child's birth certificate lists the names of their parents, parentage is not *legally* established unless certain other requirements are met.[46]

There are three common ways to establish parentage in California: (1) A parent, typically at the time of birth, signs a Voluntary Declaration of Paternity; (2) a local child support agency seeks to establish parentage as part of an attempt to obtain child support; or (3) an interested party initiates a parentage action to request a finding of parentage.[47] If parentage already has been established through a Voluntary Declaration of Paternity or as part of a child

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[44] *Bianka M.*, *supra*, 5 Cal 5th at 1011.

[45] Fam. Code § 7605. *See also Scott v. Superior Court* (2009) 171 Cal.App.4th 540, 544 (citing (Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2008) ¶ 7:23, pp. 7–8 to 7–9) ("Jurisdiction to adjudicate custody and visitation in a proceeding under the [UPA] is premised on there being a parent and child relationship [citations]. Thus, parentage in favor of the party seeking custody/visitation must be established.").

[46] *See* Fam. Code § 7601(a).

[47] See California Courts, Establishing Paternity/Parentage (accessed April 7, 2019), available at https://www.courts.ca.gov/1201.htm#acc11294.

support order, you do not need to file a parentage action in order to seek custody orders and SIJ findings from the court; instead, you file a Petition for Custody and Support, as discussed below.

If there has not been a Voluntary Declaration of Paternity or a child support order, however, an interested party must file a parentage action in order to establish parentage. This interested party can be the child, who would then be the petitioner seeking to establish a parental relationship with the respondent parent in that case.[48] The child would have to show the Court that they have a parent-child relationship with the respondent, and that their health, safety, and welfare dictate that the respondent parent should have sole legal and physical custody over them.[49]

b. Custody Actions

Although parentage may be established without a parentage action through a voluntary declaration of parentage or by a child support agency, parentage is *also* established without a parentage action where the conclusive presumption of parentage applies. A conclusive presumption of parentage exists when a child is born to married, cohabitating parents.[50] Thus, if a child's parents were married and living together at the time of the child's birth, parentage is conclusively established as a matter of law.[51] A parentage action is therefore not necessary or appropriate because the identities of the child's parents have already been legally established.

In such cases, the California Family Code allows "a spouse to bring an action for the exclusive custody of the children of the marriage."[52] This action is a Petition for Custody and Support and can be filed without filing for divorce.[53] The legal standard for granting a Petition for Custody and Support is the best interest of the child.[54] The petitioner therefore needs to show why their child's health, safety, and welfare would best be served with an order granting them sole legal and physical custody.

Each of these actions – parentage and custody – will be discussed in greater detail in Chapters 3 and 4, respectively.

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[48] *See* Fam. Code § 7630 (allowing a child to bring a maternity action); *Scott v. Superior Court*, *supra*, 171 Cal.App.4th at 544.

[49] Fam. Code § 3011.

[50] Fam. Code § 7540.

[51] *Id., see also Susan H v. Jack S* (1994) 30 Cal.App.4th 1435, 1441.

[52] Fam. Code § 3120.

[53] *See id.* Although SIJ findings may be sought in the context of a Petition for Divorce, advocates typically bring Petitions for Custody and Support instead. Petitions for Custody and Support are less likely to be contested than divorces, and they are less likely to involve property division or issues of monetary support, which require personal jurisdiction over the respondent spouse. *See In re Marriage of Leonard (1981)* 122 Cal.App.3d 443 (although personal jurisdiction is required for child support, it is not required for child custody orders).

[54] Fam. Code § 3011.

CHAPTER 2: ASSESSING A CASE

This chapter will assist practitioners in assessing a new client's case. The chapter begins with a discussion of whether your child client can even file a family court action in the first place, which in turn depends on whether they need a custody order. Would the child benefit from having a custody order placing them into one parent's sole legal and physical custody? If the answer to that question is yes, you will need to determine whether the child is also eligible for SIJ findings as part of that family court action. The chapter will take you through the key steps to determine whether your child client is eligible for SIJ findings. Is reunification with the child's non-custodial parent feasible? If not, is it because the child's non-custodial parent abused, abandoned, or neglected them? Is it in the child's best interest to not return to their country of origin—and if so, why?

Next, the chapter addresses how to determine what type of family court action to file – a parentage action or a custody action. The chapter will then discuss problems that might arise in the case of an otherwise SIJS-eligible child, including age-out issues and problems with the child's birth certificate. There will then be an overview of considerations when working with immigrant children, including how to approach working with a child client, how trauma affects a child, and tips for your first client meeting. Finally, there will be specific case examples to help conceptualize the ideas and information contained in this chapter.

I. Legal Considerations

a. Is your client eligible for SIJ findings through a family court action?

The first step in assessing a case is to determine whether your child client is eligible for SIJS. As you seek SIJ findings in family court for your client, you should be mindful of the eligibility requirements to obtain SIJS and ensure that the family court process establishes your client's eligibility.

USCIS asks three main questions when determining eligibility for SIJS:

- Is the child a dependent on the court, or in the custody of a state agency or department or an individual or entity appointed by the court?
- Did the court find that reunification with one or both of petitioner's parents is not viable because of abuse, abandonment, neglect, or similar basis under state law?
- Did the juvenile court find that it is not in the best interest of the petitioner to return to their country of nationality or last habitual residence or that of their parents?[55]

[55] 8 USC § 1101(a)(27)(J). For all requirements, see Chapter 1, *supra*. Code Civ. Proc. § 155, which governs SIJ Findings in California, mirrors the eligibility requirements under the federal SIJS Statute.

USCIS also considers whether the underlying custody or dependency order is "bona fide," *i.e.* that it is "sought to obtain relief from abuse, neglect, abandonment, or a similar basis under state law, and not primarily or solely to obtain an immigration benefit."[56]

i. Is your client eligible for a custody order through family court?

In order to meet the first eligibility requirement, your client must be dependent on the court, or in the custody of a state agency or department or an individual or entity appointed by the court.[57] Thus, to seek SIJ findings through family court, your client must be eligible to seek a custody order in state court.[58] In order to make this determination, you must first determine with whom the child lives. If the child lives with both parents and it appears that both parents care for and support them, that child does not need a state court order giving their parents' custody. The child's parents already have physical custody of them and are present to give consent in educational, medical or legal proceedings as they become necessary.[59] That child would also not be eligible for SIJS under the reunification requirement because they are living with both parents. Because that client does not need a custody order, they are likely not going to be eligible for SIJS.

If the child lives with only one parent and is not supported or cared for by the other parent, then it is likely in the child's best interest to obtain a custody order giving their supportive parent sole legal and physical custody.[60] A custody order will enable the supportive parent to make all necessary decisions for the child without the input of the other parent and will protect the child from interference by the other parent.[61] Note that if the child is not living with a parent in the United States, and is instead living with another relative or sponsor, the appropriate action would have to be filed in a probate court rather than family court.[62]

ii. Can your client reunify with their non-custodial parent?

If the child currently lives with one parent, and the facts of the child's case indicate that reunification with the other parent (referred to here as the "non-custodial parent") is not viable because of abandonment, abuse, neglect or a similar basis, seeking SIJ findings through family court is possible. You will want to assess the child's relationship with their parent and their circumstances in order to determine whether there has been abuse, abandonment, neglect or a similar basis for arguing nonviability of reunification.

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[56] *See* USCIS Policy Manual, Volume 6, Part J, Chapter 2.D.5.
[57] 8 USC § 1101(a)(27)(J)(i).
[58] *See id.*
[59] *See* Fam. Code § 3010(a).
[60] *See* Fam. Code §§ 3011, 3022
[61] Fam. Code §§ 3006-07.
[62] For guidance on filing a guardianship petition with a request for SIJ findings, see http://www.publiccounsel.org/publications/guardianship_of_the_person_attorney_manual.pdf?id=0032.

- If a child lives with one parent in the United States and lived with the other parent or both parents in home country and the child has suffered, or there is a substantial risk the child will suffer serious physical harm or illness as a result of the failure or inability of the child's parent to adequately supervise or protect the child you can argue nonviability of reunification with the non-custodial parent because of "a similar basis."
- If the child has suffered physical or emotional **abuse** by the non-custodial parent, you can provide that information to support a request for SIJ findings based on that abuse.[63]

- If the child has had little to no contact with their non-custodial parent, you can make the argument that the non-custodial parent has **abandoned** the child.[64] A child is abandoned under California law even if the parent did not intend to abandon the child, including if the child's non-custodial parent is deceased and left no provision for the child's care, *i.e.* through a trust or a will.[65]

- If a child lives with one parent in the United States and lived with the other parent in their home country, but was unable to go to school, was forced or allowed to work, or otherwise lived in conditions detrimental to their health and well-being, you can argue **neglect** by the non-custodial parent.[66]

Questions to ask your client:

Abuse?

How did your parent(s) punish you?
Did your parent(s) ever call you names?
Did your parent(s) ever hurt you in any way?
Did anyone in your home use alcohol or drugs?"
Did you ever see anyone else get hit at home?"

Abandonment?

With whom did you live in your home country?
Who takes care of you?
Who pays for your expenses?
How often do you communicate with your other non -custodial parent?

Neglect?

Did you go to school?
Did you work? If so, what kind of work?
Did you have to work?
When you were sick or had to go to the hospital, what happened?
Did anyone ever harm or threaten you?

Similar basis

Did you go to school?
Did you work? If so, what kind of work?
Did you have to work?
When you were sick or had to go to the hospital, what happened?
Did anyone ever harm or threaten you?
Were you ever at risk of substantial harm?
Were your parents ever unable to supervise you?

[63] *See* Fam. Code § 6203(a); Welf. & Inst. Code § 300(a).
[64] *See* Fam. Code § 3402(a); Welf. & Inst. Code § 300(g).
[65] *D.M. v. Superior Court*, *supra*, 173 Cal.App.4th at 1128-29; *In re Jorge G.*, *supra*, 164 Cal.App.4th at 132-33.
[66] *See* Welf. & Inst. Code § 300(b); Pen. Code § 11165. Note that even if everyone in the child's community lived in similar circumstances or had similar experiences, state court judges should focus on how those conditions would be treated in the state where the orders are sought.

iii. Is it in your client's best interest to return to their country of nationality?

You also need to investigate whether is it in your client's best interest to return to their home country or remain in the United States. The family court must consider the child's best interest in making a custody determination; thus, the judge's decision to place your client under the custody of their parent in the United States will be strong evidence that it is in the child's best interest to remain in the United States.[67] You will also want to explore with the client more details about their life in their home country and compare it to their life in the United States. Important factors to explore regarding your child client's life in their home country

include: Whether their basic needs were being met, if they could attend school, whether they had to work, and whether they experienced harm or threats by family members, gangs, or anyone else.[68]

Determining Eligibility: Best Interest

Would you be safe if you returned to your home country?
Would you have anyone to care for you if you returned to your home country?
Would you be able to go to school or access mental health services if you returned to your home country? Would you have to work?

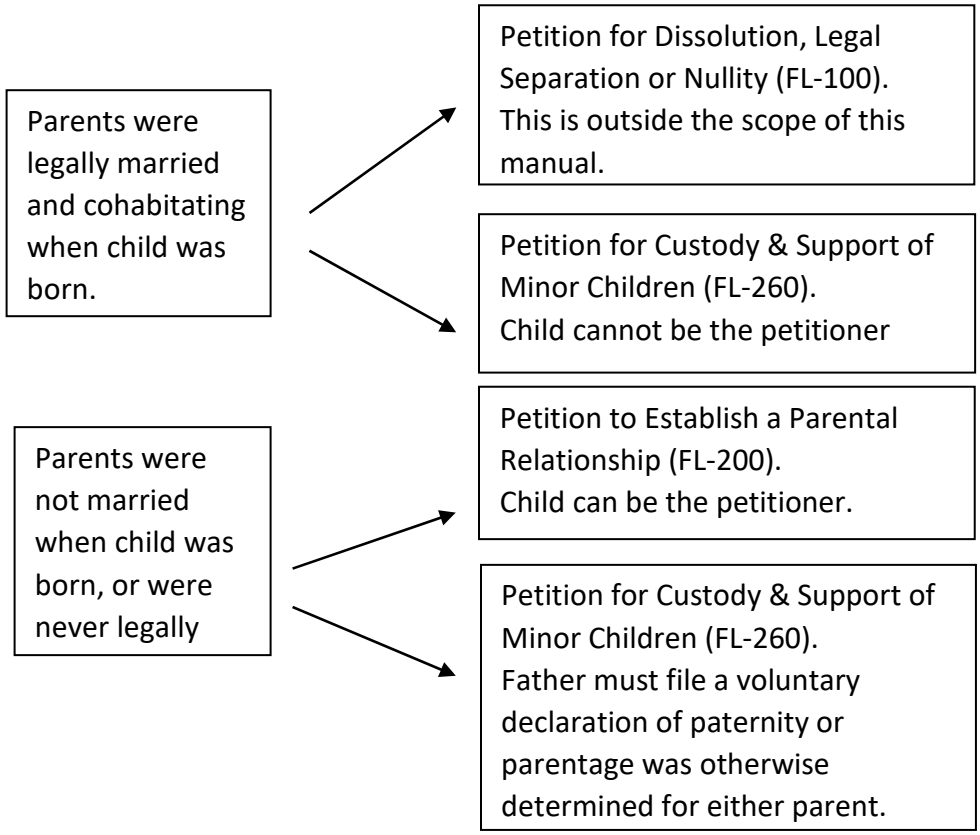
b. Can you obtain the necessary family court orders?

i. What type of family court action should you file?

PRACTICE TIP: Prior Custody Orders. You should always ask your client and their parent if any custody orders have previously been made regarding the child. In some cases foreign custody orders might exist, so it's important to ask about any possible custody actions in home country. Note that the client and their parent may be unsure, and it is always a good idea to review the custody documents to determine whether a prior custody order was issued by a court or if there was a custody agreement that did not involve a court instead. If a prior custody order has been entered, then the court that issued the order likely maintains jurisdiction over the child's custody.[69] Depending on the circumstances, you may be unable to file an action involving custody in California, or you may need to seek leave to register or modify the prior custody order with the court.[70] Issues involving prior custody orders are technical, and you should consult with an experienced family law practitioner if your client is subject to a prior custody order.

[67] See Fam. Code § 3020(a).
[68] *See* Fam. Code § 3011(a) (requiring the court to consider "the health, safety, and welfare of the child" in making custody determinations).
[69] *See* Fam. Code §§ 3421-3424.
[70] *See id.*

Your next consideration is to determine which type of family court case to file, and this depends on whether the child's parents are or have been married.[71] If the parents were not married at the time of the child's birth, you will file a parentage action (discussed in detail in Chapter 3). If the parents were married and cohabitating at the time of the child's birth and are still legally married, you will file a Petition for Custody and Support (see Chapter 4).[72]



ii. <u>Do you have sufficient time to obtain the orders before the child turns 18?</u>

Whether your client is eligible for SIJ findings is a preliminary question. Whether you will be able to obtain the custody order and SIJ findings before your client ages out of family court jurisdiction is a separate issue. A family court has jurisdiction over, and can make custody

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other as spouses without being lawfully married. It is important to clarify the legality of the marriage as you are assessing the case.

[71] Often, your client's parents may have cohabitated for years and/or participated in a religious marriage ceremony. However, unless the marriage was a legal marriage in the eyes of the country where they lived, they will not be considered married for purposes of family court actions. In many countries, partners refer to each

[72] If the child's parents were married but subsequently divorced, a court might have made orders regarding the child's custody and support as part of the divorce proceedings. You should consult with an experienced family law attorney if the child's parents were legally divorced to help you determine whether the court that oversaw the divorce issued custody or support orders. If the parents were married but subsequently one of the parents died, you lack a clear cause of action and should consult with family court experts on how to proceed. A petition for custody and support would still be the appropriate action, but the court may not want to allow proceedings again a deceased respondent or their estate. Some advocates have had success with custody petitions and others have pursued parentage actions, citing the interest of justice, even though the conclusive presumption of parentage applies.

findings as to, children under age 18 only.[73] You cannot control how old your client is when they first come into your office, but you can do your best to preserve their eligibility for SIJS. The time it takes to obtain the custody order and SIJ finding varies from jurisdiction to jurisdiction. It could take anywhere from four to six months from filing the state court petition to having a hearing in the case (without any procedural delays based on service or other issues like the appointment of a guardian ad litem, both discussed in Chapter 3). Even if your client is almost 18 when they come to your office, you may be able to request emergency orders from the court on an ex parte basis.[74] If a SIJS-eligible child comes to you a month before turning 18, you should assess whether there is time to obtain the necessary SIJ findings and your ability to seek ex parte orders, especially in a parentage action, and you should advise them of that accordingly.[75]

iii. Do you know the identity of your client's parents? Are they listed on the birth certificate?

In a parentage action, you are asking the court to make findings as to the maternity or paternity of the respondent in the action. The respondent is typically the parent with whom the child currently resides and whom the child wishes to have full legal and physical custody of them. However, keep in mind that AB 2090 now allows you to pursue a guardianship after a child turns 18 even if they are living with one parent. For further information on AB 2090, see Public Counsel's guardianship manual at TBD

In assessing the identity of your client's parents, you will want to review the birth certificate as early in your case preparation as possible. However, you should be mindful that circumstances outside your client's control might have led them not to know the identity of their biological parents regardless of what their birth certificate shows. Additionally, the Family Code provides several ways that non-biological parents may be declared parents under California law (see Chapter 3, *infra*).[76] For sensitive situations, be sure to consult with a social worker or mental health professional.

Family courts typically do not require the parties in a parentage action or custody action to provide the birth certificate of the child and will allow you to establish parentage through a written declaration or in-court testimony instead. We recommend that you do not make a regular practice of submitting the birth certificate to the court unless a judge orders you to do so, since there may be cases where you do not want to submit the birth certificate, such as where it contains incorrect information.

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[73] Fam. Code § 6500.

[74] California Rules of Court, rule 5.151, describes the general procedures for seeking ex parte orders in family court. However, many jurisdictions have also developed local ex parte procedures that provide guidance on timing, where to file and what notice is required. You should review your local court rules and consult with experienced practitioners when seeking ex parte orders.

[75] You may still attempt to file an ex-parte (emergency) Application and Order for Appointment of Guardian ad Litem ("GAL") and subsequently appear ex-parte for the custody and SIJ findings in a Request for Order hearing for a parentage action and following the proper procedures, but there are no guarantees that you will get your signed orders and effect proper service before the child turns 18. GAL requests are covered in Chapter 3, Section IV.c., *infra*.

[76] *See* Fam. Code § 7611.

If the court asks to see the birth certificate as evidence of the child's identity and/or parental relationship, you should be prepared to argue that the birth certificate is not required to establish parentage because the family code provides many other ways to establish parentage.[77] However, you may want to have a copy of the birth certificate available, along with a certified English translation. In extreme situations, the court may require DNA testing and you may want to raise this possibility with your client.[78] The people listed on the birth certificate and who your client's parents are might also implicate who you are required to serve (see Chapter 3, *infra*, on alleged, putative and natural fathers).

II. Client-Specific Considerations

It is critical that you are mindful of your child client's unique circumstances and vulnerabilities when you assess their case and help them determine the best course of action.

If your client can seek SIJ findings through family court, then they are not only a child, but they have also suffered abuse, abandonment and/or neglect by at least one parent. Given this context, you should use a child-centered lens when working with the client and try to identify their support system as they work with you. This support system often includes the parent with whom they reside. At the same time, you should remember that the child is your client, not their parent, and that your legal obligations are to them.[79]

Your client may also be a recent arrival to the United States and have suffered extreme trauma in their life. They may not speak English, and may be very intimidated meeting with an attorney or having to talk to another stranger about why they came to the United States and what they have experienced. These factors make child clients particularly vulnerable, underscoring both the importance of a client-centered approach and the need for a stable custodial relationship.

Even though your client may come to the office with a parent, you will often want to meet with the client alone in order to do your initial assessment to better protect the client's wishes and preserve confidentiality. You should take the time to build trust with your client and

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[77] *Id.*

[78] You should be aware that USCIS will likely expect you to submit a copy of the child's birth certificate with your SIJS petition. In addition to Form I-360, Petition for Special Immigrant Juvenile Status, the petition instructions require a "copy of the juvenile's birth certificate or other evidence of his or her age" to be included in the initial filing with USCIS. *See* https://www.uscis.gov/system/files_force/files/form/i-360instr.pdf at pg. 3 for additional information. If your client was a product of rape and the identity of the father is unknown, if your client's father refused to acknowledge them and his name is not listed on your client's birth certificate, or if other circumstances resulted in the names of your client's biological parents not appearing on their birth certificate, you may not want to submit the birth certificate with any of your filings (with the family court or with USCIS). In those situations, you may want to provide other evidence of their age. For example, advocates have successfully submitted a consular identification card that includes the name, date of birth, and place of birth of the child.

[79] *See* Kids In Need of Defense (KIND*), Representing Children in Immigration Matters*, at p. 6, available at https://supportkind.org/wp-content/uploads/2015/04/Chapter-1-Representing-Children-In-Immigration-Matters.pdf.

use child-friendly interviewing tools to assess your client's eligibility, explain SIJS, and describe its relationship to state court custody proceedings.

It is important to ask your client if they want the parent with whom they live to have full legal and physical custody over them. For many clients this may be an easy question to answer if they have, or are developing, a healthy relationship with the parent with whom they live. They may be used to having constant and open communication with that parent and having that parent make important decisions on their behalf. However, other clients may not be sure if they want their custodial parent to have legal custody over them and may not be willing to seek findings of abuse, abandonment or neglect against their other parent. Remember that your client is in charge of the process and you cannot seek custody orders or SIJ findings against their wishes. If you have concerns about the parental relationship or its stability – since both parties may be experiencing significant changes in their lives, likely fueled by trauma immediately preceding their journeys to the United States – you should work with the child to address those concerns before filing the state court petition, or work with the guardian ad litem ("GAL") if any concerns arise after the petition has been filed.[80]

Note that you will be required to attempt service of the non-custodial parent. Some clients and custodial parents may be afraid of this, if the custodial parent is violent or poses a risk to other family in home country, for instance. You can mark the child and the custodial parent's addresses as confidential when filing the FL-105 with which you will serve the non-custodial parent. However, in these kinds of situations, you will need to be prepared for difficult conversations with your clients, allowing them to make the ultimate decision of how to proceed.

III. Case Examples

Factual Background - Julia

10-year-old Julia was born in Honduras. Before coming to the United States, Julia lived with her maternal grandmother. Julia's mother, Maria, has lived in the United States since Julia was four years old. Julia has never met her father, Julio, and her parents were never married, but both of their names appear on her birth certificate. Julio abandoned Julia soon after her birth. In fact, Julia only saw her father once when her grandmother pointed him out in a crowd at a market. Julia's father has never tried to communicate with her or helped support her even though Julia lived in the same house during her entire time in Honduras. Maria tried to get Julia's father to be involved in her life but he refused. Maria does not know how to get in touch with Julio but thinks she could try to find his sister.

Maria came to the United States to better support Julia. Maria maintained regular communication with Julia from the United States and sent money to support her along with Christmas and birthday gifts.

[80] An attorney should check in with the client often to confirm their stated desires and with the GAL to make sure the case is proceeding in the client's best interest.

Late last year, violent street gangs started to infiltrate Julia's neighborhood, making it unsafe for Julia to walk to school. Julia's grandmother thought it best to send Julia to the United States to reunite with her mother.

Assessing the Case

Julia likely qualifies for SIJS because she needs a custody order giving her mother full legal and physical custody of her, her father has abandoned her, and it would not be in her best interest to return to Honduras because she faced the threat of harm from violent street gangs while she lived there. She should seek SIJ findings through a parentage action before the family court because her parents were not married. Julia is just 10 years old, so you should take care to use child-sensitive language to explain her legal options. You must also remember that Julia, and not her mother, will be your client and that you must follow Julia's wishes.

Factual Background- Jorge

17-year-old Jorge was born in Guatemala. Growing up, Jorge lived with his mother and younger siblings in a rural area of central Guatemala. Jorge's parents were legally married and living together when he was born, but his father left their family when Jorge was 10, and they did not hear from him for the next 5 years. Because Jorge's father was not there to support the family, Jorge had to quit school when he was 12 and work in agriculture. During this time, Jorge's mother came to the United States to try to find work to support their family. She called Jorge and his siblings regularly. When Jorge was 15, his father returned to their family home and demanded that Jorge give him his weekly earnings. Jorge's father also regularly beat Jorge and his siblings after returning home from drinking and spending all of Jorge's earnings. Without money to pay for food or electricity, Jorge and his family often went hungry. Jorge fled to the United States to reunite with his mother, escape his father's abuse, and help provide for his siblings, who are now living with Jorge's grandparents. In his mother's care, Jorge is able to attend school and receives therapy for the abuse he suffered in Guatemala.

Assessing the Case

Jorge is likely eligible for SIJS because he needs a custody order giving his mother full legal and physical custody of him. Jorge's father abused him and it would not be in Jorge's best interest to return to Guatemala were he would face renewed violence at the hands of his father and would not be able to attend school. Jorge will need to seek SIJ findings through a custody action because his parents were legally married and living together at the time of his birth. You will also need to work quickly on Jorge's case because he is 17 years old and will age-out of the court's jurisdiction when he turns 18 unless you opt to file the case in probate court once Jorge turns 18.

CHAPTER 3: FILING A PARENTAGE ACTION

This chapter discusses one of the two most common actions through which custody orders and SIJ findings are sought in California family courts: a parentage action. As discussed in Chapter 2, the appropriate action for your client's case will depend on whether the child's parents were married at the time of their birth. In our experience, the child's parents will not have been legally married in most cases, and you will be required to file a parentage action in order to seek custody orders and SIJ findings.

A parentage action is an action to establish an individual as a child's legal parent.[81] In California, a family court can only place a child in the custody of a *parent*, and thus parentage must be established before the court can grant custody orders or SIJ findings. Even though your client's parent is likely listed on their birth certificate, parentage is not legally established unless certain other requirements are met.

In California, there are three commons ways to establish parentage: (1) A parent, typically at the time of birth, signs a Voluntary Declaration of Paternity[82]; (2) a local child support agency seeks to establish parentage as part of an attempt to obtain child support[83]; or (3) an interested party initiates a parentage action to request a finding of parentage.[84] If parentage has already been established through a Voluntary Declaration of Paternity or as part of a child support order, you do not need to file a parentage action in order to seek custody orders and SIJ findings from the court. Instead, you can file a petition for custody and support, as discussed in the next chapter. If parentage has not been established, however, you will need to file a parentage action.

I. Jurisdiction

Before bringing your parentage action, you should ensure that the court has jurisdiction over the case and can make both parentage findings and custody orders on behalf of your client. In order to make a parentage finding, the court must have personal jurisdiction over the individual you are seeking to establish as the child's parent, meaning that the parent must live

[81] Much of the language in the California Family Code is antiquated and assumes that the court is determining the identity of a child's father. Although the language in the Code generally has not been amended to reflect gender-neutral language, the Code does provide that the Family Code may be used "to determine the existence or nonexistence of a mother and child relationship" as well as a father and child relationship. Fam. Code § 7650(a). "Insofar as practicable, the provisions of this division applicable to the father and child relationship apply." *Id.*

[82] Voluntary declarations of paternity are typically signed at the time of birth in order to eliminate the need for unmarried parents to seek a legal court order regarding paternity. *See* California Courts, *Establishing Paternity/Parentage* (accessed April 7, 2019), available at https://www.courts.ca.gov/1201.htm#acc11294.

[83] *See id.*

[84] *See id.*

in California, consent to jurisdiction, or otherwise be subject to the personal jurisdiction of the court.[85] The court need not have personal jurisdiction over the non-custodial parent.[86]

The Uniform Child Custody Determination and Enforcement Act ("UCCJEA") governs the requirements to establish jurisdiction to make custody determination, and California has codified the UCCJEA in Family Code section 3400 *et seq*. The court does not need to establish personal jurisdiction over either parent in order to make custody orders.[87] Instead, under Family Code section 3421(a)(1), California has jurisdiction to make initial child custody determinations if California is the "home state" of the minor child on the date of the commencement of the proceedings. Family Code section 3402(g) defines home state as "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding." The court will determine whether your client has resided in California for at least six consecutive months via Form FL-105, Declaration Under Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).[88]

However, even if California is not your client's "home state," the court still has jurisdiction to make child custody orders provided: (1) No place qualifies as the child's home state; (2) the child and one parent have presence in and significant connections to state; or (3) substantial evidence is available in California regarding the child's care, protection, training, and relationships.[89] Many advocates have successfully obtained custody orders on behalf of children who have not resided in California for six months under this standard.

II. Parties to the Action

A child may be the petitioner in a parentage action and bring the Petition to Establish a Parental Relationship with one or both parents.[90] When the child is the petitioner, the parent with whom the child wishes to establish a parental relationship is the respondent.[91] Because minor clients are under the age of 18, California law creates safeguards for their best interests through the requirement of the appointment of a Guardian Ad Litem ("GAL").[92] Because having

[85] *County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215, 1227.
[86] *Id.* The court would need to establish personal jurisdiction over the other parent if you are seeking parentage findings, child support, or other orders that impact that parent's rights.
[87] Fam. Code § 3421(c); *Bianka M. v. Superior Court*, *supra*, Cal.5th 1004.
[88] A sample FL-105 is included in **Appendix A**.
[89] Fam. Code § 3421(a)(2).
[90] *See* Fam. Code § 7630 (allowing a child to bring a maternity action); *Scott v. Superior Court*, *supra*, 171 Cal.App.4th at 544. Note that a child over 12 must be made a party to a parentage action even if they are not the petitioner. *See* Fam. Code § 7635(a).
[91] Judges unfamiliar with SIJ findings may be skeptical of a child petitioner or the need for the underlying action because both the petitioner and respondent are in agreement about the requested orders and findings and the court may be used to seeing disputes they need to resolve. If the court raises concern about the procedural posture of the case, be prepared to point to the Family Code, which allows children to be petitioners, and to other causes of action – like many divorces – where there are no real disputes between the parties.
[92] Fam. Code § 7635. The guardian ad litem need not be represented by counsel if they are a relative of the child. *Id.*

a GAL appointed is necessary for the child to be a party to the action, the Summons filed with the court should not be issued until after the GAL has been appointed.[93]

In general, only the respondent parent must be made a party to the action and subject to the personal jurisdiction of the court. In *Bianka M. v Superior Court,* the California Supreme Court held that a non-custodial parent does not need to be joined as a party in a parentage action where the child is also seeking SIJ findings.[94] Prior to 2018, some family court judges refused to make custody orders or issue SIJ findings on behalf of a child unless they joined the absent non-custodial parent to the action and could establish personal jurisdiction over the absent parent. This requirement was extremely burdensome for many children whose absent parent resided outside the state because a California court typically does not have personal jurisdiction over an individual unless they reside in California or explicitly consent to the court's jurisdiction.[95]

Bianka M., a 13 year-old girl from Honduras, filed a petition to establish a parental relationship with her mother. The superior court denied her petition and refused to make the requested SIJ findings, requiring joinder of and personal jurisdiction over her absent father who had been given personal notice of the proceedings. The Court of Appeals upheld this decision.[96] The California Supreme Court granted certiorari and reversed the Court of Appeal, holding conclusively that "[pr]ovided that the absent parent has received adequate notice, the action may proceed even if the parent is beyond the personal jurisdiction of the court and cannot be joined as a party."[97]

a. <u>Types of Parents</u>

California law differentiates between different types of parents, all of whom may be involved as parties or entitled to notice of the proceedings, as they would have an interest in the custody of the child. Any of the parents described below could initiate an action to request custody of a child and/or be responsible for the care and support of a child.

- A **"natural"** parent is a non-adoptive parent who has established a legal parent-child relationship with the child that confers or imposes rights, privileges, duties, and obligations. [98] The parent who gave birth to the child is a natural parent and establishes parentage through proof of giving birth to the child.[99] However, other individuals may

[93] Code Civ. Proc. § 373(a).
[94] 5 Cal 5th at 1011.
[95] *See id.* at 1019.
[96] *Id.* at 1011.
[97] *Id.* Joinder and personal jurisdiction may still be required of the absent parent if you are seeking a parentage finding regarding the absent parent or seeking child support orders.
[98] Fam. Code § 7601.
[99] Fam. Code § 7610 (a).

be established as the child's natural parent, even if they are not biologically related to the child.[100]

- A **"presumed" parent** is an individual who meets one of the presumptions of parentage outlined in Family Code section 7611 (see *infra*), for example, if the individual accepted the child into their home and held the child out as their own.[101] Once the presumption of parentage has been confirmed by the court and has not been overcome, a presumed parent is considered a natural parent with the same rights as a biological parent.[102]

- All other individuals who may be parents are **"alleged"** parents.[103]

Under the Uniform Parentage Act (UPA), codified in section 7611 of the Family Code, a person is presumed to be the parent of a child in any of the following situations:

- The presumed parent and the child's natural mother are or have been married to each other and the child is born during the marriage.[104]

- The presumed parent and the child's natural mother attempted marriage before the child's birth.[105]

- The presumed parent and the children's natural mother attempted marriage after the child's birth and the presumed parent listed themselves on the child's birth certificate or otherwise held themselves out as a parent.[106]

- The presumed parent receives the child into their home and openly holds out the child as their natural child.[107]

III. Preparing to File

Before you file your family court action, you must ensure that you are filing your action at the appropriate location, *i.e.* in the court with both personal jurisdiction over the necessary parties and subject matter jurisdiction over the legal issue you are presenting. Typically, this will require you to file in the superior court for the county where the child resides. Most court websites have a section where you can input the zip code of the client in order to determine at

[100] Fam. Code §§ 7601(a), 7611. *See also See In re Nicholas H*. (2002) 28 Cal.4th 56, 63 (holding "that a man does not lose his status as a presumed father by admitting he is not the biological father"); *In re Karen C.* (2002) 101 Cal.App.4th 932, 937 (extending *In re Nicholas H.* to mothers and explaining that "natural parent" is not synonymous with "genetic" parent under the UPA).
[101] *Id.* § 7611(a)(d).
[102] Fam. Code §§ 7611, 7601.
[103] *In re Zacharia D.* (1993) 6 Cal.4th 435, 449, fn. 15.
[104] Fam. Code § 7611(a).
[105] Fam. Code § 7611(b).
[106] Fam. Code § 7611(c).
[107] Fam. Code § 7611(d).

which courthouse you can file your action.[108] You should also familiarize yourself with local court rules and forms and talk to experienced practitioners who can provide you with insight into the unique practices of the court where you will file your case.

Next, you should determine whether to file your case by e-filing or in person with the court clerk. Prior to the proliferation of e-filing, which is becoming mandatory in many counties, many superior courts throughout California either allowed or required you to file new cases in person[109] at your local courthouse's filing window.

PRACTICE TIP: Remember, if English is not your client's best language, you must review all forms and declarations with your client in their best language, using an interpreter if you do not speak the language.[110] The declaration should include a certificate of translation, signed by the interpreter and certifying that they are fluent in English and the language used and that they interpreted the declaration for the declarant. Sample certificates of translation are found in **Appendices D, E, and F**.

IV. Initiating the Action

The party initiating a parentage action must submit the required forms to the court. These forms are available on the California Judicial Branch website[111] and you should always check online to ensure that you are using the most current version of the forms. Some courts may have local forms or local rules for filing with the court or initiating an action. You should research local procedures by checking the local court website and speaking to local practitioners with experience filing parentage actions and seeking SIJ findings in the county where your client resides.

The statewide forms required to initiate a parentage action are:

- Form FL-200, Petition to Establish Parental Relationship
- Form FL-210, Summons

[108] It is helpful to contact local practitioners in the area to see if a particular court is familiar with requests for SIJ findings. If a particular court where you may file is not familiar with request for SIJ findings, you may consider filing additional supporting materials, like a brief, to provide context for the court, or filing at a location more familiar with requests for SIJ findings. For an example of a court locator based on zip code, visit http://www.lacourt.org/filinglocatornet/ui/filingsearch.aspx?CT=CI.

[109] Check your local court rules to see if e-filing is mandatory or if you can still file your action in person.

[110] We recommend using a professional interpreter. If that is not possible, do not use the client's family member or anyone with connections to the declarant to interpret. Make sure that any volunteer interpreter is fluent in both languages, not a party to the action, and able to interpret accurately and without bias.

[111] You can access the forms online at https://www.courts.ca.gov/formname.htm.

- Form FL-105, Declaration Under Uniform Child Custody Determination and Enforcement Act

- Form FW-001, Request to Waive Court Fees, along with Form FW-003, Order on Court Fee Waiver (or you must pay the filing fee of $435.00)[112]

- **Orange County:** File FW-001, FW-003, FL-935, FL-105, FL-200, FL-210, FL-300, and FL-356 all at the same time in one filing (in person or mail, due to FL-935).

If the child is a party to the action, you will also need to file:

- Form FL-935, Application and Order for Appointment of Guardian ad Litem, and seek appointment of a GAL, as discussed below

Remember that any child over twelve must be made a party to the action and appointed a guardian ad litem even if they are not the petitioner.[113] A complete sample parentage filing can be found at **Appendix A**.

a. Tips for Completing Form FL-200

For question 1, check the appropriate box, indicating whether the child, one of the parents or some other party is the Petitioner. Typically, the child will be the petitioner in an action to establish a parental relationship. Question 2 asks for the information on the child who is the subject of the proceeding, and you should enter the complete name, date of birth, and age of the children over whom you are seeking custody orders. If one of the parents is the petitioner and there are multiple children involved in the proceeding, enter all of their information.

For question 3, and where the child is the petitioner, the court will most likely have jurisdiction over the respondent because the respondent resides in the state.

FL-200 Petition to Establish Parental Relationship

3. The court has jurisdiction over the respondent because the respondent

☒ a. resides in this state

☐ b. had sexual intercourse in this state

☐ c. other (*specify*):

[112] Most clients qualify for a fee waiver based on their household income or because they receive Medi-Cal. Some clerks send the fee waiver request to a judge. If this happens, offer the clerk a self-addressed stamped envelope so they can mail the order to you. If your client does not qualify for a fee waiver you should check the Civil Fee Schedule for changes in the fee structure. You can find that information on your county's superior court website or on the state court website, https://www.courts.ca.gov/documents/filingfees.pdf, at page 6.

[113] Fam. Code § 7635(a).

FL-200 Petition to Establish Parental Relationship

4. The action is brought in this county because (*you must check one or more to file in this county*)

☒ a. the child resides or is found in the county

☐ b. a parent is deceased and proceedings for administration of the estate have been or could be started in this county.

For question 4, you would check box a, indicating the child resides or is found in the county.

For question 5, indicate whether the respondent is the child's mother or father (either a or b). Under g, you would also indicate that you are seeking SIJ findings pursuant to California Code of Civil Procedure section 155 and as reflected in Form FL-356.[114] In questions 7 and 8, indicate that the Respondent is the child's parent and you are asking that the respondent be awarded sole legal and physical custody of the child. For question 8, subsection c, indicate that you are seeking no visitation rights for the other parent, and for sub-question d, briefly describe (in one sentence) the facts to support the custody request. Examples of pertinent facts include that the respondent has been caring for the child throughout their life, while the other parent has abused, abandoned or neglected the child. Questions 9-13 may be left blank. In order to signal to the court that you will also be requesting SIJ findings and to ensure that the SIJ findings can be brought to judgment, write "SIJ findings pursuant to Code of Civil Procedure section 155" in number 14.

PRACTICE TIP: Child as Petitioner. The alternative format for a parentage action would be to have the custodial parent bring the action against the non-custodial parent. However, this structure raises several complications and is not recommended. First, the non-custodial parent will often be outside of California (and likely outside of the United States). Making the non-custodial parent the respondent to the action may raise jurisdictional or service issues that can be avoided if the child is the petitioner. Second, if the parent is the petitioner, you will be representing the parent in the parentage action and the child in the SIJS petition with USCIS, which creates potential conflicts of interest (see Section II.a, *supra*, for more information). These conflicts may be exacerbated because Family Code section 7635(a) requires that a child over 12 be made a party to the action even if they are not the petitioner.

b. Other Initial Forms

In addition to the Petition, the parentage action requires the issuance of a summons (FL-210). Technically, the Summons should **not** be filed and issued until after the GAL is

[114] You will file this form at a later date.

appointed.[115] However, the current local procedure in many jurisdictions requires you to file the case (Petition and Summons) prior to appointment of the GAL. It is wise to alert the clerk that this is a case where a GAL needs to be appointed so that they do not issue the summons until the Court actually appoints the GAL.[116]

Apart from the Petition and Summons, each case with a minor child involved requires the filing of a Declaration Under Uniform Child Custody Jurisdiction and Enforcement Act (FL-105), a sample of which is included in **Appendix A**. The form provides the addresses[117] of the minor child along with information on any prior custody actions or cases to which the child has been a party.

c. FL-935, Application and Order for Appointment of Guardian ad Litem

A GAL "is essentially an agent of the court whose duty it is to protect the rights of the minor" throughout a proceeding.[118] As discussed above, any child who is a party to a parentage action must be appointed a GAL and any child 12 or older must be made a party to the action.[119] Note that where the "other parent" is not a party, we do not recommend including the "Other Parent" info (e.g., Forms FL-935, FL-300).

While the procedure for requesting appointment of a GAL varies across jurisdictions in California – *i.e.*, whether the request will be approved on the papers or whether a hearing will be required – the request should be made by filing Form FL-935, Application and Order for Appointment of Guardian ad Litem, along with the parentage petition and other initial case documents. [120] The appointment of a GAL involves little exercise of court discretion beyond determining whether there is conflict of interest.[121]

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[115] *See* Code Civ. Proc. § 373(a).

[116] If the summons is issued in error before the GAL is appointed, you will want to file an amended summons and petition once the GAL is appointed with the GAL's name listed in the caption. If you amend the summons and petition once the GAL is appointed, their name should be on the captions of all subsequently filed documents. You will want to do this to avoid problems with the caption later on in the default and judgment phase.

[117] Depending on the client's circumstances, you may be able to argue that their current address is confidential. Fam. Code § 3429(a) provides that "where there are allegations of domestic violence or child abuse, any addresses of the party alleging violence or abuse and of the child which are unknown to the other party are confidential and may not be disclosed in the pleading or affidavit."

[118] *Torres v. Friedman* (1985) 169 Cal. App. 3d 880, 883-84, *see also Alex R. v. Superior Court* (2016) 248 Cal.App.4th 1, 8.

[119] Fam. Code § 7635.

[120] Prior to 2016, the Superior Court in Los Angeles was requiring a hearing and notice to the non-custodial parent of the GAL request and hearing. In *Alex R.,* the Court ruled decisively that no such notice was required. *Supra*, 248 Cal.App.4th at 8 ("[n]either the Code of Civil Procedure nor the Family Code requires that Alex R. serve his father with the request for the application for the appointment of a guardian ad litem before a guardian ad litem may be appointed.").

[121] *J.W. v. Superior Court* (1993) 17 Cal. App. 4th 958, 965, fn. 5. Some courts will not allow the attorney representing the child to serve as GAL, citing potential conflicts between the role of GAL and the role of the child's attorney. You should check with local practitioners to see the practice in your jurisdiction. If you request to serve as the GAL for a child you are representing, you should take care to screen for potential conflicts and obtain a waiver of potential conflict from your child client.

Form FL-935 is a two-page document that does not require very much information. Who should serve as the GAL however requires more thought and consideration. The role of a GAL is governed by section 372 of the California Code of Civil Procedure and the GAL's "role is limited to protecting the child's interests in the litigation."[122] One of the most important obligations of the GAL is to ensure that the child's lawyer is diligently and competently litigating the case on behalf of the child. Once appointed, a GAL must review and sign all court documents along with the child. The GAL should also be prepared to speak to the court about the child's best interest.

When discussing potential GALs with your client, it is important to help them understand the role of the GAL. The GAL need not be a person with a law degree or other technical knowledge of custody proceedings.[123] The proposed GAL need only be someone the client can trust, confide in, and whom the attorney believes will tell them if they believe it would *not* be in the child's best interest to be placed in the custody of the respondent. The GAL is not a party to the action but merely a representative tasked with identifying that what the child is petitioning for – establishing a parental relationship with their parent, a custody order granting the parent custody over the child, and SIJ findings – is in the child's best interest.[124] The role of the GAL is especially important for younger petitioners or petitioners with diminished or limited decision-making capacity. The attorney, as the child petitioner's representative, is required to follow the stated wishes of the child, but the GAL serves as the voice of the best interest of the child. While in practice these interests rarely diverge, the GAL nonetheless serves as an important protection for the child petitioner.

Typically, family members such as older siblings, aunts, uncles, cousins and step-parents have been able to serve as GALs and need not be represented by counsel themselves.[125] Additionally, other attorneys have also served as GALs in parentage actions, including attorneys in the same firm or organization, with clear guidance to the client about who is the child's attorney and who is the GAL and a conflict waiver in place if the attorney and GAL are from the same firm.

V. Peremptory Challenges

In most jurisdictions, you will be assigned a judge upon filing your case. In other jurisdictions, you may not be assigned a judge until you file Form FL-300, Request for Order, which triggers a hearing. At whichever step the court assigns you a judge, it will be important

[122] *Alex R*, *supra*, 248 Cal.App.4th at 8.

[123] While a GAL must look after the best interests of the minor, "he or she does not act as an advocate." *McClintock v. West* (2013) 219 Cal. App. 4th 540, 549 (holding that a GAL could not be liable for malpractice because "as a matter of law, there is no basis for finding an attorney-client relationship between the guardian ad litem and a ward.").

[124] A GAL is an agent with limited powers. Their role is to serve as the minor's record representative, and they are supervised by the Court. *In re Marriage of Caballero* (1994) 27 Cal. App. 4th 1139, 1149. A guardian ad litem is not a party to an action, but merely the representative of record of a party. *See Estate of Cochems* (1952) 110 Cal.App.2d 27, 29.

[125] *See* Fam. Code § 7635(a) ("If the child is a minor and a party to the action, the child shall be represented by a guardian ad litem appointed by the court. The guardian ad litem need not be represented by counsel if the guardian ad litem is a relative of the child.").

once again to check in with local practitioners to see whether that particular judge is hostile to parentage or custody petitions in which you are also requesting SIJ findings (through Form FL-356). If you discover that the judge you are assigned may be hostile toward your client's case, you can file a peremptory challenge under California Code of Civil Procedure § 170.6.

A peremptory challenge allows you to request a new judge without providing any specific reason, and each county has its own form or practice for "papering" a judge.[126] Typically, you file this form directly with the clerk in your assigned courtroom, but procedures may vary between courthouses. If approved by the assigned judge, the presiding judge of that court will then reassign your case and mail you notice of your new judge. Challenging an assigned judge carries the risk that you are subsequently assigned a judge even more hostile to children seeking SIJ findings, and each party can only paper a judge once as a matter of right.[127] After checking with local practitioners and carefully weighing your options with your client, you may decide to stay with a newer judge in hopes of educating them on the law, rather than risk being assigned a judge who is openly hostile to cases where SIJ findings are sought.

PRACTICE TIP: Peremptory Challenges. There are specific rules and deadlines associated with peremptory challenges. In general, you must file a peremptory challenge within 10 days of your case being assigned to a judge.[128] In most jurisdictions, you are not assigned a judge until you file a RFO, but you should review your initial Petition when you file it to confirm. The information will be written either on the RFO or Petition itself or you will be given a separate sheet indicating to whom your case has been assigned. Make sure to consult Code of Civil Procedure section 170.6 and local rules to ensure you do not inadvertently lose your opportunity to paper a judge.

VI. Subsequent Filing

Once you have initiated your parentage action and your client has been appointed a GAL, you are ready to file your requests for custody and SIJ findings. The next step is to request issuance of the summons (or file an amended summons and petition)[129] and file the Request for Order (FL-300), seeking the custody order, and the Confidential Request for Special Immigrant Juvenile Findings (FL-356) in the clerk's office or by e-filing, along with supporting declarations.[130] You should also check with local practitioners and the local court rules to see if

[126] *See, e.g.* SDSC CIV-449, LACIV 015.

[127] If you file a preemptory challenge and are assigned to another problematic judge, you will have to show cause in order to disqualify that judge. Technically, the respondent can also paper a judge after you have successfully done so on behalf of your client, but they would likely require independent counsel to do so.

[128] Code Civ. Proc. § 170.6(a)(2).

[129] In some jurisdictions, the court will automatically issue the summons once the GAL is appointed. In others, you may have to request issuance from the clerk. If the clerk inadvertently issued the summons before the GAL was appointed, you should file an amended Petition and Summons and ask that the amended Summons be issued. There is not a separate form for an amended petition or summons, you simply handwrite "Amended" at the top of both forms and include the name of the appointed GAL in the caption.

[130] Remember, once a GAL is appointed, the GAL should sign all judicial council forms along with the child.

you are required to file a proposed order or if you should file a legal memorandum. If you cannot connect with any local advocates, file a memorandum of points and authorities citing all the relevant case law and codes supporting your arguments. A sample memorandum of points and authorities is found at **Appendix D**.

PRACTICE TIP: Filing a Memorandum of Points and Authorities. In general, we recommend filing a supporting memorandum if you are in a new courthouse that is less familiar with requests for SIJ findings or if your case involves unique or complicated issues.

Once the underlying family court action is filed with the court, you file Form FL-300 to ask that the court place the child into the custody of the parent with whom they reside. In parentage actions, you cannot file Form FL-300, or request any orders, until a GAL has been appointed for the child, assuming that the child is the petitioner or over the age of 12.

Subsequent Case Documents to file:

FL-300 Request for Order, Child Custody

FL-356, Confidential Request for Special Immigrant Juvenile Findings

Supporting Declaration(s)

Amended FL-210 Summons (if needed)

Amended FL-200 Petition (if needed)

Memorandum of Points and Authorities (if needed)

Once you file your RFO (Form FL-300) and Confidential Request for SIJ Findings (Form FL-356) and receive a hearing date, the court may also order the parties to mediation. Most courts will not order mediation in parentage actions because the child is typically the petitioner. However, there have been parentage cases in which mediation has nonetheless been ordered. If this happens, call the clerk and explain that the petitioner is a minor child and therefore mediation should not be required. If the clerk insists on mediation, ask to speak with a supervisor.[131] If you are unable to convince a supervisor, you should instruct your client to attend the mediation appointment even though it will likely not go forward once the mediator realizes the child is the petitioner.

Please note that our staff now ignores mediation notices issued erroneously in child v. parent parentage cases. If you are not sure if your notice was issued erroneously, please ask your Public Counsel contact or call the court clerk for clarification.

[131] If you file a parentage action where both the petitioner and the respondent are the child's parents, there will likely be mediation ordered, even though it's unlikely the respondent will attend.

a. Legal standard in making custody determinations

The Family Code grants a family court authority to make a child custody order during the pendency of another action, including a parentage action.[132] The court may "make an order for the custody of a child during minority that seems necessary or proper."[133] When making this determination, the court is governed by the best interest of the child.[134] Moreover, the question of best interest is determined from the standpoint of the minor child, not their parents.[135] Critical to this determination is the "health, safety, and welfare of the child."[136] Other factors the court should consider when making custody determinations include: 1) A history of abuse by one parent against the other parent or child; 2) the nature and amount of contact the child has had with both parents; and 3) controlled substance use or alcohol abuse by a parent.[137] The court should also consider the child's wishes[138] and seek to promote the child's stability through the orders.[139]

1. Completing Form FL-300, Request for Order

The RFO is filed with the court using Judicial Council Form FL-300, Request for Order.[140] Although Form FL-300 allows you to request a wide range of orders, you should limit your request to child custody orders (by completing number 2 on page 2 of Form FL-300) and clearly state under number 2(b)(2) that you are requesting that the court award the parent with whom the child lives sole legal and physical custody. Note that where the "other parent" is not a party, we do not recommend including the "Other Parent" info (e.g., Forms FL-935, FL-300).

2. ☒ CHILD CUSTODY ☐ I request temporary emergency orders
☐ VISITATION (PARENTING TIME)
a. I request that the court make orders about the following children (specify)
☒ Legal Custody to (*person who decides: health, education, etc.*): ☒ Physical Custody to (*person with whom child lives*):

Child's Name	Date of Birth	Legal Custody to	Physical Custody to
John Sanchez	1/1/2005	Mom Garcia	Mom Garcia

b. ☒ The orders I request for ☒ child custody ☐ visitation (parenting time) are:
(1) ☐ Specified in the attached forms:
☐ Form FL-305 ☐ Form FL-311 ☐ Form FL-312 ☐ Form FL-341(c)
☐ Form FL-341(D) ☐ Form FL-341(E) ☐ Other (*specify*): _____
(2) ☒ As follows (*specify*): ☐ Attachment 2b.
Sole legal and physical custody to the respondent mother.

[132] See Fam. Code § 3022.
[133] Id.
[134] Fam. Code § 3020(a); In re Marriage of Burgess (1996) 13 Cal. 4th 25, 31.
[135] Taber v. Taber (1930) 209 Cal. 755, 756-57.
[136] Fam. Code, § 3011(a); see also Fam. Code § 3020(a).
[137] Fam. Code § 3011.
[138] Fam. Code § 3042(a).
[139] In re Marriage of Burgess, supra, 13 Cal.4th at 32-33 (holding that "the paramount need for continuity and stability in custody arrangements-and the harm that may result from disruption of established patterns of care and emotional bonds with the primary caretaker-weigh heavily in favor of maintaining ongoing custody arrangement").
[140] The current edition of Form FL-300 is available at http://www.courts.ca.gov/documents/fl300.pdf.

You should complete number 2(c) and explain that the orders are in the child's best interest because the parent they are living with is providing them with a loving and caring home and because they have been abused, abandoned, and/or neglected by their other parent. If you request child support, spousal support, property control or other orders, the court will likely require you to join or establish personal jurisdiction over the absent parent, which could prevent your case from moving forward.[141] A sample RFO is found at **Appendix C**.

2. Completing Form FL-356, Confidential Request for Special Immigrant Juvenile Findings

Form FL-356 is a stand-alone judicial council form that was adopted for mandatory use in July 2016. Form FL-356 asks you to provide the basis upon which you are seeking the SIJ findings, and you should take care to provide the appropriate legal basis for the SIJ findings in your client's case, along with an adequate factual basis that supports them. See Chapter 5, *infra*, for a detailed explanation on how to complete the forms and **Appendix H** for a sample form.

3. Client's declaration

You should also address the need for the custody order in a declaration from the child, which you will submit concurrently with the RFO and the request for SIJ findings. Note that advocates typically submit one declaration from the child that addresses both the need for the custody order and SIJ findings. Under Code of Civil Procedure section 155(b)(1), the court must make SIJ findings if it is requested and there is evidence to support the findings and under section 155(c)(1), that evidence can consist solely of a declaration by the child. A sample child's declaration is attached at **Appendix E**.

Themes the declaration should address include:

- How the child knows that their parent is their parent (often because the parent is listed on the child's birth certificate, the child has always called this parent their mother or father, other family members have told the child throughout their childhood that that parent is their actual parent, the parent always identified themselves as the child's parent, the parent raised and supported the child, etc.).

- Facts surrounding the non-custodial parent's abuse, abandonment, and neglect.

- Why the child cannot return to their home country (what harms they face if they were to return, whether there is anyone who can care, provide, and protect them, etc.).

[141] *See County of San Diego v. Gorham*, *supra*, 186 Cal.App.4th at 1227.

- The relationship between the child and the parent whom the child wants to have legal custody over them (ways the parent provides for the child, both financially and emotionally, how the child feels living with or being cared for by the parent, etc.).

- Why the child custody order is necessary (whether there is other proof of parental relationship in the English language that can be used in emergencies, etc.).

- An explicit statement that the child wants a particular parent to have legal custody over them and why.

A declaration from the parent is recommended only if the child is too young to address the relevant points outlined above in their own declaration. See **Appendix G** for a sample parent declaration. For information on supporting the SIJ findings through a declaration, see Chapter 5, *infra*.

VII. Completing Service

After your subsequent filing and once you have a hearing date, you must effectuate service on the respondent and the non-custodial parent. The Code of Civil Procedure and section 7635(b) of the Family Code governs notice. Under the Code of Civil Procedure, the Summons and the Petition to Establish Parental Relationship must be personally served on the respondent, and other case documents must also be served (see chart below).[142] Service on the respondent must be completed at least 30 days before a default judgment is entered[143] and at least 16 days before a hearing.[144] Court days are weekdays and exclude weekends and holidays.

Under the Family Code, natural, presumed, and alleged parents must also be given notice of the proceedings even if they are not parties to the action:

> A natural parent, each person presumed to be a parent under Section 7611 or 7540, each person who is a parent of the child under Section 7613 or 7962, and each person alleged to be the genetic parent … shall be given notice of the action in the manner prescribed in Section 7666 and an opportunity to be heard, and shall be made a party [to the action] if they request to be joined.[145]

[142] Code Civ. Proc. § 415.10 ("A summons may be served by personal delivery of a copy of the summons and of the complaint to the person to be served. Service of a summons in this manner is deemed complete at the time of such delivery"). Sections 415.10–415.40 also allow for service by first-class mail with acknowledgment of receipt.
[143] Code Civ. Proc. Code §§ 402.12(a)(3), 585; Cal. Rules of Court, rule 5.401.
[144] Cal. Rules of Court, rule 5.92(f); Code Civ. Proc. § 1005(b). For more information on the custody and SIJ findings hearing, see Chapters 5 and 6, *infra*. When there are different requirements regarding how soon before a hearing a party must be served, always err on the side of caution and serve or attempt to serve the respondent and non-custodial parent as soon as possible after you are assigned a hearing date.
[145] Fam. Code § 7635(b).

This means that you must give notice to the parent you are alleging has abused, abandoned, or neglected the client. Such parents are entitled to notice served by personal delivery at least ten days before the date of a hearing.[146] If the whereabouts or identity of an individual are unknown or cannot be ascertained, the Family Code provides for waiver of notice to that individual (see below).[147]

What to Serve	**If Respondent is a monolingual Spanish speaker**, you should also serve them with blank Spanish language copies of the form, where available.[149]
1. FL-200 2. FL-210 3. Blank FL-220 4. FL-105 5. Blank FL-105 6. FL-300 7. FL-356 8. Declarations filed with the Court 9. Blank FL-320 10. Blank FL-358 11. Memorandum (if filed) 12. Proposed order (if filed)[148]	1. FL-200s 2. FL-220s 3. FL-105s 4. FL-300s 5. FL-320s 6. FL-356s 7. FL-357s 8. FL-358s

The **respondent** must be personally served with the documents listed above at least 16 court days prior to the RFO hearing.[150] Once the respondent has been served, the person who served the respondent must sign a Proof of Service of Summons (Form FL-115) that you file with the court. You should file the FL-115 at least five days prior to your scheduled hearing. See **Appendix L** for a sample Form FL-115 for a parentage case.

In a **parentage action,** you must also personally serve the **non-custodial parent** with notice of the proceeding at least 10 court days prior to the hearing.[151] If the non-custodial parent resides outside the United States, make sure to serve in compliance with international service requirements. For non-Hague countries, generally service in compliance with Code of Civil Procedure sections 413.10 and 415.10 is sufficient.[152] Per Code of Civil Procedure section

[146] Fam. Code § 7666(a).
[147] Fam. Code § 7666(b)(3).
[148] For both parentage and custody actions, custody orders are made on Forms FL-340 and FL-341 and SIJ findings on Form FL-357. We recommend filing these with the court at least one week before the hearing as proposed orders. However, some advocates do not submit them ahead of time and instead bring them to the hearing. You should check your local court rules and with experienced practitioners to see if the judge you are assigned requires filing a proposed order before the hearing.
[149] Any forms available in Spanish can be found at https://www.courts.ca.gov/forms.htm.
[150] *See* Cal. Rules of Court, rule 5.92(f); Code of Civil Proc. § 1005(b).
[151] Fam. Code §§ 7635(b), 7666.
[152] Although Guatemala and El Salvador are signatories to the Inter-American Convention on Letters Rogatory and Additional Protocol (IACAP), the IACAP does not provide an exclusive method of service or preclude service by means authorized under local law. Thus, services that conform with Code of Civil Procedure section 413.10(c) (which allows for personal service under section 415.10) are sufficient. *See Severn v. Adidas Sportschuhfabriken*

415.40, you can also serve the non-custodial parent via mail (restricted delivery, return receipt requested). However, mail in Central America is largely unreliable and it is unlikely you will receive the return receipt back in a timely fashion (if at all).

You should submit Form FL-330, Proof of Personal Service, signed by the person who served the non-custodial parent, to show the court that the non-custodial parent has been served. You must file the Form FL-330 with the court five days before the hearing. A sample FL-330 can also be found in **Appendix L**.

If you cannot locate the non-custodial parent, the Family Code requires the court to waive notice if "the whereabouts or identity of the alleged father are unknown or cannot be ascertained."[153] To request that the court waive notice, you should submit a declaration of due diligence explaining your efforts to find the non-custodial parent. No additional form is required. In preparing your due diligence declaration, you should, at the minimum, contact several family members or friends to ask about the parent's whereabouts, including those in the country where the non-custodial parent resides, and conduct an online search for the parent. You can also consider contacting the appropriate consulate to ask if they are able to locate the individual. A sample declaration of due diligence can be found at Appendix K.[154]

In some situations, you might know the whereabouts of the non-custodial parent but have difficulty effectuating service. This may arise, for example, if the person is incarcerated abroad and is unable to receive correspondence or have other contact with the outside world. In this situation, you might request a substituted form of service if other methods, like going through a consulate, are unsuccessful.

Although you may serve the initial parentage documents separately from the requests for custody and SIJ findings, many advocates serve all the documents at once in order to ease the burden of effectuating service.

(1973) 33 Cal. App. 3d 754; Cal. Code Civ. Proc. §§ 413.10(c), 415.10; *Kreimerman v. Casa Veerkamp S.A. de C.V.* (5th Cir. 1994) 22 F.3d 634, 640; *Morgenthau v. Avion Res. Ltd.* (N.Y. 2008) 898 N.E.2d 929, 934.

[153] *See* Fam. Code § 7666(b)(3). Where the non-custodial parent is the mother, the Code allows for a similar waiver. *See* Fam. Code § 7650(a).

[154] Should you file a parentage case where the custodial parent is the petitioner and the non-custodial parent is the respondent and their whereabouts are unknown, you will have to serve the respondent via posting or publication. For a detailed discussion on how to do this, see Chapter 5, Section VI, *infra*.

[155] *See, e.g., Kreimerman v. Casa Veerkamp* (5th Cir. 1994) 22 D.3d 634 (holding that the text of the convention strongly indicated, not that the IACLR preempts other conceivable methods of service, but that it merely provided a mechanism for transmitting and delivering letters rogatory when and if parties elect to use that mechanism); *Pizzabiocche v. Vinelli* (M.D.Fla. 1991) 772 F.Supp. 1245.

PRACTICE TIP: Serving Individuals Outside the United States. Before serving an individual outside of the United States, it is critical that you check the rules governing service in the country where you plan to effectuate service. If the country is a signatory to the Hague Convention, you will likely have to effectuate service through that country's Central Authority. Service under the Hague Convention is outside the scope of this Manual so be sure to consult with experienced family law attorneys. El Salvador, Guatemala, and Honduras are not signatories to the Hague Service Convention, but Mexico is a signatory.

El Salvador, Guatemala, and Honduras are signatories to the Inter-American Convention on Letters Rogatory and Additional Protocol (IACLR). However, under the IACLR, service under California law is acceptable because El Salvador, Guatemala, and Honduras have not required the exclusive use of letters rogatory to effectuate service.[155]

PRACTICE TIP: Consistent Captions. The caption on Proofs of Service must match the caption of the FL-200 exactly or else it may be rejected by the clerk.

VIII. Next Steps

Once you have initiated your parentage action, your client has been appointed a GAL, and you file your requests for custody and SIJ findings, you are ready to prepare for your hearing and then bring your case to judgment. At the hearing, the court will determine whether to grant your requests for custody and SIJ findings. Courts typically set one hearing date for both requests, which is why we suggest that you file Form FL-356 with Form FL-300. However, it is possible that the clerk issues two separate hearing dates – one to address the RFO requesting a custody order and another to address the request for SIJ findings – in which case you can try calling the assigned judge's clerk to request that the hearings be consolidated. Advocates have also succeeded in orally requesting that the court address both requests at the first hearing date. Keep in mind that regardless, the court must first issue the custody order before making SIJ findings. These steps are discussed in detail in Chapters 5 and 6.

IX. Case Example

Stephanie is a 14-year-old girl from Mexico. In Mexico, Stephanie lived with both of her parents until her mother came to the United States when Stephanie was 10. Growing up, Stephanie's mother would leave their family home for weeks at a time, and when she was home, she would tell Stephanie she wished she was never born. After Stephanie's mother left to the United States, Stephanie remained with her father until he also came to the United States a year later. Stephanie's parents were never married.

Stephanie lived with her grandparents until they became too ill to care for her, even with financial support from her father. With increasing violence from drug traffickers, Stephanie was also unable to get safely to school without being harassed by traffickers and

decided to join her father in the United States. Stephanie reunited with her father in Santa Barbara and later found out that her mother was in San Francisco. Stephanie reached out to her mother through social media, but received no response. Because Stephanie's parents were never married, she was abandoned by her mother, and she faces harm if she were to return to Mexico, Stephanie should file a parentage action to establish her father as her legal father and seek a custody order and SIJ findings through that action.

CHAPTER 4: FILING A CUSTODY ACTION

Parentage actions are the most common cause of action brought by children seeking custody orders and SIJ findings through the California family court. However, when parentage has already been established, a parentage action will not be appropriate, and a Petition for Custody and Support should be brought instead.

As discussed in Chapter 3, parentage may be established without a parentage action through a voluntary declaration of parentage or by a child support agency. Parentage is also established without a parentage action where the conclusive presumption of parentage applies. A conclusive presumption of parentage exists when a child is born to married, cohabitating parents.[156] In other words, if the child's parents were married and living together at the time of the child's birth, parentage is conclusively established as a matter of law.[157] A parentage action is not necessary or appropriate because the identities of the child's parents have already been legally established.

In such cases, the California Family Code allows "a spouse to bring an action for the exclusive custody of the children of the marriage."[158] This action is called a Petition for Custody and Support and may be filed without filing for divorce.[159]

I. Jurisdiction

Before filing the custody action, you should ensure that the court has jurisdiction to make custody orders for your client. As discussed in Chapter 3, the court does not need to establish personal jurisdiction over either parent in order to make custody orders.[160] Instead, jurisdiction is established if the state where the court is located is the child's "home state," that is the "state where the child lived with a parent or person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding."[161]

However, even if California is not your client's home state, the court still has jurisdiction to make child custody orders provided: 1) no place qualifies as the child's home state; 2) the child and one parent have presence in and significant connections to the state; and 3) substantial evidence is available in California regarding the child's care, protection, and

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[156] Fam. Code § 7540.
[157] *Id., see also Susan H v. Jack S*, *supra*, 30 Cal.App.4th at 1441.
[158] Fam. Code § 3120.
[159] *See id.* Although SIJ findings may be sought in the context of a Petition for Divorce, advocates typically bring Petitions for Custody and Support instead. Petitions for Custody and Support are less likely to be contested than divorces, and they are less likely to involve property division or issues of monetary support, which require personal jurisdiction over the respondent spouse. *See In re Marriage of Leonard* (1981) 122 Cal.App.3d 443 (although personal jurisdiction is required for child support, it is not required for child custody orders).
[160] Fam. Code § 3421(c); *Bianka M. v. Superior Court*, *supra*, Cal.5th 1004.
[161] Fam. Code §§ 3421(a), (g).

relationships.[162] As mentioned previously, advocates have successfully obtained custody orders under this standard on behalf of children who have not resided in California for the six months preceding the filing of the custody action.

II. Parties to the Action

Unlike a parentage action, a Petition for Custody and Support cannot be brought by the child.[163] Instead, one spouse must bring the action against the other spouse.[164] Typically, the spouse with whom the child lives brings the action and is the petitioner in the proceedings. The other spouse – who you will be alleging has abused, abandoned, or neglected the child – is the respondent in the action.

This "parent v. parent" formulation raises important ethical considerations that are distinct from those in a parentage action. As the attorney bringing the action on behalf of the parent-petitioner, you will enter into an attorney-client relationship with the parent and owe the parent all of the ethical obligations and duties of care that typically attach to an attorney-client relationship. However, if you already represent the child in their immigration proceedings – or if you plan to represent them in their SIJS petition with USCIS – you may face a conflict of interest between your competing duties to the child and their parent.

California has created rules for attorneys to manage conflicts of interests and you must take care to follow these rules and avoid a conflict.[165] First, you must assess whether an actual conflict exists between the child and their parent.[166] If a conflict exists, you cannot take on dual representation.[167] If no actual conflict exists, you must nonetheless advise the child and their parent of your competing duties to both parties and the risk that you will have to withdraw if a conflict arises.[168] Before you enter into representation, obtain the parties' written consent to the joint representation.[169] It is important that the child and parent also understand that you might have to share information between the parties and that they waive confidentiality in consenting to the joint representation.

III. Preparing to File

Before you file your family court action, you must ensure that you are filing your action at the appropriate location, *i.e.* in the court with both personal jurisdiction over the necessary parties and subject matter jurisdiction over the legal issue you are presenting. Typically, this will require you to file in the superior court for the county where the child resides. Most court

[162] Fam. Code § 3421(a)(2).
[163] Fam. Code § 3120.
[164] *See id.*
[165] *See* California Rules of Professional Conduct, Rule 1.7.
[166] *Id.*
[167] *Id.*
[168] *Id.*
[169] *Id.* Some advocates also obtain consent from the parent to continue representing the child should a conflict arise.

websites have a section where you can input the zip code of the client in order to determine at which courthouse you can file your action.[170] You should also to familiarize yourself with local court rules and forms and talk to experienced practitioners who can provide you with insight into the unique practices of the court where your case will be filed.

Next, you should determine whether to file your case by e-filing or in person with the court clerk. Prior to the proliferation of e-filing, which is becoming mandatory in many counties, most superior courts throughout California either allowed, or required, you to, file new cases in person[171] at your local courthouse at their filing window.

IV. Filing the Action

The party initiating a custody action must submit the required forms to the court. These forms are available on the California Judicial Branch website[172] and you should always check online to ensure that you are using the most current version of the forms. Some courts may have local forms or local rules for filing with the court or initiating an action. You should research local procedures by checking the local court website and speaking to local practitioners with experience filing custody actions and seeking SIJ findings in the county where your client resides.

PRACTICE TIP: Certificates of Translation. Remember, if English is not your client's best language, you must review all forms and declarations with your client in their best language, using an interpreter if you do not speak the language.[173] The declaration should include a certificate of translation, signed by the interpreter and certifying that they are fluent in English and the language used, and that they interpreted the declaration for the declarant. Sample certificates of translation are found in **Appendices D, E, and F**.

The statewide forms required to file a custody action are:

- FL-260, Petition for Custody and Support of Minor Children[174]
- Form FL-210, Summons

[170] It is helpful to contact local practitioners in the area to see if a particular court is familiar with requests for SIJ findings. As with a parentage action, if a particular court where you may file is not familiar with SIJ findings requests, you may consider filing additional supporting materials, like a brief, to provide context for the court, or filing at a location more familiar with requests for SIJ findings if allowed to do so. For an example of a court locator based on zip code, visit http://www.lacourt.org/filinglocatornet/ui/filingsearch.aspx?CT=CI.

[171] E-filing at Stanley Mosk tends to be pretty quick, and going in person is not always recommended.

[172] You can access the forms online at https://www.courts.ca.gov/formname.htm.

[173] We recommend using a professional interpreter. If that is not possible, do not use the client's family member or anyone with connections to the declarant to interpret. Make sure that any volunteer interpreter is fluent in both languages, not a party to the action, and able to interpret accurately and without bias.

[174] The most current version of this and other forms can be found at https://www.courts.ca.gov/formnumber.htm.

- Form FL-105, Declaration Under Uniform Child Custody Determination and Enforcement Act (FL 105)

- Form FW-001, Request to Waive Court Fees, along with Form FW-003, Order on Court Fee Waiver, or filing fee of $435.00[175]

- Form FL-300, Request for Order

- Form FL-356, Confidential Request for Special Immigrant Juvenile Findings

Other documents that you should file include supporting declarations from the petitioner-parent and the child. You may also want to file a supporting memorandum if your case will be heard in a new courthouse that is less familiar with SIJ findings or your case involves unique or complicated issues. You should also check with local practitioners and the local court rules to see if you are required to file a proposed order or if you should file a legal memorandum. If you cannot connect with any local advocates, file a memorandum of points and authorities citing all the relevant case law and codes supporting your arguments.

A sample custody filing is found at **Appendix B**. Note that a GAL is not required in custody actions as the child is not a party to the action. This means you will not file Form FL-935, Application and Order for Appointment of Guardian ad Litem. Another difference between custody and parentage actions is that with custody actions, the Summons will be issued at the same time you file your custody action. In parentage actions, the GAL must be appointed first before the Summons can be issued. Since you do not have to wait for appointment of a GAL, you can file Forms FL-300 and FL-356, along with the supporting declarations, at the same time as the initial case forms.

As with parentage actions, you should check your local court rules and forms and consult with practitioners before initiating the action and take care to comply with all local rules.

a. Legal standard in making custody determinations

The Family Code grants a family court authority to make a child custody order during the pendency of another action, including a parentage action or custody action.[176] The court may "make an order for the custody of a child during minority that seems necessary or proper."[177]

[175] Most petitioners qualify for a fee waiver based on their household income. Some clerks send the fee waiver request to a judge. If this happens, offer the clerk a self-addressed stamped envelope so they can mail the order to you. If your client does not qualify for a fee waiver you should check the Civil Fee Schedule for changes in the fee structure. This is, evidently, not relevant if you are e-filing. You can find that information on your county's Superior Court website or on the state court website, https://www.courts.ca.gov/documents/filingfees.pdf.
[176] *See* Fam. Code § 3022.
[177] *Id.*

When making this determination, the court is governed by the best interest of the child.[178] Moreover, the question of best interest is determined from the standpoint of the minor child, not their parents.[179] Critical to this determination is the "health, safety, and welfare of the child."[180]

Other factors the court should consider when making custody determinations include: 1) a history of abuse by one parent against the other parent or child; 2) the nature and amount of contact the child has had with both parents; and 3) controlled substance use or alcohol abuse by a parent.[181] The court should also consider the child's wishes[182] and seek to promote the child's stability through the orders.[183]

b. Tips for Completing Form FL-260

For question 1, check the appropriate box, indicating which parent is the Petitioner and which parent is the Respondent to the action. Question 2 asks for the basis for bringing the claim as a Petition for Custody and Support (rather than a parentage action). The most common response is box A ("Petitioner is married to the Respondent and no action is pending in any court for disillusion, legal separation, or nullity").

FL-260 Petition for Custody and Support of Minor Children

1. Jurisdiction for bringing action

a. Petitioner is the ☐ mother ☐ father of the minor children.

b. Respondent is the ☐ mother ☐ father of the minor children.

2. a. ☒ Petitioner is married to the respondent, and no action is pending in any court for dissolution, legal separation or nullity.

For question 3, input the complete names, dates of birth, and ages of the children over whom the petitioner/parent is seeking custody orders.

For question 5, complete sub-questions a and b, asking that legal and physically custody be awarded to the petitioner. You can leave sub-questions c to h blank. For question 6, check the box to indicate that each party will pay their own legal fees. Question 7 is not applicable to cases where child support is not requested, so you can leave the question blank.[184] For

[178] Fam. Code § 3020(a); *In re Marriage of Burgess*, *supra*, 13 Cal. 4th at 31.
[179] *Taber v. Taber* (1930) 209 Cal. 755, 756-57.
[180] Fam. Code, § 3011(a); *see also* Fam. Code § 3020(a).
[181] Fam. Code § 3011.
[182] Fam. Code § 3042(a).
[183] *In re Marriage of Burgess*, *supra*, 13 Cal.4th at 32-33 (holding that "the paramount need for continuity and stability in custody arrangements-and the harm that may result from disruption of established patterns of care and emotional bonds with the primary caretaker-weigh heavily in favor of maintaining ongoing custody arrangement").
[184] Some advocates write in "not requested at this time" in response to Question 7.

Question 8, write in "Special Immigrant Juvenile Findings pursuant to Code of Civil Procedure section 155 (see form FL-356)."

You should carefully review the form with the petitioner in their native language to ensure that everything in the form is accurate. Then, the petitioner should sign and date the form.

c. Other Initial Forms

Apart from the Petition and Summons, each case with a minor child involved requires the filing of a Declaration Under Uniform Child Custody Jurisdiction and Enforcement Act (FL-105), a sample of which is included in **Appendix B**. The form provides the addresses[185] of the minor child along with information on any prior custody actions or cases to which the child has been a party.

d. Completing Form FL-300 Request for Order

Form FL-300, Request for Order ("RFO"), is used to ask that the court place the child into the custody of the parent with whom they reside. Although Form FL-300 allows you to request a wide range of orders, you should limit your request to child custody orders (by completing number 2 on page 2 of Form FL-300) and clearly state under number 2(b)(2) that you are requesting that the court award the parent with whom the child lives sole legal and physical custody.

2. ☒ CHILD CUSTODY ☐ I request temporary emergency orders
☐ VISITATION (PARENTING TIME)
a. I request that the court make orders about the following children (specify)

Child's Name	Date of Birth	☒ Legal Custody to (*person who decides: health, education, etc.*):	☒ Physical Custody to (*person with whom child lives*):
John Sanchez	1/1/2005	Mom Garcia	Mom Garcia

b. ☒ The orders I request for ☒ child custody ☐ visitation (parenting time) are:
(1) ☐ Specified in the attached forms:
☐ Form FL-305 ☐ Form FL-311 ☐ Form FL-312 ☐ Form FL-341(c)
☐ Form FL-341(D) ☐ Form FL-341(E) ☐ Other (*specify*): _____
(2) ☒ As follows (*specify*): ☐ Attachment 2b.
Sole legal and physical custody to the respondent mother.

You should complete number 2(c) and explain that the orders are in the child's best interest because the parent with whom they are living is providing them a loving and caring home and because they have been abused, abandoned, and/or neglected by their other parent. If you request child support, spousal support, property control or other orders, the court will

[185] Depending on the client's circumstances, you may be able to argue that their current address is confidential. Fam. Code § 3429(a) provides that "where there are allegations of domestic violence or child abuse, any addresses of the party alleging violence or abuse and of the child which are unknown to the other party are confidential and may not be disclosed in the pleading or affidavit."

likely require you to join and establish personal jurisdiction over the absent parent, which could prevent your case from moving forward. A sample RFO is found at **Appendix C**.

e. Completing Form FL-356, Confidential Request for Special Immigrant Juvenile Findings

Form FL-356 is a stand-alone judicial council form that was adopted for mandatory use in July 2016. Form FL-356 asks you to provide the basis upon which you are seeking the SIJ findings, and you should take care to provide the appropriate legal basis for the SIJ findings in your client's case, along with an adequate factual basis that supports them. See Chapter 5, *infra*, for a detailed explanation on how to complete the forms and **Appendix H** for a sample form.

f. Client's Declaration

You should also address the need for the custody order in a declaration from the child, which you will submit concurrently with the RFO and the request for SIJ findings. Note that advocates typically submit one declaration from the child that addresses both the need for the custody order and SIJ findings. A sample child's declaration is attached at **Appendix F**.

Issues the declaration should address include:

- Facts about the non-custodial parent's abuse, abandonment, and neglect.
- Why the child cannot return to their country of origin (what harms they face if they were to return, whether there is anyone who can care, provide, and protect them, etc.).
- The relationship between the child and the parent whom the child wants to have legal custody over them (ways the parent provides for the child, both financially and emotionally, how the child feels living with or being cared for by the parent, etc.).
- Why the child custody order is necessary (whether there is other proof of parental relationship in the English language that can be used in emergencies, etc.).
- An explicit statement that the child wants a particular parent to have legal custody over them and why.

When submitting a Petition for Custody and Support, you should also submit a declaration from the petitioner-parent, which addresses similar factors and establishes the marital relationship between the two parents. See **Appendix G** for a sample parent declaration. For information on supporting the SIJ findings through a declaration, see Chapter 6, *infra*.

V. Mediation

Once you file your requests for custody (Form FL-300) and SIJ findings (Form FL-356) and receive a hearing date, the court may also order the parties to mediation. Mediation will likely be required for a custody action or a parentage action where both parties are adults. The petitioner will have to attend the mediation appointment even though it is very likely that the respondent will not attend.

VI. Peremptory Challenges

In most jurisdictions, you will be assigned a judge upon filing your case. Once you are assigned a judge, check in with local practitioners to see whether that particular judge is hostile to custody petitions in which you are also requesting SIJ findings (Form FL-356). If you discover that the judge you are assigned may be hostile toward your client's case, you can file a peremptory challenge under California Code of Civil Procedure section 170.6. A peremptory challenge allows you to request a new judge without providing any specific reason; each county has its own form for "papering" a judge.[186] Typically, you file this form directly with the clerk in your assigned courtroom, but procedures may vary between courthouses. If approved by the assigned judge, the presiding judge of that court will then reassign your case and mail you notice of your new judge. Challenging an assigned judge carries the risk that you are subsequently assigned a judge even more hostile to children seeking SIJ findings. After checking with local practitioners, weigh your options with your client carefully before making a decision.

PRACTICE TIP: Peremptory Challenges. There are specific rules and deadlines associated with peremptory challenges. In general, you must file a peremptory challenge within 10 days of your case being assigned to a judge.[187] Make sure to consult Code of Civil Procedure section 170.6 and local rules to ensure you do not inadvertently lose your opportunity to paper a judge.

VII. Completing Service

Prior to the RFO and SIJ findings hearing, proper service must be completed. In a Petition for Custody and Support, the respondent will be the non-custodial parent and they must be served with case documents (see chart below). The Code of Civil procedure governs notice of a custody action and requires that the Summons and Petition for Custody and Support

[186] *See, e.g.*, SDSC CIV-449, LACIV 015. Note that each party is limited to one peremptory challenge as a matter of course. If you file a preemptory challenge and are assigned to another problematic judge, you will have to show cause in order to disqualify that judge.
[187] Code Civ. Proc. § 170.6(a)(2).

be personally served on the respondent.[188] Service on the respondent must be completed at least 30 days before a default judgment is entered[189] and at least 16 court days before a hearing.[190] Once the respondent is served, the person who served the respondent must sign a Proof of Service of Summons (Form FL-115) that must be filed with the court. You should file your FL-115 at least five court days before your hearing. See **Appendix L** for a sample FL-115 for a custody action. Unlike a parentage action, you generally do not need to serve any individuals besides the respondent, but there is no provision for waiver of notice. If you are unable to locate the respondent or otherwise cannot serve the respondent—i.e., because the respondent is incarcerated in a maximum security prison abroad—you will need to effectuate service via posting or publication.

What to Serve	**If Respondent is a monolingual Spanish speaker**, you should also serve them with blank Spanish language copies of the form, where available.[192]
1. FL-210 2. FL-260 3. Blank FL-270 4. FL-105 5. Blank FL-105 6. FL-300 7. FL-356 8. Declarations filed with the Court 9. Blank FL-320 10. Blank FL-358 11. Memorandum (if filed) 12. Proposed order (if filed)[191]	1. FL-260s 2. FL-270s 3. FL-105s 4. FL-300s 5. FL-320s 6. FL-356s 7. FL-357s, and 8. FL-358s.

If the respondent cannot be found, you will need to complete service by publication or posting. Publication requires the summons to be published at least once a week for four consecutive weeks in the newspaper most likely to deliver actual notice to the respondent. Posting requires the summons and relevant court documents to be "posted" for 28 days in a public location in the courthouse.[193] Posting is a much less onerous process than publication, but it is available only to clients who qualify for fee waivers.[194]

[188] Code Civ. Proc. § 415.10 ("A summons may be served by personal delivery of a copy of the summons and of the complaint to the person to be served. Service of a summons in this manner is deemed complete at the time of such delivery"). Sections 415.10–415.40 also allow for service by first-class mail with acknowledgment of receipt.
[189] Code Civ. Proc. § 585; Cal. Rules of Court, rule 5.401.
[190] Cal. Rules of Court, rule 5.92(f); Code Civ. Proc. § 1005(b). For more information on custody and SIJ findings hearing, see Chapters 5 and 6, *infra*.
[191] Custody orders are made on Forms FL-340 and FL-341 and SIJ findings on Form FL-357. We recommend filing these with the court at least one week before the hearing as proposed orders. However, some advocates do not submit them ahead of time and instead bring them to the hearing. You should also check your local court rules and with experienced practitioners to see if the judge you are assigned requires filing a proposed order before the hearing.
[192] Any forms available in Spanish can be found at https://www.courts.ca.gov/forms.htm.
[193] *See* Code Civ. Proc. § 415.50; Cal. Rules of Court, rule 5.72; *Boddie v. Connecticut* (1971) 401 U.S. 371.
[194] Cal. Rules of Court, rule 5.72.

Procedures for posting and publication vary widely from court to court, so you should consult with an experienced attorney before requesting posting or publication. In general, you will need to submit an Application for Order for Publication or Posting (Form FL-980) to the court and attach a due diligence declaration explaining your efforts to give notice to the respondent. At minimum, you should send the documents to the respondent's last known address, contact several family members or friends to ask about the respondent's whereabouts, and conduct an online search for the respondent. See **Appendix J** for a sample posting application.

VIII. Next Steps

Once you file Forms FL-300 and FL-356, you will be given a hearing date. At the hearing, the court will determine whether to grant your requests for custody and SIJ findings. Courts typically set one hearing date for both requests, which is why you should file Form FL-356 with Form FL-300. However, it is possible that the clerk issues two separate hearing dates – one to address the RFO requesting a custody order and another to address the request for SIJ findings – in which case you can try calling the assigned judge's clerk to request that the hearings be consolidated. Advocates have also succeeded in orally requesting that the court address both requests at the first hearing date. Keep in mind that either way the court must first issue the custody order before making SIJ findings. See Chapters 5 and 6, *infra*, for additional information on preparing for your hearings, including preparing the orders for the court to sign. After the hearing, you will also need to bring your case to judgment. These steps are also discussed in detail in Chapter 5.

IX. Case Examples

Example 1: Alicia is a 15-year-old girl from El Salvador. Alicia's parents, Jorge and Melissa, married six months before Alicia was born and they lived together until Melissa left the family when Alicia was about seven years old. Alicia's parents never divorced and no one has filed a previous custody action involving Alicia. When Alicia was 10 years old, Jorge moved to Los Angeles, California in order to earn money to support the family and left Alicia in the care of her grandparents. After a gang member tried to force Alicia to be his girlfriend, she fled to the United States and reunited with her father about eight months ago.

Alicia may be eligible for SIJS because she has been abandoned by her mother and faces danger in El Salvador. Since no divorce and custody action has ever been filed, Jorge needs a state court custody order to ensure that he has the legal authority to make all necessary decisions for his daughter and allow Alicia to seek SIJ findings and SIJS.

In analyzing Alicia's case, you recognize that you must file her state court petition as a Petition for Custody and Support because the conclusive presumption of parentage applies, given that Jorge and Melissa were married and cohabitating at the time of Alicia's birth. The action will be between Jorge and Melissa.

Example 2: 20 years ago, Sandra and Jose legally married in Guatemala. They were together for five years, but separated when Sandra was three months pregnant with their son, Pablo. Sandra went to live with her sister in Guatemala City and Jose returned to live with his parents in a town in the Guatemalan Highlands. After Pablo was born, Jose visited him a couple of times but he never provided any economic support. Pablo has not seen his father since he was very young.

After facing extortion from gang members, Sandra fled to the United States when Pablo was 13 years old. Pablo followed a year later and reunited with his mother in San Bernardino, California 10 months ago. Although Pablo was born to married parents, the conclusive presumption of paternity does not apply to Pablo's case because his parents were not cohabitating at the time of his birth.[195] Thus, Pablo should file a parentage action, seeking to establish that Sandra is his legal mother, and seek a custody order and SIJ findings through that action.

[195] *See* Fam. Code § 7540.

CHAPTER 5: PREPARING FOR YOUR HEARING AND BRINGING THE CASE TO JUDGMENT

Once you have filed your parentage or custody action and submitted your request for custody orders, you will be scheduled for an RFO hearing before the family court. This chapter focuses on the RFO hearing, first discussing how you and your client can prepare for the hearing, and then reviewing what to expect the day of the hearing. Finally, this chapter discusses the final step in your family court action, bringing the case to judgment, which you will typically achieve through default proceedings.

I. Preparing for the RFO Hearing

Prior to the RFO hearing, you should ensure that service has been effectuated and that all proofs of service have been filed with the court.[196] If you have not already submitted proposed orders to the court, you should prepare them to bring to the hearing. Assuming that the requests for custody and SIJ findings are set for the same hearing date, the forms containing the orders will be:

- Form FL-340, Findings and Orders After Hearing
- Form FL-341, Child Custody and Visitation (Parenting Time) Order Attachment
- Form FL-357, Special Immigrant Juvenile Findings

Form FL-357 is discussed in depth in Chapter 6, *infra*, and sample custody orders are found at **Appendix M**.

You should also meet with the child (and the guardian ad litem if it is a parentage action) to help them prepare for the hearing. If the action is a Petition for Custody and Support, the parent will be the petitioner, so you should meet with the parent as well to prepare for court.[197]

Attending court is often a new and frightening experience for children and adults, and meeting with the client prior to the hearing is critical to helping your client understand the process and manage their expectations. At the meeting, you should remind the child that the hearing is in front of a family court judge who has no power to order them removed from the United States. You should review who the people are that will be in the courtroom (the judge, the respondent if the child is the petitioner, attorney, court interpreter, judicial assistant, bailiff,

[196] See Chapters 3 and 4, *supra*, for a discussion of service and the proof of service forms.

[197] In a parentage action, the child might want the parent with whom they live to attend the preparation meeting as well. Remember that you are not the parent's attorney and they are the opposing party in the action. Although you may choose to allow them to attend the meeting, remind them that you are not their attorney and cannot give them legal advice.

and other litigants) and explain the layout of the courtroom. You should also ask your client to dress in courtroom appropriate attire. It is not a problem if your client does not have formal clothing, but you should advise the clients to wear clothing they would consider wearing to church or some other formal event.

Next, you should prepare the client for what will happen when the case is called. Court practice may vary from jurisdiction to jurisdiction or even from judge to judge, so it is always important to consult with local attorneys before the hearing so that you and your client know what to expect. In general, the child and the parent will be asked to state their complete names for the court and will be placed under oath. The judge may also ask them questions about the custody order or SIJ findings or ask you as the petitioner's attorney to examine the parties to establish the basis for the orders. Remind your client to answer all questions honestly and to tell the court if they do not understand the question or the interpreter, or if they do not know the answer to a question. You may also want to conduct a brief mock direct examination with the child (and their parent if they are the petitioner) so they have experience answering questions in court. A mock direct examination in the context of a parentage action can be found at **Appendix N** and a mock direct examination in the context of a custody action can be found at **Appendix O**.

Prior to the state court hearing, you will want to familiarize yourself with the judge who will be hearing the case and their procedures and practices. If possible, you should consult with other attorneys who have pursued custody orders and SIJ findings before the judge, and you may want to visit the courtroom and observe the judge yourself. This information can be invaluable to ensuring that you are prepared to address common issues raised by the judge.

a. <u>The RFO Hearing</u>

On the day of the hearing, plan to meet your client at the court early. Entering the courthouse and passing through the courthouse security may be intimidating to your client, so you may want to meet them outside the building and accompany them through the security line. Once you arrive at the judge's courtroom, check the calendar outside the courtroom – if there is one – and find your docket number for the day. Then check-in with the judge's clerk when the courtroom is open. Make sure to bring business cards with you, since many courtrooms require you to check in with a business card. If you need an interpreter, alert the clerk that an interpreter is needed.[198] Finally, ask the clerk if the judge would prefer your client to wait outside the courtroom until their case is called; many courtrooms have rules against minors in the courtroom when dealing with custody issues. If you plan to ask the court to clear the courtroom for your client's hearing, you should alert the clerk that you would like the courtroom cleared when your case is called.[199]

[198] Some courts require you to request an interpreter prior to the hearing, particularly when a party speaks a language other than Spanish. If you are unsure of the court's requirements, call the clerk as soon as you get a hearing date to let the court know you will need an interpreter.

[199] *See* Cal. Rules of Court, rule 5.250(f). Clearing the courtroom may help the child feel more comfortable providing testimony before the court and prevent the release of sensitive information, but it may also cause the court to hold your case to the end of their calendar or otherwise delay your proceeding.

Once court is in session, wait until an interpreter is present and the judge calls your case. Once the judge calls your case, you, the child, the GAL if there is one, and the child's parent will move to the front of the courtroom.[200] The judge will ask for appearances. Introduce yourself with your name and firm's name and say that you are appearing *pro bono* on behalf of the petitioner. Your client, their parent, and the GAL will also state their name for the record. Next, the court clerk will place the parties under oath, if they have not already.

After appearances and the oath, several things may happen. The judge may issue the requested custody orders and SIJ findings without asking any questions of the parties. The judge may want to elicit testimony from the child or the respondent or ask you to elicit testimony from your client. If the judge wants your client to testify, consider objecting and asking the court to rely on the declaration or to have the GAL testify on the child's behalf. You can point to the Rules of Court concerning testimony of children, which require the court to consider the child's best interest before requiring that they testify.[201] If the judge insists that you conduct an examination of your client, keep your questions simple and to the point. Ask about the child's relationship with both parents in order to establish that the parent with whom the child resides is providing a loving and stable home for the child and that the other parent is not an appropriate caretaker. Also, ask the child to express their wishes about who should have legal and physical custody over them. Mock direct examinations can be found at **Appendices M and N**.

The judge may also raise legal concerns about the case. Be prepared to argue your case orally in front of the court. Courts frequently raise questions about notice and service of the RFO documents, joinder of the absent parent, and jurisdiction. The court may also inquire why a custody order is necessary if the absent parent has not been involved in the child's life for years and does not seek to exercise their custodial relationship. You should be prepared to remind the court of the law governing service and jurisdiction and to argue that in parentage actions, *Bianka M.* clearly holds that joinder of and jurisdiction over the absent parent is not necessary.[202]

Finally, be prepared to argue that the custody order is in the child's best interest and best promotes the child's health, safety, and welfare under the factors outlined in the Family Code and discussed in Chapters 3 and 4, *supra*. Explain that the parent needs the custody order in order to ensure that they have the legal authority to make all necessary medical, educational, and legal decisions for the child, and to promote the child's stability and sense of security. If the court asserts that the custody order is not necessary because the parent has not run into legal barriers exercising authority over the child, point out that there is no guarantee that a

[200] You and the parties may have to stand during the hearing since there will likely only be one interpreter and that person will have to stand between the petitioner and respondent (and GAL if they do not speak English) to interpret during the hearing.
[201] Cal. Rules of Court, rule 5.250. *See also* Fam. Code § 3042(b); *In re Jennifer J* (1992) 8 Cal.App. 4th 1080, 1088-89 (recognizing the trauma caused by requiring a child to testify in court and allowing the court to find the child unavailable to testify or decline to hear testimony in order to protect the child).
[202] *See Bianka M*, *supra*, 5 Cal 5th at 1011.

hospital or other setting will accept the child's foreign birth certificate as proof of their relationship, and that it is in the child's best interest to have a clear custodial relationship. See **Appendices M and N** for sample mock RFO hearing scripts.

Hopefully, the judge will be persuaded by your arguments and place the child in the custody of their parent. If the judge is not willing to make the custody order, you can either ask for time to brief the issues for the court before it makes a final decision, or be heard on the record and make final arguments orally to the court. You want to be careful to outline all of your arguments and create a record in case you need to file a writ or an appeal of the judge's decision. Writs and appeals are discussed in detail in Chapter 7. Once the judge orally makes your orders, ask the judge to sign Forms FL-340, Findings and Orders After Hearing, and FL-341, Child Custody and Visitation (Parenting Time) Order Attachment. See **Appendix M** for sample orders.[203] We recommend asking the court to sign these orders on the record to avoid delay in receiving the orders from the court clerk.

At the hearing, the judge will also address your request for SIJ findings. See Chapter 6, *infra*, for more information on common issues the judge may raise regarding SIJ findings.

II. Bringing the Case to Judgment

The court's orders, placing your client into the custody of their parent and making SIJ findings on their behalf, do not end your case before the family court. In order to receive final orders and close your case with the family court, you will need to seek a judgment. In most parentage or custody SIJ cases, you will be proceeding via a default judgment. If 30 days have passed after serving the respondent with the Petition and no written Response has been filed, you can proceed with a default judgment.[204] The respondent's appearance at the RFO hearing does not preclude proceeding in default if they have not filed a written response.

a. Default and Judgement forms

A respondent has 30 days from the date they are personally served with the summons and complaint to file a written response.[205] The end of the 30 days is not an automatic cut-off; the court will still accept a response from the respondent after 30 days unless the petitioner files a request for default. Once default is entered, the respondent is no longer able to file a response. After default is entered, the court may then enter a default judgment in your favor. To begin the process, you need to prepare Form FL-165, Request to Enter Default. This form requires the attorney to sign, attesting to the procedural posture of the case.

[203] You should also provide Form FL-357 if you have not previously filed it as a proposed order and ask the court to sign the SIJ findings.
[204] Code Civ. Proc. §§ 412.20(a)(3), 585; Cal. Rules of Court, rule 5.401.
[205] *Id.*

In addition to the request, you must also file Form FL-230, Declaration for Default or Uncontested Judgment. This is the form the client signs acknowledging the default request and the orders that are being sought. Children who have had GALs appointed will need to have their GAL sign the declaration as well.

The two main judgment forms are the FL-190, Notice of Entry of Judgment, and the FL-250 Judgment, with Attachment. The attachment mirrors the SIJ findings and custody request, but in a word document. Sample judgment packets for parentage and custody actions are found at **Appendices O and P**, respectively.

PRACTICE TIP: Raising new issues at the default stage. You can only get the relief you asked for in your Petition. If you want to raise new issues, you will need to amend your Petition and start the process over again. This is why it is important to request the SIJ findings in your Petition.

What Goes into a Default Packet?

The default packet includes the following Forms[206]:

- FL-165, Request to Enter Default
- FL-230, Declaration for Default or Uncontested Judgment
- FL-250, Judgment, with Attachment
- FL-190, Notice of Entry of Judgment

For Petitions for Custody and Support, also file Form FL-235, Advisement and Waiver of Rights Re: Establishment of Parental Relationship. Sample default packets are found at **Appendices O and P**.

b. Filing with the court

Be sure to check the local rules at your courthouse for filing your default packet. The Superior Court in Los Angeles requires default requests be eFiled.

[206] Cal. Rules of Court, rules 5.401-5.415.

After the default packet has been properly filed, you should receive written notice from the court via mail that default has been entered by the court against the respondent. This means that the court will now consider your judgment packet and determine whether to enter judgment in the case. The time you will have to wait for your judgment to be entered varies from jurisdiction to jurisdiction, but the process can take months. You should periodically call the court clerk to check the status of your judgment filing. The court may also reject your judgment packet, asking you to complete an additional form or submit additional evidence,[207] or schedule the case for a judgment hearing. If your case is called for a hearing, you should be prepared to answer any questions the court has about the case and argue why judgment should be entered.[208]

Once judgment has been entered, the custody and SIJ findings are permanent (until the child's 18th birthday) and you can congratulate yourself on a job well done.

[207] In some counties, advocates report that the court clerk often erroneously rejects judgments. If your judgment is rejected repeatedly, you should speak to a supervisory clerk to explain why your judgment is correct or attempt to clarify the clerk's concerns.

[208] If the judge requires a hearing, it will likely be because the judge has questions about the proposed judgment. A judge may also want testimony from the parties to confirm the contents of the judgement.

CHAPTER 6: SIJ FINDINGS UNDER CALIFORNIA LAW

The hearing on your client's request for SIJ findings will typically be held at the same time as the RFO hearing. The form used to request SIJ findings is Form FL-356, and the court issues the findings themselves on Form FL-357.[209] The findings are the heart of a SIJS petition; the language contained in the findings is what USCIS reviews to assess whether a state juvenile court correctly applied state law to the facts of a particular case. The information that goes into these forms is therefore critical. Carefully drafting Forms FL-356 and FL-357 can ensure success when USCIS reviews a petition for SIJS.

This chapter begins with an overview of California law as it applies to SIJ findings in family court. It will then discuss the logistics of getting SIJ findings in family court – what to file and when. The chapter will then outline the substantive information that must go into both the request for SIJ findings (Form FL-356) and the SIJ findings themselves (Form FL-357) in terms of both state law and factual detail, the combination of which should then enable a judge to draw conclusions firmly grounded in California state law. Finally, this chapter will provide a link to a resource for practitioners who need additional guidance and support to file a petition for SIJS with USCIS.

I. Requirements for State Courts to Make SIJ Findings

The California Code of Civil Procedure outlines the minimum requirements for a family court judge to make SIJ findings. Section 155(b)(1) specifies that:

> If an order is requested from the superior court making the necessary findings regarding special immigrant juvenile status…and there is evidence to support those findings, which may consist solely of, but is not limited to, a declaration by the child who is the subject of the petition, the court *shall* issue the order…

The court therefore has an obligation to make SIJ findings where the evidence supports it. Although some family court judges might want additional evidence beyond a declaration in order to make the findings in a particular case, the statute is clear that a declaration can form a sufficient evidentiary basis for the findings on its own.

Section 155 also lists the specific findings that a superior court judge must make:

1. That the child was either declared a dependent of the court or legally committed to, or placed under the custody of, a state agency or department, or an individual or entity appointed by the court (and the date on which this occurred).[210]

[209] This is the same form used to obtain SIJ findings in any branch of the superior court. The Judicial Council of California created the form for standardized use throughout California.
[210] Code Civ. Proc. § 155(b)(1)(A)(i)-(ii).

2. That reunification of the child with one or both of the child's parents was determined not to be viable because of abuse, abandonment, neglect, or a similar basis pursuant to California law (and the date on which the judge determined reunification not to be viable).[211]

3. That it is not in the best interest of the child to be returned to the child's, or his or her parent's, previous country of nationality or country of last habitual residence.[212]

The first of these findings should be made once the child's parent has received sole legal and physical custody of that child. The next two findings – reunification not being viable on one of the three bases and best interests – should primarily flow from information contained in the child's declaration. The superior court's role in making these findings is limited to applying California law to a child's specific situation. Other issues – such as a juvenile delinquency history, the fact that a child might have crossed the border without inspection, views on immigration policy in general – should not come into play when a judge analyzes a request for SIJ findings. California case law has made it clear that immigration status is not the purview of state courts, and that state court judges need to focus solely on identifying abandoned, abused, or neglected children and considering their best interests when deciding whether to make SIJ findings. The California Court of Appeal has stated that, "[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 [] children under its jurisdiction who cannot reunify with a parent or be safely returned in their best interests to their home country."[213]

II. Procedures for Obtaining SIJ Findings in Family Court

Practitioners request SIJ findings through Form FL-356, Confidential Request for SIJ Findings. Form FL-356 is only two pages long but requires a good deal of information: information about the child and the child's parents, the nature of the family court proceedings, the person into whose custody the court places the child, the reason or reasons reunification is not viable, and why it's in the child's best interest to remain in the United States. Form FL-356

[211] Code Civ. Proc. § 155(b)(1)(B).

[212] Code Civ. Proc. § 155(b)(1)(C). These findings mirror the requirements of the federal SIJS statute. However, you should take care to cite to the Code of Civil Procedure and not the federal statute when asking the family court to make the SIJ findings.

[213] *Leslie H. v. Superior Court*, *supra*, 224 Cal.App.4th at 351 (also stating, "[a]s *Mario S.* aptly observed, the SIJ statute and accompanying regulations 'commit … specific and limited issues to state juvenile courts. The juvenile court need not determine any other issues, such as what the motivation of the juvenile in making application for the required findings might be [citations]; whether allowing a particular child to remain in the United States might someday pose some unknown threat to public safety [citation]; and whether the USCIS, the federal administrative agency charged with enforcing the immigration laws, may or may not grant a particular application for adjustment of status as a SIJ.'" (citing *In re Mario S.*, (N.Y. Fam.Ct. 2012) 38 Misc.3d 444 [954 N.Y.S.2d 843, 852-53])).

should be accompanied by the child's declaration, which can be filed as an attachment to the form or concurrently with the request.[214]

Questions 11 and 12 on page 2 of Form FL-356 involve the reasons reunification with one parent is not viable and why the child's best interest is served by staying in the United States. Although the attorney is submitting a declaration with Form FL-356 that contains all of this information, it is important to summarize the bases for these findings in these two sections on the form itself as well. This should include the facts about what happened with the absent parent and why it is not in the child's best interest to return to their country of nationality or of last habitual residence, while also citing to the legal basis under California law to support the findings (see the below section for the applicable California code sections). See **Appendix H** for a sample Form FL-356.

The court makes SIJ findings on Form FL-357, which practitioners may file as "Proposed Orders" when filing Forms FL-356 and FL-300 (the form for the RFO).[215] Much like Form FL-356, Form FL-357 requires information about the child, the parent into whose custody the court placed the child, the basis or bases for reunification not being viable, and why it is not in the child's best interest to return to their home country. The information in Form FL-357 should generally mirror the information contained in Form FL-356, although much depends on what happens in court the day of the RFO hearing as well. For example, an attorney might argue that a child's father abandoned and neglected her, but the judge is willing only to make the finding based on abandonment alone. If that happens, the proposed Form FL-357 would have to be modified. The same could be true in the best interest section. Form FL-356 might have cited gang threats as a reason the child's best interest is to remain in the United States. If the judge does not base their best interest determination on the gang threats, Form FL-357 would also need to be modified to reflect the judge's basis for their best interest determination.

In addition to facts about the case itself, Form FL-357 must have California legal citations and/or state case law citations to support the judge's findings.[216] If SIJ findings do not identify the legal basis that the judge used to make the findings, USCIS could ultimately deny the child's SIJS petition. There should be legal citations in at least three sections of Form FL-357: Question 4, regarding placement of the child in one parent's custody, question 5, why reunification is not viable, and question 6, why it is not in the child's best interest to be returned to the child's or parent's country of nationality or last habitual residence. The provisions of California law most useful to cite in response to each of these questions can be found in the next section of this chapter. Form FL-357 should also contain a complete and

[214] If the child's declaration is filed independently and concurrently with the FL-356 instead of as an attachment to FL-356, it may make it clearer for the court that the declaration is submitted to support both the request for a custody order and the SIJ findings.

[215] Generally, attorneys do not have to submit Form FL-357 at the same time as Form FL-356 and the RFO documents, but doing so may avoid unnecessary delays with the court and is a best practice.

[216] Citations to California statutes and/or case law are critical, but practitioners should *not* cite to federal law on Form FL-357. USCIS has denied I-360 petitions that reference federal law because the findings must have a state law basis.

carefully drafted explanation of the factual basis for the court's findings. See **Appendix I** for a sample Form FL-357.

PRACTICE TIP: Strategizing Before Filing Your Case and What to Do With Modified Orders. As soon as you have a judge assigned to your case, you will want to check with local practitioners to see whether you want to paper that judge. Should you miss the window to file your peremptory challenge or neglect to reach out to local practitioners and end up with a judge hostile to child petitioners or requests for SIJ Findings, you may end up with problematic orders. Judges may cross things out of your proposed FL-357, interlineate comments, or white out portions, leaving you with an FL-357 that UCSIC could use to deny the client's SIJS petition. If you receive such an order on the day of your hearing, ask to be placed on second call or on the afternoon calendar so you can address the changes on the record with the judge. If the judge denies your request, or sends you problematic orders later in the mail, consider going back into court ex parte to get new orders.

PRACTICE TIP: Ex Parte Filings. The California Rules of Court govern ex-parte filings generally,[217] but as with any filing, you should check the local rules and with local practitioners for any courthouse-specific procedures. The purpose of ex parte filings is to bring a matter before the court that cannot wait for a regularly scheduled hearing because irreparable harm, among other things, is likely to result. Typically, ex parte filings for purposes of requesting new SIJ Findings or for an RFO hearing date prior to an eighteenth birthday will include the following forms and documents:

- FL-300 – you must check the box indicating "temporary emergency orders."
- Proposed Orders (FL-357).
- A Declaration of Necessity and Urgency detailing the irreparable harm that would occur barring the ex parte hearing.
- An ex parte application (a brief narrative on pleading paper indicating what you are requesting).

III. Common Legal Citations for the SIJ Findings

As mentioned above, it is critical to include state statutory or case law citations to support the findings on Form FL-357. As an initial matter, it is critical to point out that the findings in Form FL-357 are made using California law, even if the underlying facts took place in a different country. The Judicial Council of California, in its 2014 memorandum following the passage of Senate Bill 873, stated that, "[a]ll [SIJ] findings are to be based on California state law."[218] Thus, the only question for a judge is whether the actions or inactions of a child's

[217] *See* California Rules of Court, rule 5.151.

[218] Curtis L. Child, *Senate Bill 873 and the Special Immigrant Juvenile Process in the Superior Courts*, Judicial Council of California, pg. 13 (Sept. 30, 2014), available at http://www.courts.ca.gov/documents/jc-20141028-item1.pdf

parents would constitute abuse, abandonment, or neglect under California law, irrespective of where they occurred and even if such behavior is common in the child's home country.

PRACTICE TIP: Citing to Code of Civil Procedure Section 155 in your Request for SIJ Findings. In order to be eligible for SIJS, USCIS must find that the applicant did not seek the underlying custody order for immigration purposes only. Citing to Code of Civil Procedure section 155, which explicitly states that the superior court has jurisdiction to make findings necessary to enable a child to petition the USCIS for SIJS, may lead USCIS to request further evidence or deny the SIJS petition because the state law cited is expressly for immigration purposes. You should use section 155 to persuade the state court judge to make the SIJ findings, but Form FL-357 should cite to other provisions of California law.

The following are the key provisions of California law that practitioners can cite in response to the three sections of the form that allow for a narrative response. It is important to note that, although these code sections might be the most helpful for practitioners, they are no substitute for independent legal research based on the facts of an individual case. Moreover, while citing to California statutory law should provide a sufficient state law basis for your SIJ findings, practitioners can also cite to California case law to support the requested SIJ findings as needed.

<u>Placement in the custody of one parent</u>

Family Code section 3006:

"'Sole legal custody' means that one parent shall have the right and the responsibility to make the decisions relating to the health, education, and welfare of a child."

Family Code section 3007:

"'Sole physical custody' means that a child shall reside with and be under the supervision of one parent, subject to the power of the court to order visitation."

Family Code section 3011:

"In making a determination of the best interests of the child in a proceeding described in section 3021, the court shall, among any other factors it finds relevant, and consistent with section 3020, consider all of the following: (a) The health, safety, and welfare of the child."

(citing USCIS, *Special Immigrant Juvenile Status: Information for Juvenile Courts*, § 3 ("the role of the court is to make factual findings based on state law.")).

Family Code section 3020(a):

"The Legislature finds and declares that it is the public policy of this state to ensure that the health, safety, and welfare of children shall be the court's primary concern in determining the best interests of children when making any orders regarding the physical or legal custody or visitation of children."

Abuse

Family Code section 6203(a):

"For purposes of this act, 'abuse' means any of the following: (1) To intentionally or recklessly cause or attempt to cause bodily injury. (2) Sexual assault. (3) To place a person in reasonable apprehension of imminent serious bodily injury to that person or to another."

NOTE: Family Code section 6203(b) clarifies thatabuse "is not limited to the actual infliction of physical injury or assault."

Welfare & Institutions Code section 300(a):

"The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm inflicted nonaccidentally upon the child by the child's parent or guardian. For purposes of this subdivision, a court may find there is a substantial risk of serious future injury based on the manner in which a less serious injury was inflicted, a history of repeated inflictions of injuries on the child or the child's siblings, or a combination of these and other actions by the parent or guardian that indicate the child is at risk of serious physical harm."

Abandonment

Family Code section 3402(a):

"'Abandoned' means left without provision for reasonable and necessary care or supervision."

Welfare & Institutions Code section 300(g):

"The child has been left without any provision for support"

NOTE: The term "abandonment" under California law looks at a child's situation of being left without any provision for support – and not at the parent's situation of having abandoned their child. There is therefore no intent requirement to show abandonment in California. As

such, a parent that fails to send their child money or fails to maintain contact with their child can have abandoned their child, even without intending to do so.[219]

PRACTICE TIP: Death of a parent as abandonment. The death of a parent *should* be considered abandonment under California law. California treats children that have experienced the death of a parent in the same way that it treats children that have been abandoned for dependency purposes; in both situations, the child has been left "without any provision for support."[220] In preparing a SIJ findings request based on death as abandonment, practitioners should focus on whether the child was left without "provision for support" following a parent's death – *i.e.*, whether the child received an inheritance or some other form of financial support from the deceased parent. If the deceased parent left the child an inheritance or otherwise provided for them, focus instead on the absence of that parent from the child's life. How did that parent's death make the child feel? Did the death of that parent have a continuing impact on the child's life? Does the child still think about and miss their deceased parent?

Although practitioners should argue that the death of a parent *is* abandonment by that parent, death could be a similar basis to abandonment under California law as well. Section 11250 of the Welfare & Institutions Code outlines when children can receive aid and other services from the state. It states that, "[a]id, services, or both shall be granted under the provisions of his chapter…to families with related children under the age of 18 years…in need thereof because they have been deprived of parental support or care due to: (a) the death, physical or mental incapacity, or incarceration of a parent…(c) continued absence of a parent from the home due to…desertion...."[221]

Neglect

Family Code section 3200.5(b):

This section of the Family Code involves supervised visitation of a child – more specifically when the services of a professional provider of supervised visitation services might be necessary. Family Code section 3200.5(b) discusses situations when a court might order supervised visitation with the help of a professional provider, including in "any case in which the court has determined that there is domestic violence or child abuse or neglect, as defined in Section 11165.6 of the Penal Code…." Penal Code section 11165.6 in turn references Penal Code section 11165.2, which is discussed in more detail below.

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[219] *See, e.g., D.M. v. Superior Court*, *supra*, 173 Cal.App.4th at 1128-29 (no parental intent required for a finding that a child falls under Welf. & Inst. Code § 300(g)); *In re Jorge G.*, *supra*, 164 Cal.App.4th at 132-33 (finding that a child was abandoned under Fam. Code § 3402(a) when his parents were incarcerated).

[220] *See* Welf. & Inst. Code § 300(g). *See also D.M. v. Superior Court*, *supra*, 173 Cal.App.4th at 1128-29 (no parental intent required for a finding that a child falls under Welf. & Inst. Code § 300(g)); *In re Jorge G.*, *supra*, 164 Cal.App.4th at 132-33 (finding that a child was abandoned under Fam. Code § 3402(a) when his parents were incarcerated).

[221] *See* Welf. & Inst. Code § 11250.

Welfare & Institutions Code section 300(b)(1):

"The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child, or the willful or negligent failure of the child's parent or guardian to adequately supervise or protect the child from the conduct of the custodian with whom the child has been left, or by the willful or negligent failure of the parent or guardian to provide the child with adequate food, clothing, shelter, or medical treatment, or by the inability of the parent or guardian to provide regular care for the child due to the parent's or guardian's mental illness, developmental disability, or substance abuse."

Penal Code section 11165.2(a):

"'Severe neglect' means the negligent failure of a person having the care or custody of a child to protect the child from severe malnutrition ... 'Severe neglect' also means those situations of neglect where any person having the care or custody of a child willfully causes or permits the person or health of the child to be placed in a situation such that his or her person or health is endangered, as proscribed by Section 11165.3, including the intentional failure to provide adequate food, clothing, shelter, or medical care."

Penal Code section 11165.2(b):

"'General neglect' means the negligent failure of a person having the care or custody of a child to provide adequate food, clothing, shelter, medical care, or supervision where no physical injury to the child has occurred."

PRACTICE TIP: There is no intent requirement for a finding of neglect in California. Penal Code section 11165.2 begins by noting that the term "neglect" includes both acts and omissions on the part of the person responsible for a child's welfare. Thus, there is no intent requirement for neglect under California law, and failing to provide a child with the necessities of life for whatever reason should qualify as neglect.

Education Code sections 48200, 49160:

These code sections both involve the conditions under which children in California can work. Section 48200 states that, "[e]ach person between the ages of 6 and 18 years not exempted under the provisions of this chapter or Chapter 3 (commencing with Section 48400) is subject to compulsory full-time education," while section 49160 outlines the conditions under which children can work.

PRACTICE TIP: Working as neglect. California law clearly requires children to go to school and not to work, unless they work under very specific conditions. Parents who allowed their children to work full-time in their home countries – even if the child asserts that he or she is the one that made that decision – likely did not adequately supervise their children under California law, which is a form of neglect.

Best interest determinations

Family Code section 3011:

"In making a determination of the best interests of the child in a proceeding described in Section 3021, the court shall, among any other factors it finds relevant, and consistent with Section 3020, consider all of the following: (a) The health, safety, and welfare of the child."

Family Code section 3020(a):

"The Legislature finds and declares that it is the public policy of this state to ensure that the health, safety, and welfare of children shall be the court's primary concern in determining the best interests of children when making any orders regarding the physical or legal custody or visitation of children."

Case Example: Jose

Jose's mother brought him to the United States from El Salvador when he was six years old. He is now 17. Jose's father beat Jose's mother, but he never beat Jose. Jose remembers seeing his father hurt his mother, and remembers being terrified for her safety and for his own as well. Jose still has nightmares about what his father did to his mother. Jose lives with his mother in the United States and his father remains in El Salvador. Because his parents were never married, Jose files a parentage action, has a GAL appointed and subsequently files an RFO and a request for SIJ findings.

Jose qualifies for SIJ findings based on his father's abuse. Although Jose's father never hurt him physically, Jose did witness him beating his mother, which caused him tremendous emotional harm. Family Code section 6203(a) states that abuse can include placing a person "in reasonable apprehension of imminent serious bodily injury to that person or to another."[222] Section 6203(b) specifies that the harm that constitutes abuse can be physical or emotional.[223] A court should find that Jose's father abused him within the meaning of California law.

[222] Fam. Code § 6203(a).
[223] *Id*. § 6203(b).

Case Example: Mohammed

Mohammed entered the United States by himself at the age of 16. He came to the United States in order to reunite with his father, whom he had not seen since he was 11 years old. Mohammed's mother died in his home country, leaving him without any means of financial support. Mohammed's father had always kept in touch with him, sending him money regularly and calling him every week to see how he was doing in school. Mohammed did not have anyone in his home country who could adequately care for him, and he wanted to live with his father in the United States.

Mohammed can file a parentage action and a request for SIJ findings. Mohammed qualifies for SIJ findings because his mother abandoned him when she died and left him without any financial support. California views the death of a parent as a form of abandonment when a child is left "without provision for support."[224] Mohammed's mother likely preferred not to leave Mohammed in this situation, but there is no requirement that a parent intend to abandon a child in order for a court to make an abandonment finding.[225]

IV. The SIJ Findings Hearing

The SIJ findings hearing is typically combined with the RFO hearing. You should refer to Chapter 4, *supra*, for more information on preparing for the hearing. The SIJ findings portion of the hearing can be short and simple with minimal questions, or can involve a great deal of questioning and even testimony from your client or their parent. Many judges focus on whether there is enough evidence to support a finding of abuse, abandonment, or neglect. Attorneys should read the relevant California statutes and applicable case law and be prepared to show why the facts of a particular case fit into the state definitions of abuse, abandonment, and neglect.

Attorneys should also prepare their clients to answer simple questions about their case, keeping in mind that children generally do *not* need to testify in state court proceedings and that a child's declaration containing facts to show abuse, abandonment, or neglect should be sufficient to support the SIJ findings. Children may be asked questions about their relationship with their non-custodial parent, the nature of their current relationship with the parent, and about their life in the United States with the parent who has physical custody over them, including questions about school and whether their needs are met. Mock hearing transcripts can be found at **Appendices M and N**.

[224] Welf. & Inst. Code § 300(g). *See, also D.M. v. Superior Court*, *supra*, 173 Cal.App.4th at 1128-29 (no parental intent required for a finding that a child falls under Welf. & Inst. Code § 300(g)); *In re Jorge G.*, *supra*, 164 Cal.App.4th at 132-33 (finding that a child was abandoned under Fam. Code section 3402(a) when his parents were incarcerated).

[225] *See id.*

V. Resources for Filing SIJS Petitions with USCIS

When you have gotten your conformed and signed SIJ findings from the family court, you are ready to move on to filing a SIJS petition with USCIS. These next steps – filing an I-360 petition and eventually an application for adjustment of status – are beyond the scope of this manual. Practitioners that need guidance on the USCIS phase of a SIJS case should consider purchasing the Immigrant Legal Resource Center's Special Immigrant Juvenile Status manual, available by going to https://www.ilrc.org/special-immigrant-juvenile-status.

CHAPTER 7: WRITS AND APPEALS

If the superior court denies your request for custody or SIJ findings, you may challenge the judge's decision by filing a writ or an appeal to the division of the California Court of Appeal that has jurisdiction over the superior court that heard your client's case.

This chapter provides a brief overview of writs and appeals.[226] It is not intended to provide a comprehensive guide to appellate relief.[227] If you have never filed a writ or appeal, you should seek expert assistance as you move forward in the appellate process. You should also carefully consider whether it is best for your client to pursue appellate litigation and counsel them accordingly. Your ability to pursue a successful writ or appeal will depend on the record that you have built before the superior court, so you should take care throughout the process of your client's case to present all necessary evidence and arguments and preserve the record for appeal. If you need to file a writ or appeal, keep in mind that you will need to get the contact information of the court reporter in the courtroom so that you can request expedited transcripts as soon as possible. Please also keep in mind that a precedent decision in your case may affect other children besides your client, so you should reach out to other practitioners to make certain the framing of your appeal helps, rather than hurts, these children's collective cause.

I. Writ of Mandate

A writ petition requests that the Court of Appeal issue a writ of mandate, which "compel[s] the performance of an act which the law specifically enjoins."[228] An appellate court "must" issue a writ where "there is not a plain, speedy, and adequate remedy, in the ordinary course of law."[229] Writ petitions are adjudicated much faster by the Courts of Appeal than are appeals and are granted only when "there is no adequate remedy at law ... and the petitioner will suffer an irreparable injury if the writ is not granted."[230] Thus, before the Court will decide the merits of the claim, the court must find that your request warrants writ review. Luckily, the Court of Appeal has held that "there is a particular need to accelerate the writ process in child

[226] Practitioners should note that the option of filing a Motion to Reconsider directly to the superior court also exists. Motions to Reconsider must be filed within 10 days of an adverse ruling, and must be based on the existence of new or different facts, circumstances, or law. *See* Code. Civ. Proc. § 1008(a). Filing a Motion to Reconsider extends the time to file an appeal, but likely does not impact the timing of a writ. *See* Cal. Rules of Court, rule 8.108(e). Motions to Reconsider are only recommended if you have a sympathetic judge and truly new evidence or law that can change the judge's mind – or if you want to get the new evidence on record for a subsequent appeal.

[227] For a more comprehensive overview of writs and appeals in California, consult the Rutter Guide on California Appeals and Writs, available for purchase at https://store.legal.thomsonreuters.com/law-products/Practice-Materials/Civil-Appeals-and-Writs-The-Rutter-Group-California-Practice-Guide/p/100029491.

[228] Code. Civ. Proc. §1085.

[229] Code. Civ. Proc. §1086.

[230] *Los Angeles Gay & Lesbian Ctr. v. Superior Court* (2011) 194 Cal.App.4th 288, 299-300.

custody disputes where children grow up quickly and have immediate needs."[231] Thus, you may want to argue that your client needs an immediate decision because their health, safety, and welfare are jeopardized without a custody order in place clearly giving their parent unilateral authority to make important medical and other decisions for them. Similarly, you can argue that writ review is warranted for a denial of SIJ findings if your client is in removal proceedings and faces removal from the United States without the opportunity to seek SIJS. Finally, if your client is close to turning 18, consider arguing that the regular appellate process may not be completed before your client's 18th birthday, leaving your client without an adequate remedy if writ review is not granted.

Although there is no firm filing deadline for a writ petition, common law suggests that the writ petition must be filed within 60 days of the adverse decision, and we recommend filing the writ petition as soon as possible.[232] Delay in filing the petition may undercut your urgency argument and lead the court to conclude that writ review is not warranted.[233]

Code of Civil Procedure sections 1084 to 1097 and California Rules of Court rules 8.930–8.936 provide more detail on the contents of a writ petition and supporting documents.[234] In general, you should submit the following documents:

- **Writ Petition**: This petition provides a brief explanation of the case, why writ relief is warranted, the interests of the parties, the authenticity of exhibits, the timeliness of the petition, the relief sought, and a summary of the basis for relief.

- **Memorandum of Points and Authorities**: The Memorandum may be included with the writ petition and is your legal brief explaining why the superior court's decision should be overturned under the applicable standard of review. Be sure to consult and follow the rules of court regarding the format for the brief.

- **Appendix of Exhibits in Support of Writ of Mandate**: In a writ petition, the appellant is responsible for compiling the record and filing it with the court. This should include all documents filed with the superior court, all orders issued by the court, and a copy of the transcript of the proceedings. If you want the Court of Appeal to consider anything that is not part of the record before the superior court, you will need to file a Motion for Judicial Notice.

- **Proof of Service**: You will need to serve the lower court, the Respondent, and any real parties at interest in the case.

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[231] *Keith R. v. Superior Court* (2009) 174 Cal.App.4th 1047, 1057.
[232] APP-150, *Information on Proceedings for Writs in the Appellate Division of the Superior Court*, available at: https://www.courts.ca.gov/partners/documents/APP-150-INFO.pdf.
[233] *Id.*
[234] Since a typical writ filing is quite lengthy, this manual does not contain a full sample in its appendix. Practitioners that would like to obtain or review a sample writ filing can contact Mary Tanagho Ross at mross@publiccounsel.org.

You should also visit the Court of Appeal's general website, where you can find the division that will be deciding your writ and review their local court rules as well as any filing procedures.[235]

After you properly file all required documents, the Court of Appeal will then review your writ and issue a decision. If the case is extremely urgent (for example if your client is about to turn eighteen), the Court may issue a decision quickly, but it is difficult to predict when a decision will be issued.[236] The Court may deny your petition, through either a reasoned written decision or a summary denial, which would not explain the reasons for the denial.

If you are successful, the Court of Appeal may issue either an alternative writ or a peremptory writ. An alternative writ requires the superior court to take the action you are requesting (such as entering the requested orders or holding a new hearing to more fully consider your evidence) or "to show cause" at a hearing before the Court of Appeal as to why the court does not want to enter the orders."[237] A peremptory writ, by contrast, requires the superior court to take the action ordered by the Court of Appeal, and does not give the superior court the option to respond.[238]

II. Appeals

Another option is to file an appeal of the superior court's decision. The adjudication process for an appeal is much longer than the process for a writ, frequently taking one to two years. If your client is in removal proceedings or close to their 18th birthday, there may not be time for the appeal to be adjudicated before your client ages out of the state court system or faces removal from the United States. However, unlike a writ, you do not have to show an urgent need for the appeal to be filed quickly. You can also file an appeal even if you already have a writ pending with the Court of Appeal, especially since the Court of Appeal might ultimately deny the writ if it believes that an appeal is the appropriate means of resolving the action.[239]

Before moving forward with an appeal, confirm that the superior court's decision is appealable, since you can generally only appeal a final judgement.[240] The appellate process involves several filings and steps with different filing deadlines. Any filing you submit must be served on the opposing party, the real party in interest – *i.e.*, a party whose substantive legal rights are impacted by the adverse decision – and the superior court.

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[235] https://www.courts.ca.gov/courtsofappeal.htm.

[236] In age-out cases, the Court of Appeal can issue a decision in as little as a few days. In non-age-out cases, the timeframe for a decision has averaged approximately a month in our experience, but if the superior court does not comply with the Order to Show Cause it could take several months to schedule a hearing and receive a decision.

[237] Code. Civ. Proc. § 1087.

[238] *Id.*

[239] If the Court of Appeal denied your writ on the merits, however, a subsequent appeal is likely not possible.

[240] A final judgement is not the same as taking your case to judgment as referenced in Chapter 5. A final judgment in this context refers to any order issued by the family court that is appealable. *See* Cal. Rules of Court, rule 8.104(e).

- **Notice of Appeal and Fee/Fee Waiver Request:** The Notice of Appeal (Form AP-002) must be filed with the superior court that issued the decision you are appealing.[241] The notice must be filed within 60 days of the judge's decision.[242] Individual courts may have different rules about which courtroom or office accepts notices of appeal and you should check with the court clerk and experienced appellate practitioners before filing the notice of appeal. You must also file the applicable fee (generally $775) or a request for fee waiver (Form FW-001 and APP-016) along with the notice of appeal.[243] You must also serve the opposing party and all real parties in interest with the notice. The superior court must then inform the Court of Appeal and all parties that a Notice of Appeal has been filed.[244]

- **Notice Designating the Record on Appeal** (Form APP-003): This notice must be filed with the superior court within 10 days of filing the Notice of Appeal and is used to designate which documents should be part of the official record on appeal.[245] Unlike in writ proceedings, you do not need to compile the documents yourself because the superior court clerk is responsible for creating the record.[246] However, you should carefully list each document that was before the superior court that you wish the Court of Appeal to consider, along with the court transcript and the order you are appealing.[247] You must also serve the opposing party and all real parties at interest with the notice.

- **Civil Case Information Statement**: The superior court clerk will send the Court of Appeal notification of the filing of the notice of appeal.[248] Within 15 days of that happening, you must file the Civil Case Information Statement (Form APP-004) with the Court of Appeal.[249] This form provides general information about the basis of appeal and the parties.[250] You should attach a copy of the order that you are appealing to the Civil Court Information Sheet.[251] You must also serve the opposing party, the superior court, and all real parties at interest with the notice.

- **Clerk's Transcript/Record on Appeal**: The superior court will then create the Clerk's Transcript containing the record on appeal. Depending on your jurisdiction, it may take several months for the Clerk's Transcript to be prepared. The Court will send the

[241] Cal. Rules of Court, rule 8.100(a).
[242] Cal. Rules of Court, rule 8.104(a). If you have filed a writ petition, the Court of Appeal may not have issued its decision by the time the appeal deadline is reached. You should consider also filing a Notice of Appeal in case the Court of Appeal denies your writ petition.
[243] Cal. Rules of Court, rule 8.100(b).
[244] Cal. Rules of Court, rule 8.100(e).
[245] Cal. Rules of Court, rule 8.121(a).
[246] Cal. Rules of Court, rule § 8.121(b).
[247] *Id.*
[248] Cal. Rules of Court, rule 8.100(e)(1).
[249] Cal. Rules of Court, rule 8.100(g).
[250] *Id.*
[251] *Id.*

completed transcript to the parties to the appeal and to the Court of Appeal, and you should cite to the Clerk's Transcript as the record in your briefing and argument.

- **Briefing and Argument:** Once the Clerk's Transcript has been prepared, the Court of Appeal will set a briefing schedule to file your argument with the Court. As with a writ petition, be sure to follow the rules of court carefully regarding the format and content of the brief. The brief should argue why the lower court's decision should be overturned under the applicable standard of review. After briefing is complete, the Court of Appeal may set your case for oral argument.

- **Decision:** The Court of Appeal's decision may come several months after oral argument or after briefing is complete. Hopefully, the Court grants your appeal.[252] If so, the Court will likely remand your client's case back to the superior court to conduct a new hearing or issue a different decision. The Court may also deny your appeal.

III. California Supreme Court Review

If the Court of Appeal denies your writ petition or appeal, your next option is to submit a Petition for Review to the California Supreme Court. You must submit the Petition for Review within 10 days of the Court of Appeal's adverse decision becoming final.[253] Be mindful that the Supreme Court takes review of only a very small percentage of cases and that it will likely be years before the Supreme Court issues a decision on your case. Also, be aware that a decision in your case will likely impact other children seeking SIJ findings throughout California, and as with considering whether to file a writ or an appeal, you should reach out to other practitioners to make certain that the framing of your appeal helps, rather than hurts, other vulnerable children.

[252] If your client has turned 18 during the pendency of your appeal or writ, you will need to seek a nunc pro tunc order from the court, dated prior to your client's 18th birthday. Nunc pro tunc orders are beyond the scope of this manual and you should consult with an experienced appellate practitioner with experience in family law if seeking such orders.

[253] Cal. Rules of Court, rule 8.100(e)(1). A decision of the Court of Appeal typically becomes final thirty days after it is filed. *See* Cal. Rules of Court, rule 8.264(b).

Case Study: Bianka M.[254]

Bianka M. was a 10-year-old girl from Honduras who entered the United States as an unaccompanied minor. Federal officials detained Bianka and then released her to her mother, who had left Honduras for the United States many years earlier. Bianka found pro bono counsel and later filed a parentage action, naming her mother as the respondent and asking for an order placing her in her mother's sole custody. Bianka also asked the court to issue SIJ findings. Bianka alleged that her father, who lives in Honduras, had abandoned her, and that it is not in her best interest to return to her home country. Bianka's counsel notified her father of the parentage action, but he took no steps to participate in her case.

Timeline

- **December 12, 2014**: Bianka filed a parentage action naming her mother as Respondent.

- **April 23, 2015**: Bianka filed a Request for Order, seeking both a custody order and SIJ findings from the superior court.

- **July 14, 2015**: Bianka and her mother attended the RFO hearing, after which the superior court took Bianka's requests under submission.

- **August 24, 2015**: The superior court denied both of Bianka's requests. The court concluded that it could not issue either a custody order or SIJ findings unless Bianka first established a basis for exercising personal jurisdiction over her father and joined him as a party to the action.

- **October 9, 2015**: Bianka filed a writ to the Court of Appeal, asking the Court to overturn the superior court's decision that it needed to exercise personal jurisdiction over her father and join him as a party to the action in order to make a custody order and issue SIJ findings.

- **March 2, 2016**: The Court of Appeal denied Bianka's writ, concluding that her request for a custody order was premature because her mother, as the proposed custodial parent, had not filed a response and parentage had not been determined. The Court of Appeal went on to hold that requiring joinder of the father was appropriate, even if not mandated, because the child sought a finding of abandonment and the father's identity and whereabouts were known, and held that it could not move forward without personal jurisdiction over her father in Honduras. The Court of Appeal also found that Bianka's family court action was not a bona fide custody proceeding under the Uniform Parentage Act since it appeared that she only brought it to obtain SIJ findings.

[254] The timeline and description of events is largely taken from the California Supreme Court's opinion in Bianka's case. *See Bianka M. v. Superior Court*, *supra*, 5 Cal. 5th 1004.

- **May 25, 2016**: The Supreme Court of California granted review to determine whether the superior court had properly required Bianka's nonresident, noncustodial parent to be joined as a party in her parentage action seeking SIJ findings. The Supreme Court also agreed to review whether the child's perceived immigration-related motivations for filing their action have any bearing on whether the action could proceed.

- **August 16, 2018**: The Supreme Court reversed the decision of the Court of Appeal. The Supreme Court held that, as long as the absent parent received adequate notice, the action may proceed even if the parent is beyond the personal jurisdiction of the court and cannot be joined as a party. The action may also proceed regardless of whether the court believes it was filed primarily for the purpose of obtaining the protections from abuse, abandonment, or neglect that federal immigration law provides.

CONGRATULATIONS!

Thank you for taking the time to handle this case.

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While this publication is designed to provide accurate and current information about the law, readers should contact an attorney or other expert for advice in particular cases, and should also consult the relevant statutes and court decisions when relying on cited material, as the laws might change.