

1-1-2013

Uneven Access to Special Immigration Juvenile Status: How the Nebraska Supreme Court Became an Immigration Gatekeeper

Megan Johnson
ProBAR Children's Project

Yasmin Yavar
ProBAR Children's Project

Follow this and additional works at: <http://lawcommons.luc.edu/clrj>

 Part of the [Courts Commons](#), [Family Law Commons](#), [Immigration Law Commons](#), and the [Juvenile Law Commons](#)

Recommended Citation

Megan Johnson & Yasmin Yavar, *Uneven Access to Special Immigration Juvenile Status: How the Nebraska Supreme Court Became an Immigration Gatekeeper*, 33 CHILD. LEGAL RTS. J. 64 (2013).
Available at: <http://lawcommons.luc.edu/clrj/vol33/iss1/6>

This Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Children's Legal Rights Journal by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.

Uneven Access to Special Immigration Juvenile Status: How the Nebraska Supreme Court Became an Immigration Gatekeeper

Meghan Johnson & Yasmin Yavar *

I. Introduction

Children unlawfully present in the United States who have been abused, neglected, or abandoned by a parent are among the most vulnerable members of society. In the Immigration Act of 1990, which was in line with humanitarian and practical concerns, Congress introduced a path for such children to attain lawful immigration statuses, which would allow them to be classified as “special immigrant juveniles” and subsequently obtain Special Immigrant Juvenile Status (“SIJS”). Years later, eligibility for SIJS continues to be an open and evolving concept. This Article explores recent changes to SIJS eligibility, highlighting a state court decision that limits this important form of relief beyond what was provided for in the statute and in a way that threatens to deny relief to children in need.

Eligibility for SIJS has changed and expanded over the years.¹ The original statute provided relief to children declared dependent on a U.S. juvenile court who had been deemed eligible for long-term foster care and for whom the court had determined it was

* Meghan Johnson, J.D., is Pro Bono Coordinator and Yasmin Yavar, J.D., is Special Consultant to ProBAR Children’s Project, a project of the American Bar Association’s Commission on Immigration based in Harlingen, Texas. ProBAR Children’s Project serves unaccompanied minors detained in immigration detention facilities in the Rio Grande Valley in south Texas. Correspondence: meghan.johnson@americanbar.org. This piece was written with the assistance of ProBAR staff; the authors offer special thanks to Meredith Linsky, Nithya Nathan, Justin Tullius, and Delia Avila for their revisions and feedback on drafts of this Article.

¹ For a brief background on the purpose and evolution of SIJS relief, see generally Section II of the Department of Homeland Security’s proposed regulations implementing 2008 amendments to the SIJS statute, Special Immigrant Juvenile Petitions, 76 Fed. Reg. 54,978 (proposed Sept. 6, 2011) (to be codified at 8 C.F.R. pts. 204, 205, 245).

Uneven Access to Special Immigration Juvenile Status

not in their best interest to return to their respective home countries.² The language was amended in 1997 to clarify that SIJS relief was only intended to benefit those children who could demonstrate that they had suffered abuse, neglect, and abandonment.³ In late 2008, eligibility for SIJS expanded in various ways, including the replacement of the requirement of eligibility for long-term foster care with a requirement that a juvenile's reunification with one or both parents is not viable due to abuse, abandonment, neglect, or a similar basis under state law.⁴ With the 2008 revisions, the number of individuals submitting petitions to the immigration authorities for SIJS relief nearly doubled.⁵

Applying for SIJS involves a complicated and time-consuming three-step process and requires legal resources that many children in need are unable to access. The first step in the application process is to request that a state court,⁶ acting in its family or juvenile capacity, enter certain findings regarding the child's family situation.⁷ Use of local courts in this manner allows federal immigration authorities to rely on the special expertise of juvenile and family courts in making determinations about proper parental

² Immigration Act of 1990, Pub. L. No. 101-649, § 153(a), 104 Stat. 4978 (1990).

³ Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 113, 111 Stat. 2440 (1997).

⁴ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(d)(1), 122 Stat. 5044 (codified at 8 U.S.C. § 1232).

⁵ In fiscal year 2009, U.S. Citizenship and Immigration Services ("USCIS") received 1,484 SIJS petitions; in 2008, USCIS received 1,361 petitions; in 2007, USCIS received 739 petitions. Special Immigrant Juvenile Petitions, 76 Fed. Reg. at 54,984.

⁶ Steps 2 and 3 involve applications filed with the immigration authorities, including USCIS and are detailed below.

⁷ The required findings are that (1) the immigrant has been declared dependent on a juvenile court located in the U.S. or, by such a court, have been legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court; (2) the immigrant's reunification with one or both parent's not be viable due to abuse, neglect, abandonment, or a similar basis under State law; and (3) it would not be in the immigrant's best interest to be returned to his or his parents' previous country of nationality or country of last habitual residence. See 8 U.S.C.A. § 1101(a)(27)(J) (West 2012).

Uneven Access to Special Immigration Juvenile Status

care and a child's best interest. The reliance on local courts, however, also allows for the introduction of differing interpretations and applications of federal law among and between the states.⁸

This Article examines one state court's interpretation of the law, demonstrating how it limits access to federal immigration relief in a way that is out of line both with other states and with the apparent intent of Congress in providing for SIJS relief. Part II of this Article offers a sample case of a child who appears to be an intended candidate for SIJS. Part III provides a background on SIJS, briefly exploring its origin and practical effects and outlining the process of applying for this form of relief. Part III also explains a state court's involvement in making the factual findings necessary for applying for SIJS and discusses the potential for disparate interpretations of federal immigration laws across the nation. Part IV analyzes a recent Nebraska Supreme Court opinion that interprets the SIJS statute to foreclose SIJS relief for certain children and also reviews the impact of this precedent on the availability of SIJS relief in Part II's sample case and more generally. This Article ultimately concludes that the Nebraska precedent institutes an unnecessary and improper limitation on this important form of relief.

II. Sample Case

The stories of undocumented children who enter the United States alone are many and varied. Such children may journey here because they long to be with a parent whom they barely know, to escape gang violence in their home countries, to pursue the opportunities they believe are available in the United States, and so forth.⁹ Some of the children satisfy the qualifications for SIJS, and

⁸ The differing interpretations and applications of the law arise when a state court in State A, for example, issues an opinion binding in that state that applies federal law in one way. Courts in another state, State B, unbound by the precedent in State A, may adopt a completely different interpretation of the same federal law.

⁹ For in-depth reporting on the dangerous journey north that increasing numbers of children hazard alone to join their parents in the United States, see generally SONIA NAZARIO, *ENRIQUE'S JOURNEY* (2006). *See also* JESSICA JONES & JENNIFER PODKUL, *WOMEN'S REFUGEE COMM'N, FORCED FROM HOME: THE LOST BOYS AND*

Uneven Access to Special Immigration Juvenile Status

others do not. Norman's story is one of a child who appears to be eligible for SIJS, based on having suffered abuse and neglect from his custodial parent, and for lacking a suitable home back in his home country.

Norman is a fifteen-year-old boy from Honduras.¹⁰ Recently, he decided to leave his home in Honduras to live with his father who has resided without documentation in the United States since Norman was eight-months-old. Norman began his journey alone, riding buses from his hometown through Honduras and Guatemala. Norman's father paid \$3,000 to a network of "guides" who specialize in providing safe passage through Mexico en route to the United States. Once in Mexico, Norman was moved from one migrant "safe house" to another, sometimes waiting for days without food before he arrived safely at the Mexico-U.S. border.¹¹ In Reynosa, Mexico, he waited another ten days to cross the Rio Grande River into Hidalgo, Texas. While in Reynosa, Norman stayed in a safe house with fifteen other individuals, where three armed men fed them and coordinated their crossings. After five days in the safe house, the armed guides told Norman that they would be unable to cross him unless his family paid an additional \$1,500. Norman's father had no choice but to pay the additional amount when Norman called him from the safe house in Reynosa. A few days later, near midnight, one of the guides took Norman and three others to the river, where all five of them climbed aboard a small inflatable raft and quietly crossed the dark water. Minutes after they crossed, they were caught in the flashlight beams of two U.S. Border Patrol agents.

The agents detained each person in Norman's crossing group. They were taken to a small processing center, where the agents collected identification information and issued each of them charging

GIRLS OF CENTRAL AMERICA (Diana Quick & Fred Hamerman eds., 2012) (describing recent surges in unaccompanied minors fleeing their homes in Central America and entering the United States unaccompanied by a parent or guardian).

¹⁰ Though the facts of Norman's case track those of a real one, names and other identifying information have been changed to protect attorney-client confidentiality.

¹¹ A "safe house" is a shelter for migrants like Norman, where the migrants rest during their journey and wait for the next leg of their trip.

Uneven Access to Special Immigration Juvenile Status

documents that the government would present to an immigration court in order to initiate removal proceedings in the United States.¹² Because Norman was under eighteen years of age and traveling without a parent or legal guardian, he was transferred to the custody of the U.S. Office of Refugee Resettlement (“ORR”), which began the process of finding a trusted adult in the United States to whom Norman could be released.¹³ Meanwhile, Norman lived in an ORR detention facility for minors in Harlingen, Texas. ORR assigned him a caseworker, who began communicating with Norman’s father to collect documents that would allow Norman to live with his father while he went through removal proceedings.¹⁴

While in ORR detention, Norman was visited by a paralegal from a local legal services organization that offers children a short legal orientation and screens each newly detained child for potential legal relief. Norman is a particularly intelligent and capable boy. During the legal orientation presentation he learned that sometimes children who have suffered abuse, neglect, or abandonment by a parent are eligible to apply for relief from removal. He realized that he might fit that definition, so during his legal screening he told his story.

¹² Removal proceedings are the process by which immigration enforcement authorities request that an immigration judge order individuals charged as unlawfully present in the United States to be removed from the United States. *See* 8 U.S.C.A. § 1229(a) (West 2012).

¹³ For background on how the U.S. government processes and provides for unaccompanied minors charged as unlawfully present in the United States, see generally OLGA BYRNE & ELISE MILLER, VERA INST. OF JUST., CTR. ON IMMIGR. & JUST., *THE FLOW OF UNACCOMPANIED CHILDREN THROUGH THE IMMIGRATION SYSTEM: A RESOURCE FOR PRACTITIONERS, POLICYMAKERS, AND RESEARCHERS* (2012), <http://www.vera.org/sites/default/files/resources/downloads/the-flow-of-unaccompanied-children-through-the-immigration-system.pdf>.

¹⁴ ORR caseworkers work to reunite children quickly (so as to avoid lengthy periods of detention for children) and safely if reunification in the United States is possible. Children are released from custody to an eligible sponsor (often a parent, relative, or family friend) after completion of a reunification packet and background check. The sponsor is not required to have lawful immigration status in the United States. The forms required and more information about the reunification process can be found at the ORR website, at <http://www.acf.hhs.gov/programs/orr/resource/unaccompanied-childrens-services>.

Uneven Access to Special Immigration Juvenile Status

When Norman was eight-months-old, his parents took him to the United States. His parents were unable to find work in Honduras, so they decided to journey north, hoping to be able to provide for their son and for other members of their family struggling to survive in Honduras. After two years, Norman's parents separated because Norman's mother wanted to return to Honduras while his father wished to remain in the United States. Norman's father pleaded with his wife, asking that she leave their son with him in the United States, but Norman's mother refused. One day, while her husband was at work, she left with Norman.

Back in Honduras, Norman's mother found them a place to live near her parents' house. Her parents gave them money to pay rent and buy groceries, and Norman's father also sent them money from the United States. Norman's mother did not work and instead went out to parties with her friends. She occasionally had friends over to drink and use drugs. From an early age, Norman recalls seeing his mother's friends using marijuana and cocaine in his home. Eventually, Norman's mother started a relationship with one of these friends, a man who later became Norman's stepfather. When Norman was six, Norman's stepfather moved in with Norman and his mom, who was by then pregnant with Norman's sister. Norman described his stepfather as an angry man. Norman does not remember ever seeing his stepfather work; rather, he spent his days at home, drinking and using drugs.

Norman's stepfather lived in Norman's home until Norman was thirteen. He beat Norman most days using sticks, ropes, and even belts. One time, he beat Norman so severely that Norman had to wear a cast on his leg for six months. Norman's stepfather also beat Norman's mother. Norman describes how he frequently tried to protect his mother from his stepfather's beatings. First, Norman would take his baby sister over to his grandparents' house. Then he would ride his bicycle to the police station and ask someone to go with him back to his house. The police would arrive to interrupt Norman's stepfather beating Norman's mother, and they would take his stepfather to the local jailhouse for a couple of days. When Norman's stepfather was released, he returned to Norman's home.

Uneven Access to Special Immigration Juvenile Status

Whenever Norman's stepfather was gone for days at a time, Norman's mother became aggressive with Norman and his sister. She hit them and insulted them, telling them that she wished they were never born and that they were a burden and needed to buy their own food. Norman always worried about his sister who had asthma. When his sister had asthma attacks, Norman took her to the nearby hospital. On more than one occasion, Norman's grandparents offered to let him and his sister live with them; though they were elderly and not fully capable of raising two young children, they did not like how their daughter treated her children. But Norman's mother would not let the children leave her home. Norman did not understand why his mother insisted on keeping Norman and his sister in her home. To Norman, it seemed that his mother did not love him and wished him dead. More times than Norman can recall, his mother locked him out of the house at night, forcing him to sleep in the alley next to their house.

About two years ago, Norman's stepfather finally left Norman's mother and did not return. After his departure, Norman's mother became increasingly angry and depressed. Norman thought that she took her anger out on him and his sister. She would hit them and call them names on almost a daily basis. As her insults and abuse worsened, Norman finally told his father about what had been going on in their home. Though Norman's father had called him once a month for as long as Norman can remember, often Norman's mother did not let Norman speak with him. When Norman's father finally heard of the abuse Norman had long suffered, he offered to help Norman travel to the United States to live with him.

Norman describes his father as a hardworking and extremely religious man, who he remembers sent him school supplies and toy trucks on his birthdays. Norman does not really know his father, but he desperately wants to go live with him. Norman thinks his father loves him while his mother does not. Norman decided to go to the United States, despite his deep concern about his sister's well-being while he is away. Norman cried as he explained that he called his house in Honduras from the detention center and learned that his sister, now eight-years-old, was home alone while his mother was out with her friends.

Uneven Access to Special Immigration Juvenile Status

From what Norman disclosed in the legal screening, the paralegal understood that Norman appears to have suffered from abuse and neglect at the hands of his mother. The paralegal also noted that Norman does not appear to have a safe place to live in Honduras and that it therefore may not be in his best interest to return. While it is difficult to tell from what little information Norman knows about his father, it seems Norman would have a safe and loving place to live in the United States.¹⁵ The question now is whether U.S. immigration law, and specifically SIJS, provides a way for Norman to remain in the United States, rather than return home to his abusive mother. The answer surprisingly, depends on where in the United States Norman will fight his case. And this differing availability of federal immigration relief stems not from applicable state law but from divergent interpretations of the governing federal statute.

III. SIJS Relief and Application Process

For a child in Norman's situation, SIJS might provide an independent means of safety and self-reliance when the child is at the mercy of parents' decisions about where to reside. SIJS is a form of relief available to certain non-citizen children present in the United States who have suffered abuse, neglect, or abandonment by a

¹⁵ The statute does not require that the individual have a safe and loving place to live in the United States, only that it not be in his or her best interest to return to the home country. Indeed, given the changes to the law in 2008, a child granted special immigrant juvenile status while in ORR custody and before he or she reaches eighteen is eligible for housing and other assistance via the government's Unaccompanied Refugee Minors ("URM") program. *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(d)(4), 122 Stat. 5044. For more information, see Letter from Eskinder Negash, Dir., Office of Refugee Resettlement to State Refugee Coordinators, Refugee Health Coordinators, Nat'l Volunteer Agencies & Other Interested Parties, Eligibility for the Unaccompanied Refugee Minor Program for Children Granted Special Immigrant Juvenile Status by the Department of Homeland Security (Sept. 27, 2010), *available at* <http://www.acf.hhs.gov/programs/orr/resource/state-letter-10-11>.

Uneven Access to Special Immigration Juvenile Status

parent.¹⁶ This important source of humanitarian relief takes into account the special vulnerabilities of this population and infuses immigration law with child protection and welfare principles.¹⁷ Being adjudicated a “special immigrant juvenile” (“SIJ”) allows the child to apply to become a lawful permanent resident (“LPR”) and reside in the United States indefinitely.¹⁸ As an LPR, a child has access to important resources unavailable to undocumented persons present in the United States, including financial aid for higher education, free or low-cost health insurance, work permits, and driver’s licenses.¹⁹ More generally, humanitarian sources of lawful immigration status in the United States help to integrate those who would escape dangerous and unsustainable circumstances and otherwise remain in the shadows of society. Integration of desperate populations fleeing dangerous conditions thereby serves the practical purpose of fortifying safety and rule of law in the United States.²⁰

SIJS targets individuals who are arguably the *most vulnerable* among those seeking relief from dangerous conditions. As previously stated, those eligible for SIJS are non-citizens present in the United States, under the age of twenty-one, whose return to one or more parent is not viable due to abuse, abandonment, neglect, or some similar basis under state law. Furthermore, those eligible must demonstrate that it is not in his or her best interest to return to the country of birth or last habitual residence.²¹ The fact that these

¹⁶ See 8 U.S.C.A. § 1101(a)(27)(J) (West 2012).

¹⁷ See ANGIE JUNCK ET AL., SPECIAL IMMIGRANT JUVENILE STATUS AND OTHER IMMIGRATION OPTIONS FOR CHILDREN AND YOUTH § 3.2 (3d ed. 2010) [hereinafter JUNCK ET AL., IMMIGRATION OPTIONS]; see also Angie Junck, *Special Immigrant Juvenile Status: Relief for Neglected, Abused, and Abandoned Undocumented Children*, 6 JUV. & FAM. CT. J. 48 (2012) [hereinafter Junck, *Special Immigrant Juvenile Status*],

http://www.throughtheeyes.org/files/2012_ncs_materials/B3_handout18.pdf (elaborating on special vulnerabilities of individuals eligible for SIJS relief).

¹⁸ See JUNCK ET AL., IMMIGRATION OPTIONS, *supra* note 17, at 1-4 to 1-6.

¹⁹ See *id.*

²⁰ See, e.g., MARC R. ROSENBLUM, MIGRATION POL’Y INST., IMMIGRANT LEGALIZATION IN THE UNITED STATES AND EUROPEAN UNION: POLICY GOALS AND PROGRAM DESIGN 2 (2010) (discussing societal benefits of bringing persons with unauthorized presence in the United States into lawful immigration status).

²¹ See 8 U.S.C.A. § 1101(a)(27)(J) (West 2012).

Uneven Access to Special Immigration Juvenile Status

individuals are undocumented, young, and lacking the support of one or more parents bears heavily on their ability to help themselves, in both a personal and a legal context. Children are less able than adults to access financial resources or free legal services that could help relieve them of dangerous circumstances, and they also often lack the necessary cognitive skills to make decisions in their own best interest.²² Their incapacity is compounded when a parent mistreats them, as bonds of trust are broken and feelings of love or shame can overwhelm a child's natural sense of self-protection.²³ In addition, unauthorized presence in the United States raises significant obstacles to self-sufficiency even for adults. Undocumented persons are often marginalized economically, politically, and socially and further subjected to a higher rate of poverty and crime.²⁴

A. Explaining the Steps of the SIJS Process

As previously mentioned, to obtain protection via SIJS, applicants must embark on what is essentially a three-step process that involves state and federal authorities. The first step is to obtain the predicate findings, those required by the federal definition of "special immigrant juvenile," from a state court. Next, with those findings in hand in the form of a certified court order, the applicant can file an application for SIJS with United States Citizenship and Immigration Services ("USCIS"). Finally, once SIJS status is approved, the applicant can seek lawful permanent residence in the U.S., either before USCIS or an immigration judge. The details of these processes are provided below.

Step 1: Obtain Predicate Findings from State Court

A child must ask a state court, acting as a juvenile court, for certain predicate findings in order to begin the SIJS process. The federal regulations define "juvenile court" as one having jurisdiction under state law to make judicial determinations about the custody and care of juveniles.²⁵ The findings may be obtained in the context of a variety of proceedings that might include custody, child welfare, guardianship, adoption, delinquency, or declaratory actions. The

²² See, e.g., JUNCK ET AL., IMMIGRATION OPTIONS, *supra* note 17, at 2-3 to 2-4

²³ *Id.* at 2-11.

²⁴ *Id.* at 1-4.

²⁵ See 8 C.F.R. § 204.11(a) (2013).

Uneven Access to Special Immigration Juvenile Status

petitioner bringing the proceedings may be the child or an adult caregiver or agency seeking responsibility over the child. The court presiding over the proceedings must find: (1) that the child is dependent on a juvenile court or has been legally committed to, or placed, under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court;²⁶ (2) that reunification with one or both parents is not viable due to abuse, neglect, abandonment, or a similar basis under State law; and (3) that it would not be in the child's best interest to be returned to the child's or parent's previous country of nationality or country of last habitual residence.²⁷

Step 2: File Application for Visa with Immigration Agency

Next, the child must complete a Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360), and submit it to USCIS, which is required by law to adjudicate the petition within 180 days.²⁸ The child must include with his or her application a certified copy of the court order obtained in Step 1 mentioned above. If the I-360 is approved, the child has attained SIJ status and is immediately

²⁶ SIJS does not necessarily affect custody. The court must find the child "dependent" on the court, which might simply mean the court asserts jurisdiction over the child. *See, e.g., JUNCK ET AL., IMMIGRATION OPTIONS, supra* note 17, § 4.3.

²⁷ *See* 8 U.S.C.A. § 1101(a)(27)(J) (West 2012).

²⁸ For a description of this SIJS application process, see generally Interoffice Memorandum from William R. Yates, Assoc. Dir. for Operations, U.S. Citizenship & Immigration Servs., to Reg'l Dirs. & Dist. Dirs., Memorandum 3—Field Guidance on Special Immigrant Juvenile Status Petitions (May 27, 2004) [hereinafter Memorandum, Field Guidance on Special Immigrant Juvenile Status Petitions], *available at* http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives/%201998-2008/2004/sij_memo_052704.pdf; *see also SIJ: After You File*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=2b798b6ee9af0310VgnVCM10000082ca60aRCRD&vgnnextchan nel=2b798b6ee9af0310VgnVCM10000082ca60aRCRD> (last updated July 12, 2011) (describing the time period in which the courts will act after receiving an application).

Uneven Access to Special Immigration Juvenile Status

eligible to adjust status to an LPR.²⁹ To do so, the child must complete an Application to Adjust Status (Form I-485).³⁰

Step 3: Apply for Lawful Permanent Residency with Immigration Authorities

Adjudication of the Form I-485 involves a background check, medical exam, lengthy questionnaire, and in most cases, an interview with an immigration official exploring the child's past behavior and activities.³¹ This process is designed to screen for any grounds for inadmissibility that would foreclose one's ability to become an LPR, such as a history of certain criminal activities or membership in a terrorist organization.³² The process for becoming an LPR for a child already eligible for SIJS can take many months or even years, and additionally requires the help of immigration attorneys who are both knowledgeable about working with traumatized children and willing to handle these work-intensive cases at little or no cost.³³

B. Delegation to and Deference for State Courts

As previously stated, this Article focuses on the first step of the SIJS application process which is the request to a state court for a predicate order making the required SIJS findings. The SIJS statute requires the use of family or juvenile courts to enter findings as to whether the child meets the criteria for SIJS. The statute contemplates use of local entities for those findings because of their special expertise in making determinations as to family situations, evaluating best-interest factors, and understanding other child welfare issues.³⁴ Choosing to use the courts for this purpose is an indication of Congress's interest in protecting these children and providing for their safety and welfare. Using state entities to help administer

²⁹ Memorandum, Field Guidance on Special Immigrant Juvenile Status Petitions, *supra* note 28.

³⁰ *Id.*

³¹ *Id.*; *SIJ: After You File*, *supra* note 28.

³² Memorandum, Field Guidance on Special Immigrant Juvenile Status Petitions, *supra* note 28; *SIJ: After You File*, *supra* note 28.

³³ See, e.g., Junck, *Special Immigrant Juvenile Status*, *supra* note 17, at 52.

³⁴ See *Special Immigrant Juvenile Status (SIJS)*, IMMIGR. CTR. FOR WOMEN & CHILD., <http://icwclaw.org/services-available/special-immigrant-juvenile-status-sijs/> (last visited Feb. 23, 2013) (describing the role of state juvenile courts in making best interest determinations for children as part of their eligibility for SIJS).

Uneven Access to Special Immigration Juvenile Status

federal law, however, always involves a risk of variance between localities in the enforcement of the federal law. For example, judges in State A could interpret and apply the requirements for SIJS differently from judges in State B, so that the same child might be eligible for the protection in State A but unable to obtain it in State B. Congress must take this potential for non-uniformity and arbitrariness in the application of the law into account when allowing local officials to participate in federal law administration and enforcement.

Such interstate variance presents special problems in the context of immigration law. Immigration policymaking is delegated to the federal government, as it involves the treatment of foreign nationals who should be treated uniformly nationwide. In areas of immigration law that use local officials to enter predicate orders and make findings necessary for a foreign national to obtain immigration relief, the local officials are often wary of the implications of their actions and nervous about what they perceive as making decisions about whether a person will obtain an immigration benefit.³⁵ Some may not want to participate in what they perceive as a process that condones or further encourages illegal immigration. This apprehension can be addressed by reference to the congressional intent, which purposefully relies on the special expertise of local officials that is not available to federal immigration authorities.³⁶ In

³⁵ For example, in the area of U Visas, which are available to victims of crimes in the United States who are subsequently helpful in the investigation or prosecution of that crime, the local law enforcement agency must certify the fact that the victims have been or are likely to be helpful. *See, e.g.*, U.S. DEP'T OF HOMELAND SEC., U VISA LAW ENFORCEMENT CERTIFICATION RESOURCE GUIDE FOR FEDERAL, STATE, LOCAL, TRIBAL AND TERRITORIAL LAW ENFORCEMENT 2, 16, http://www.dhs.gov/xlibrary/assets/dhs_u_visa_certification_guide.pdf; Cindy V. Culp, *Waco Judge Grants U-Visa to Girl After DA Denied Paperwork*, WACO TRIB., Dec. 14, 2012 (on file with the author) (describing a recent report from Waco, Texas, that explains the reasons that local officials are wary of providing this certification).

³⁶ A 1997 House of Representatives Conference Report indicates that “[t]he conferees intend that the involvement of the Attorney General is for the purposes of determining special immigrant juvenile status and not for making determinations of dependency status.” H.R. REP. NO. 105-405, at 130 (1997) (Conf. Rep.). In line with this expressed intent, a March 24, 2009 USCIS policy memorandum instructs immigration officers adjudicating SIJS petitions “to avoid questioning a child about

Uneven Access to Special Immigration Juvenile Status

addition, variances can be minimized by careful attention to the limited role of the local officials, who are often asked, and permitted, only to enter discrete factual findings that will be reviewed by federal officials in the context of a greater inquiry as to the eligibility of an applicant for the immigration relief sought. In the case of SIJS, once the factual findings are obtained from the state court, the applicant still must apply for SIJ status with the immigration authorities and, contemporaneously or subsequently, apply for lawful permanent residence in order to legalize his or her status. The role of local officials is limited to the first step and does not itself bestow upon the applicant any immigration status or benefit.

C. Variance Among the State Courts

In the SIJS context, recent developments in state court handling of predicate orders have created a situation in which access to SIJS relief meaningfully differs across and even within states. First is the issue of post-eighteen-year-old SIJs: the SIJ statute holds an individual eligible for SIJS until the age of twenty-one, but courts that are asked to enter findings in SIJS cases generally do not take cases for children over the age of eighteen.³⁷ Courts across state lines differ as to whether they are willing to continue jurisdiction. The Department of Homeland Security, including its Ombudsman office, is taking up this issue in favor of allowing continuing jurisdiction for

the details of the abuse, abandonment or neglect suffered, as those matters were handled by juvenile court, applying state law.” Interoffice Memorandum from Donald Neufeld, Acting Assoc. Dir. Domestic Operations & Pearl Chang, Acting Chief, Office of Policy & Strategy, U.S. Citizenship & Immigration Servs., to Field Leadership, Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions 3 (Mar. 24, 2009) [hereinafter Memorandum, Trafficking Victims Protection Reauthorization Act of 2008], available at http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/TV_PRA_SIJ.pdf. A separate but relevant point is that, as Angela Lloyd put it, “the dual role of guardian and border enforcer are incongruous and cannot mimic the environment of a state juvenile court in which parties are expressly driven by the custodial and best interests of children.” Angela Lloyd, *Regulating Consent: Protecting Undocumented Immigrant Children from their (Evil) Step-Uncle Sam, or How to Ameliorate the Impact of the 1997 Amendments to the SIJ Law*, 15 B.U. PUB. INT. L.J. 237, 258 (2006).

³⁷ For an overview of this issue, see generally JUNCK ET AL., IMMIGRATION OPTIONS, *supra* note 17, § 3.2, at 3-8 to 3-10.

Uneven Access to Special Immigration Juvenile Status

children until age twenty-one.³⁸ The second area of disparity is with “one-parent SIJ,” which, as explained below, means one parent has been the source of abuse, neglect, or abandonment and is not a suitable parent to whom the child can return. To determine whether the child qualifies for “one-parent SIJ,” the state court must interpret the federal statutory language, which requires that a court find reunification with “one or both parents” is not viable due to abuse, neglect, or abandonment.

Norman’s case, described above, involves this latter issue of one-parent SIJS. In one-parent SIJS cases, one parent has been the source of abuse, neglect, or abandonment and is not a suitable parent to whom the child can return. For Norman however, there is another parent with whom reunification seems viable. While Norman appears eligible for SIJS predicate findings under the plain language of the statute, a recent opinion of the Nebraska Supreme Court would likely lead to the conclusion that Norman is excluded from SIJS relief. The next Part explores the basis of this recent opinion and its impact, both on Norman’s case and more generally.

IV. Recent Nebraska Supreme Court Precedent

A recent decision from the Nebraska Supreme Court has caused great concern among non-profit legal service providers and immigration advocates who serve children like Norman. The decision is alarming because it introduces a novel interpretation of the SIJ definition that, if followed in other states, would foreclose SIJS relief for many children previously thought to be eligible. The Nebraska case is significant because Nebraska’s is the only highest court in the country that has weighed in on this issue. Because of that, despite it not being binding outside Nebraska, the decision might be used as persuasive precedent by courts around the country. A summary of the case facts, procedural history, and the appellate court’s reasoning are provided below.

A. In re Erick M.

³⁸ See *CIS Ombudsman*, U.S. DEP’T HOMELAND SECURITY, www.dhs.gov/cisombudsman (last visited Feb. 1, 2013).

Uneven Access to Special Immigration Juvenile Status

In *In re Erick M.*, a juvenile Erick, was committed to the care and custody of a Nebraska state agency, the Office of Juvenile Services (“OJS”), after he was twice charged with being a minor in possession of alcohol.³⁹ While in state custody, “Erick had continually disappeared from the residential center, used alcohol and drugs, committed law violations, and threatened the staff.”⁴⁰ Investigation into his family situation revealed that his father had long abandoned Erick but that his mother was active in his life and waiting for Erick to return to her following his time in OJS custody. During a hearing, his attorney stated “Erick’s goal was to ‘get back home’ and work on a rehabilitation program from there.”⁴¹ After nearly a year in state custody, Erick brought a motion for SIJS findings.⁴² Erick sought SIJS based on the fact that he was under state custody, his father had long abandoned him, and it was not in his best interest to return to Mexico, his country of birth.⁴³

The juvenile court held a hearing on the motion for SIJS findings and heard evidence as to whether reunification with one or both parents was not viable due to abuse, neglect, or abandonment. A family permanency specialist testified that she had no contact information for Erick’s father and that she did not know whether paternity had ever been established.⁴⁴ She also testified that Erick did not know his father’s whereabouts.⁴⁵ The family permanency specialist further testified that she knew of no reports or investigations of abuse or neglect by Erick’s mother and that she intended to continue to work with the mother once Erick was released back into his mother’s care.⁴⁶ The juvenile court, having heard this evidence, denied Erick’s motion on the basis that “the facts

³⁹ *In re Erick M.*, 820 N.W.2d 639, 642 (Neb. 2012).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² It is unclear who brought the motion for SIJS findings on Erick’s behalf. The authors speculate that Erick’s counsel in his delinquency proceedings may have brought the motion, though an immigration attorney not otherwise involved in his delinquency proceedings could instead have brought the motion.

⁴³ *In re Erick M.*, 820 N.W.2d at 642.

⁴⁴ *Id.*

⁴⁵ *Id.* at 643.

⁴⁶ *Id.* at 642-43.

Uneven Access to Special Immigration Juvenile Status

failed to show that reunification with Erick's mother was not viable because of abuse, neglect, or abandonment."⁴⁷ Specifically, the court found that:

(1) it had removed Erick from his home because of his alcohol abuse and he had never been removed from his mother's home because of abuse, neglect, or abandonment; (2) Erick's mother had been present at almost every hearing; (3) Erick had lived with her before the court committed him to OJS; and (4) no evidence showed that he would not be returned to his mother when he was paroled or discharged⁴⁸

The court made no finding as to whether Erick's father had abandoned Erick, essentially ending the inquiry once it found that there was one parent with whom reunification was feasible.⁴⁹

Erick appealed, arguing that the court erred in finding that he did not satisfy the reunification prong.⁵⁰ He argued that the plain language of the statute required that he show no more than that reunification with his father was not viable due to abandonment.⁵¹ He pointed out that the use of the disjunctive "or" in the term "1 or both" in the statute meant that so long as he had satisfied the first, i.e., shown that reunification with one parent was not viable due to abuse, neglect, or abandonment, he need not show more to satisfy the reunification prong.⁵² The state, in turn, argued that the plain language precluded Erick's interpretation, asserting that his interpretation rendered the words "or both" superfluous.⁵³ The state further argued that "Congress did not intend for courts to ignore the presence of a parent with whom reunification is feasible" and that

⁴⁷ *Id.* at 643. The court also found that there was "no evidence that Erick's father had ever abused or neglected Erick," though it made no findings as to whether the father had abandoned Erick. *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

Uneven Access to Special Immigration Juvenile Status

“under Erick’s interpretation, a juvenile court would be required to find that the reunification component was satisfied every time the State could not identify or find a juvenile’s parent, even when reunification with the other parent was appropriate.”⁵⁴

The case turned on this contested meaning of “one or both.” To resolve the dispute, the Nebraska Supreme Court looked first to the statute’s plain language, which it found ambiguous given the language’s susceptibility to more than one reasonable interpretation.⁵⁵ Though it conceded that Erick’s was a reasonable reading of the language, the court introduced an alternative reasonable reading and explanation for the use of the disjunctive “or”:

Because “or” describes what a juvenile court must determine in the alternative, we could also reasonably interpret the phrase “1 or both” parents to mean that a juvenile court must find, depending on the circumstances, that *either* reunification with one parent is not feasible *or* reunification with both parents is not feasible.⁵⁶

Under the court’s formulation, the disjunctive functions to set up the two types of cases that might be at issue—that the child has either one parent for whom reunification is at issue or that the child has two parents for whom reunification is at issue, depending on whether the child lived with one or both around the time of the determination.⁵⁷

⁵⁴ *Id.*

⁵⁵ *Id.* at 644-46.

⁵⁶ *Id.* at 644.

⁵⁷ *See id.* at 647 (“[I]f a juvenile lives with only one parent when a juvenile court enters a guardianship or dependency order, the reunification component under §1101(a)(27)(J) is not satisfied if a petitioner fails to show that it is not feasible to return the juvenile to the parent who had custody. . . . In contrast, if the juvenile was living with both parents before a guardianship or dependency order was issued, reunification with both parents is usually at issue.”). Confusingly, however, the court simultaneously determines that the issues of reunification with both parents will always be at issue. *See id.* That is, the court must decide whether reunification with either parent is viable. While this complicates the suggestion that the disjunctive can be explained in the way the court suggests, the court merely uses its

Uneven Access to Special Immigration Juvenile Status

This formulation deals, albeit indirectly, with the state's concern of the superfluity of the term "or both."

Having found the language susceptible to more than one reasonable interpretation, the court deemed it ambiguous and turned to sources outside the statute to interpret it.⁵⁸ Focusing first on legislative history, the court noted the progression of SIJS language over time.⁵⁹ The court pointed out that originally SIJS findings consisted only of "a judicial or administrative order determining . . . that the juvenile alien was dependent on a juvenile court and that it would not be in the juvenile's best interest to be returned to the juvenile's or parent's home country."⁶⁰ The court then noted that in a 1997 amendment, Congress restricted SIJS eligibility, requiring a court determination that the juvenile is "eligible for long-term foster care due to abuse, neglect, or abandonment."⁶¹ The court found legislative history indicating, "Congress intended that the [1997] amendment would prevent youths from using this remedy for the purpose of obtaining legal permanent resident status, rather than for the purpose of obtaining relief from abuse or neglect."⁶² In

reformulation to explain that it finds the language ambiguous and open to outside sources of interpretation. *See id.* at 644.

⁵⁸ *Id.* at 644. The court correctly points out that it is confined to the statute's language unless it has found that language ambiguous: "We will not look beyond the statute to determine the legislative intent when the words are plain, direct, or unambiguous." *Id.* After explaining the two separate functions of the disjunctive "or," the court explains that no other language in the statute helps to clarify the meaning: "Unfortunately, there are no related provisions in the act from which we can discern Congress' intent." *Id.* In an apparent misstep, however, the court next turns to agency guidance *during* this ambiguity determination, stating, "*Absent any statutory or regulatory guidance*, we conclude that the statute is ambiguous because the parties have both presented reasonable, but conflicting, interpretations of its language." *Id.* (emphasis added) (citing *Project Extra Mile v. Neb. Liquor Control Comm'n*, 810 N.W.2d 149, 163 (Neb. 2012) ("[D]eference to an agency's interpretation of its governing statutes is improper when the statutes are unambiguous . . .")). This erroneous searching for agency guidance during the ambiguity determination is ultimately inconsequential, however, since the court finds that there are no agency guidelines shedding light on the issue at hand. *Id.*

⁵⁹ *Id.* at 644-46.

⁶⁰ *Id.* at 645.

⁶¹ *Id.*

⁶² *Id.*

Uneven Access to Special Immigration Juvenile Status

regulations following the 1997 amendment, “immigration authorities interpreted the ‘eligible for long-term foster care’ requirement to mean that ‘a determination has been made by the juvenile court that family reunification is no longer a viable option.’”⁶³

The court then considered the 2008 amendment to the statutory definition of a special immigrant juvenile, which introduced the “1 or both” language at issue in Erick’s case. The court noted that the “2008 changes expanded the pool of juvenile aliens who could apply for SIJ status” and recognized that Congress removed the requirement that a state juvenile court find that a juvenile is eligible for long-term foster care.⁶⁴ Although the court did not say so, this revelation seems to have triggered the following question for the court: when Congress eliminated the requirement that a court find “family reunification is no longer a viable option due to abuse, neglect, or abandonment” and replaced it with the requirement that a court find that “reunification with 1 or both parents is not viable due to abuse, neglect, or abandonment,” did Congress intend that a court no longer consider reunification with both parents? That is, would the inquiry end once a court found that, for example, a child could not be reunified with a father because that father had abandoned the child? If so, Erick’s argument would prevail. And therefore, courts could ignore the question of whether there was nevertheless a parent with whom reunification was viable.

In exploring this question of Congress’s intent, the court looked to whether agency officials and judges considered reunification with both parents when one parent was found to have abandoned the child.⁶⁵ The court concluded that “even when reunification with an absent parent is not feasible because the juvenile has never known the parent or the parent has abandoned the child, USCIS and juvenile courts generally still consider whether reunification with the known parent is an option.”⁶⁶ In support, the court cited three opinions in which USCIS or a court made findings as to both parents, even though there was a determination that one

⁶³ *Id.* at 645-46.

⁶⁴ *Id.* at 645.

⁶⁵ *Id.* at 646-47.

⁶⁶ *Id.* at 646.

Uneven Access to Special Immigration Juvenile Status

parent had abandoned the child.⁶⁷ None of these cases however, include a discussion as to whether all the findings were required; they include the findings without more discussion.⁶⁸ The court nevertheless seemed satisfied that “USCIS does not consider proof of one absent parent to be the end of its inquiry A petitioner must normally show that reunification with the other parent is also not feasible.”⁶⁹ In Erick’s case, this meant that “[b]ecause Erick was living with . . . his mother when the juvenile court adjudicated him, he could not satisfy the reunification component without showing that reunification with his mother was not feasible.”⁷⁰

B. The Nebraska Supreme Court’s Novel Interpretation of SIJS Law

In interpreting “one or both” to mean that Erick had to demonstrate that reunification with *both* parents was not feasible, the court seems not only to have departed from the plain language of the statute, but also improperly to have imbued its decision with concerns as to opening the floodgates of immigration relief to children abandoned by one parent. On its face, the statute requires an inquiry as to whether reunification with one or both parents “*is not feasible* because of abuse, neglect, or abandonment.”⁷¹ The court’s application of the language instead asks whether reunification with either parent is viable; if “the juvenile has a safe parent to whose custody a court can return the juvenile,” the child will not qualify for SIJS.⁷² This seems to nullify the 2008 amendment written, as the court noted, in the spirit of expanding SIJS eligibility. That is, the court’s application reverts to the pre-2008 requirement that a child show that family reunification is no longer an option.⁷³

⁶⁷ *Id.* at 646 nn.31 & 35.

⁶⁸ See *In re Trudy-Ann W. v. Joan W.*, 901 N.Y.S.2d 296, 298 (App. Div. 2010); *In re [Male Juvenile From Mexico]*, 2011 WL 7790423, at *3 (U.S. Dep’t of Justice, Immigration & Naturalization Servs., Office of Admin. Appeals Mar. 15, 2011); *In re O.Y.*, 2009 WL 5196007, at *2 (N.Y. Fam. Ct. Sept. 22, 2009).

⁶⁹ *In re Erick M.*, 820 N.W.2d at 647.

⁷⁰ *Id.*

⁷¹ *Id.* at 643 (emphasis added) (citing 8 U.S.C. § 1101(a)(27)(J)(i) (2012)).

⁷² *Id.* at 647.

⁷³ “[W]e disagree that when a court determines that a juvenile should not be reunited with the parent with whom he or she has been living, it can disregard

Uneven Access to Special Immigration Juvenile Status

It seems that the court was preoccupied primarily with the expansion of the SIJS relief beyond those for whom it believes the relief was intended. The court repeatedly referred to the notion that “protecting the juvenile from parental abuse, neglect, or abandonment must be the petitioner’s primary purpose” in pursuing SIJS relief.⁷⁴ The court also seemed to believe that children abandoned by one parent but in the custody of the other parent do not fall under the SIJS statute, despite having conceded that this is a reasonable interpretation of the current SIJS language. While this sensitivity to the function and purpose of SIJS is not inappropriate for a court interpreting the SIJS language, it does appear at odds with the purpose of state court involvement in SIJS findings: to enter limited, discrete factual findings as to the child’s family situation based on the court’s expertise in child welfare and best interest considerations. Indeed, the court’s considerable effort in nailing down a definition of the “1 parent” language contradicts even the court’s own recognition that “Congress wanted to give state courts and federal authorities flexibility to consider a juvenile’s family circumstances in determining whether reunification with the juvenile’s parent or parents is feasible.”⁷⁵

whether reunification with an absent parent is not feasible because of abuse, neglect, or abandonment.” *Id.* at 648. While earlier the court suggested that the relevance of the fitness of one parent or the other would depend on the parent with whom the child was living at the time of the determination, this statement suggests that the court expects no such distinction to be drawn. Under any circumstance, the fitness of *both* parents is at issue. *See id.* (“[W]hen ruling on a petitioner’s motion for an eligibility order under [the SIJS statute], a court should generally consider whether reunification with either parent is feasible.”). This essentially nullifies the introduction of the one-parent language and the elimination of the long-term foster care eligibility requirement.

⁷⁴ *See id.* at 645-48.

⁷⁵ *Id.* at 642. This statement of congressional intent is in line with the fact that there is no legislative history on the one-parent language, and the fact that the administering agency’s proposed regulations also fail to clarify the meaning of the term. The absence of federal guidance may indicate an intent to allow state officials ample space to apply the law in line with general principles, in this case, of child welfare and protection.

Uneven Access to Special Immigration Juvenile Status

A New York family court considering *In re Erick M.* commented that the Nebraska court seemed to go too far, and held in favor of immigration gatekeeping rather than child welfare:⁷⁶

The function of the juvenile court in deciding an application for special findings which would permit a juvenile to file an application for adjustment of status as a special immigrant juvenile is limited in scope. . . . 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 Whether or not a juvenile's application constitutes a potential abuse or misuse of the SIJ provisions of the immigration law is an issue to be determined by the USCIS. That issue is beyond the scope of what a state juvenile court is required to decide upon. . . .⁷⁷

The New York court therefore refused to apply Nebraska's approach, though it felt compelled to address it. The New York court demonstrates how a family court could apply the plain language of the statute in favor of a child like Erick, whose reading was, after all, deemed reasonable by the Nebraska court. It also directly acknowledges and executes the state court's limited role in SIJS proceedings: to enter factual findings *permitted* under the statutory language in light of child welfare and best interest considerations. Thus limiting its reach, the New York court shows how family courts across the country can enter predicate findings without delving into immigration policy considerations and thereby encroaching on determinations reserved for federal immigration authorities.

⁷⁶ *In re Mario S.*, 954 N.Y.S.2d 843, 853 (Fam. Ct. 2012). While Nebraska state law is not binding outside its borders, the New York court seemed compelled to comment on the recent opinion. *Id.* at 852. ("This Court would be remiss in not setting forth why it declines to follow the recent opinion of the Supreme Court of Nebraska in *Erick M.* . . ."). This might be because, as previously stated, Nebraska's is the only high court to have weighed in on the issue, which arguably adds persuasive weight to the decision.

⁷⁷ *Id.*

Uneven Access to Special Immigration Juvenile Status

Unfortunately it so happens that Norman, introduced above in Part II, is not headed to New York but instead plans to live with his father in Omaha, Nebraska. Once reunified there with his father, *In Re Erick M.* will likely operate to preclude Norman's access to SIJS relief.⁷⁸ This situation highlights an obstacle for the legal services providers screening Norman: in order to assess his eligibility for relief, the advocates must know where Norman will fight his case and keep abreast of how SIJS language is being applied in that jurisdiction. This kind of logistical burden could be avoided if state courts limited their involvement in defining statutory language and instead applied the language in any permissible way that allows them to serve the best interest of the particular child at issue. As it stands however, Norman will likely be deemed ineligible for SIJS relief and left without means to lawfully remain with his one suitable caretaker—ineligible based solely on where in the United States he fights the case.

C. A Lack of Guidance for the State Courts

The Nebraska Supreme Court struggled with what it deemed ambiguous language, and it did so without any real guidance from Congress or USCIS. There is no legislative history illuminating Congress's intent in introducing the disjunctive phrase at issue in *In re Erick M.* Current regulations have yet to be amended to reflect the 2008 changes to the SIJS definition. Indeed, current regulations are particularly confusing to state court judges who reference them, as they still contain the outdated requirement that the child qualify for

⁷⁸ Of course there are creative ways for advocates to argue that the Nebraska court's holding should not apply to Norman. For instance, one could argue that the true "custodial" parent in Norman's case is his mother, who was the custodial parent at the time when Norman sought SIJS relief. One might also argue that Norman's reunification with his father is not "viable" because his father is unlawfully present in the United States. *See, e.g., In re Welfare of D.A.M.*, No. A12-0427, 2012 WL 6097225, at *6 (Minn. Ct. App. Dec. 10, 2012) ("Planning for the return of appellant to his mother after his placement does not answer the question of whether appellant will be able to successfully live in her care. The viability of appellant's reunification with his mother for SIJS purposes requires the district court to consider her present living conditions, her willingness and ability to care for appellant, and all other relevant circumstances, so as to make a conclusion about whether that reunification is 'practicable' or 'capable of succeeding.'").

Uneven Access to Special Immigration Juvenile Status

long-term foster care.⁷⁹ Though new regulations are in the works, the proposed draft revealed that they do not explicitly address the issue of one-parent SIJS. In its commentary to the proposed regulations, USCIS seems to recognize the “one or both parents” language to mean “expanded eligibility” for SIJS.⁸⁰ But without an explicit recognition of the validity of one-parent SIJS cases, advocates are at a loss when briefing unfamiliar state court judges on the availability of one-parent SIJS relief. Finally, USCIS has issued no official public legal memoranda articulating its policy on the validity of SIJS petitions based on one-parent facts.

D. Working Toward Uniformity

If Congress meant for SIJS not to apply to a child who had been abandoned by one parent, it can so clarify by once again amending the definition of “special immigrant juvenile.” Further amendment by Congress could also clarify that SIJS *was* intended to apply to children abandoned by a single parent, even if residing with or able to reunify with the second parent. An amendment could be a step toward uniformity in helping avoid Norman’s situation, so that protection under the law is triggered not by a child’s circumstances and needs but by his geographical location.

Any further legislation should take into account a child like Norman. Although one might argue that the feasibility of Norman’s reunification with his father can fairly preclude Norman from relief because he can return with his father to Honduras, this argument disregards the independent protection of Norman, who has been unable to control the residence choices of his parents. Child welfare and protection require that vulnerable children like Norman have independent access to legal relief. Norman is a child in need of safe custody, and that is not an option for him in his home country. Now that he is in the United States, safe repatriation is an issue immigration officials must consider under the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008

⁷⁹ See 8 C.F.R. § 204.11(a) (2013).

⁸⁰ See Special Immigrant Juvenile Petitions, 76 Fed. Reg. 54,978, 54,979 (proposed Sept. 6, 2011) (to be codified at 8 C.F.R. pts. 204, 205, 245).

Uneven Access to Special Immigration Juvenile Status

("TVPRA"). A child like Norman, involuntarily at the mercy of his parents' relocation decisions, needs an outlet for relief and safety. This is in line with international child protection and humanitarian principles. This should be the driving force for developing relief for immigrant children as it was in introducing SIJS.

Of course, new legislation takes a substantial amount of time and resources for enactment and is therefore not the simplest fix to the "one-parent" dilemma. A more practical solution may actually come from USCIS. The agency could recognize the validity of one-parent claims in its new regulations, thereby giving advocates a concrete provision in the Federal Register to which they can refer a state court judge. Alternatively, the agency could issue a public legal memorandum directing USCIS officers adjudicating SIJS claims and the public on the agency's interpretation of the "one or both" requirement. As an example, USCIS issued an initial memorandum regarding the TVPRA on March 24, 2009⁸¹ and although that memorandum clearly indicates that it is meant to be guidance created "solely for the purpose of USCIS personnel in performing their duties," it still carries substantial weight and can offer guidance for more than just USCIS adjudicators as to the agency's application of the statute.⁸² Four years after that initial memorandum, and with the current ability to reflect on how the law has been utilized across states, an update is necessary.

E. Advocacy After Nebraska's Decision

Advocates do not have the luxury of simply awaiting clarification from Congress or USCIS, of course, as they continue to encounter children eligible for one-parent SIJS on a daily basis. Those advocates must continue to act quickly to try to discern where a child may ultimately be headed in the United States and to strategize about the child's options for legal relief on that basis. If a child is destined for an unfriendly jurisdiction like Nebraska, it may be a reason to prioritize his or her case and obtain the predicate order in any other jurisdiction that might be appropriate. Otherwise, justice

⁸¹ Memorandum, Trafficking Victims Protection Reauthorization Act of 2008, *supra* note 36.

⁸² *Id.* at 5. State court judges with little or no knowledge of immigration law might find such memoranda particularly helpful.

Uneven Access to Special Immigration Juvenile Status

delayed will be justice denied. This sort of strategizing is not something advocates are unfamiliar with, of course. They often must consider the availability of free or low cost legal services in the child's destination area; where those services are not available, advocates do their best to make sure a child obtains legal assistance before he or she departs. But the type of strategizing involved with analyzing the one-parent dilemma is different. Advocates will need to keep abreast of state law on SIJS claims as it develops across the country. To do so, advocates across organizations and state lines will need to continue to collaborate and effectively share information.

It may also be time for advocates to reach across practice lines, to their brethren in state family and juvenile law for assistance. Those practitioners are more familiar with state law as it applies to youth and with the challenges faced and concerns held by state court judges. Additionally, they share with immigration advocates a common interest—looking out and seeking justice for our vulnerable youths. Partnerships with local family law practitioners could help unveil the mystery of, and demonstrate the credibility of, SIJS before hesitant state court judges. With family and juvenile lawyers bridging both worlds, immigration advocates could participate in state judicial conference trainings and could provide explanatory materials about SIJS.

V. Conclusion

SIJS is an important benefit for children unlawfully present in the United States who have suffered parental abuse, neglect, or abandonment. Through recent precedent, the Nebraska Supreme Court restricted access to SIJS relief, apparently acting out of concern over immigration policy and thereby taking on the federal role of immigration gatekeeper. The current statutory definition of "special immigrant juvenile" allows for USCIS to approve applications for SIJS in one-parent cases like those of Erick and Norman. For a state court to fail to issue factual findings requested by a child, especially when the necessary evidence supporting those findings is in the record, due to principles of immigration policy—and perhaps fears of overextension of immigration benefits—is

Uneven Access to Special Immigration Juvenile Status

inappropriate. The state courts ought to be focused on principles of child welfare and best interest analysis because that is their limited and prescribed role in the SIJS scheme. Whether a child is ultimately eligible for SIJS involves analysis that should, and does, belong to federal immigration authorities alone. Admittedly, the Nebraska Supreme Court's decision was made in the absence of real guidance from federal authorities. Congress, USCIS, or both must clarify for the states what the 2008 amendments to the statutory definition of "special immigrant juvenile" mean and how the "one or both" language was intended to be applied.

In the meantime, though it is within a state court's delegated authority and expertise to decide whether parental reunification is possible and what is in the child's best interest, it is not the state court's role within the SIJS scheme to close the door on protection from deportation for these vulnerable children. Children for whom SIJS relief was arguably intended will be denied relief if they are so unlucky as to fight their cases in Nebraska. If other states rely on Nebraska's decision as persuasive authority, then immigration advocates will be forced into a costly game of forum shopping in order to protect clients from deportation. Clearly, justice dictates that relief for the children served depends on their real needs, not their latitude and longitude measured at a particular point in time.