

## Advisory Council on Immigration Issues in Family Court Memorandum #1

**To:** Family Court Judges, Chief Clerks and Non-judicial Staff

**From:** Advisory Council on Immigration Issues in Family Court

**Re:** Guidance on Guardianship Matters and Applications for Special Immigrant Juvenile (“SIJ”) Findings

**Date:** January 4, 2017

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The Advisory Council on Immigration Issues in Family Court, co-chaired by Hon. Edwina G. Mendelson, Acting Supreme Court Justice, and Theo S. Liebmann, Clinical Professor and Director of Clinical Programs, Hofstra Law School, was appointed by Chief Administrative Judge Lawrence Marks in 2015. The Council has prepared this memorandum to assist Family Court jurists and non-judicial staff regarding issues frequently arising in guardianship proceedings involving requests for the State court special findings required by Federal law for juveniles to obtain Special Immigrant Juvenile Status (SIJ). This is the first in a series of memoranda, bench aids and other documents in preparation by the Council to address the variety of immigration issues arising in and as a result of Family Court proceedings.

### Background

In the past five years, the number of children seeking refuge in the United States has increased dramatically.<sup>1</sup> These children are often escaping violence in their homes and communities, abject poverty, and extreme governmental dysfunction.<sup>2</sup> New York State, where many of them have relatives or other community connections, is a frequent destination. In fact, for immigrant children crossing the U.S.-Mexico border, New York State is the fourth-most common state destination, and Nassau and Suffolk counties are both among the top-10 most frequent county destinations.<sup>3</sup>

Many of the children coming to New York and other states are eligible for a form of immigration relief called Special Immigrant Juvenile (“SIJ”) Status. A grant of SIJ Status provides a pathway to lawful permanent residence, also known as a “green card.” SIJ Status is available to children who can provide an order from a state “juvenile” court showing the following: (1) they are under 21; (2) they are unmarried; (3) they are either dependent on a juvenile court, or have been placed by a juvenile court under the custody of a state agency or department, or have been placed by a State or juvenile court under the custody of an individual or entity; (4) they are not able to reunify with one or both parents due to abuse, neglect, abandonment or a similar basis; and (5) it is not in their best

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<sup>1</sup> See U.S. Customs and Border Patrol on-line report “United States Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016,” available at <https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016>.

<sup>2</sup> See Migration Policy Institute’s February 18, 2016 on-line report “Increased Central American Migration to the United States May Prove an Enduring Phenomenon,” available at <http://www.migrationpolicy.org/article/increased-central-american-migration-united-states-may-prove-enduring-phenomenon>.

<sup>3</sup> See U.S. Office of Refugee Resettlement on-line reports at <http://www.acf.hhs.gov/orr/programs/ucs/state-by-state-uc-placed-sponsors>; and at <http://www.acf.hhs.gov/orr/unaccompanied-children-released-to-sponsors-by-county>.

interests to return to their country of origin.<sup>4</sup> The family court has a discrete yet vital role in these children’s pursuit of SIJ Status: the family court does not and cannot grant SIJ Status or any immigration benefit; however, only a state “juvenile court” such as a family court, and not a federal court, can make the necessary pre-cursor findings that accompany the SIJ application made to the United States Citizenship and Immigration Services (“USCIS”), the federal agency that ultimately determines SIJ eligibility.<sup>5</sup>

New York has for many years recognized the family court’s jurisdiction over motions seeking the five SIJ findings, the court’s obligation to issue findings when supporting evidence is presented, and the consistency of issuing SIJ findings with family court goals of permanency, stability and safety.<sup>6</sup> New York courts have also recognized the important but limited role that SIJ findings, and therefore the family courts, play in the ultimate decision on whether a child will be permitted to stay in the U.S.<sup>7</sup> As numerous decisions have noted, while a family court can issue an order granting SIJ findings, the order is not a final determination on whether a child will be permitted to stay in the U.S., nor is it even a grant of SIJ Status; it is solely an issuance of specific state court findings that a child must obtain in order to proceed with an application for SIJ Status before USCIS.<sup>8</sup>

As the number of children eligible for SIJ Status in New York has increased, so has the number of children accessing the family courts both to have adult caretakers appointed as their guardian, and to ask family courts to issue SIJ findings. This increase, which has put enormous pressures on the clerical and judicial components of a number of family courts throughout the State, has also led to a wide divergence in how the cases are brought by attorneys, and how they are handled by the courts. In response to that divergence, this Advisory Memorandum provides guidance on a number of issues for courts to consider in assessing applications for guardianship and SIJ findings, and for attorneys to consider in bringing those cases.<sup>9</sup>

### **Testimony and Affidavits in Uncontested Matters**

The vast majority of guardianship/SIJ cases are uncontested. As with other types of matters which at times come before the family court without being contested by an opposing party – such as one sided custody or family offense matters; neglect or termination of parental right inquests; or most adoption matters – jurists must necessarily rely primarily on the evidence presented by the parties

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<sup>4</sup> 8 U.S.C. § 1107(a) (27)(J). A juvenile court is any court with jurisdiction to make “judicial determinations about the custody and care of juveniles.” See 8 C.F.R. §204.11(a).

<sup>5</sup> *Id.* See also U.S. Citizen and Immigration Services Memorandum “Trafficking Victims Protection Reauthorization Act of 2008: Special immigrant Juvenile Status Provisions” (March 24, 2009), available at [https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static\\_Files\\_Memoranda/2009/TVPRA\\_SIJ.pdf](https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/TVPRA_SIJ.pdf).

While this advisory memorandum focuses on family court proceedings, there may be other state courts which have jurisdiction to make SIJ findings.

<sup>6</sup> See, e.g., *Matter of Antova McD.*, 50 A.D.3d 507 (1<sup>st</sup> Dept., 2008); *Matter of Trudy Ann W.*, 73 A.D.3d 793 (2<sup>nd</sup> Dept. 2010). See also New York State Unified Court System General Form G-42 (“Special immigrant Juvenile Status – Order”), available at [nycourts.gov/forms/familycourt/general](http://nycourts.gov/forms/familycourt/general).

<sup>7</sup> See, e.g., *Matter of Marcelina M.-G.*, 112 A.D.3d 100 (2<sup>nd</sup> Dept. 2013); *Matter of Marisol N.H.*, 115 A.D.3d 185 (2<sup>nd</sup> Dept. 2014).

<sup>8</sup> *Id.*

<sup>9</sup> Applications for SIJ findings can be and are made in contexts other than guardianship of the person matters, including abuse and neglect, delinquency, custody, adoption, destitute child, and family offense proceedings. This advisory memorandum focuses on discrete issues in guardianship proceedings that were most commonly raised by jurists and advocates as areas where guidance and clarification would prove especially useful.

who are present. For most uncontested guardianship/SIJ cases, therefore, jurists use their expertise to assess the credibility of testimony, affidavits, or other evidence presented, just as they do in other types of uncontested cases. Family courts use the sworn testimony of the proposed guardian, or the child, or both, to elicit evidence regarding the applications for guardianship and SIJ findings, and to address the central issues in question – whether granting the guardianship serves the interests of the minor, and whether the facts presented support each of the five SIJ findings.<sup>10</sup>

In guardianship / SIJ matters, as in any other case, jurists also rely on the assumption that the attorneys appearing before them are practicing and presenting evidence in a manner consistent with their ethical duties under the New York State Rules of Professional Conduct. These duties include requirements related to candor to the court, timely and diligent pursuit of a case, merit of the claims being brought, and avoidance of conflicts of interest.<sup>11</sup>

A child appearing in a guardianship / SIJ matter has a right to be represented by counsel.<sup>12</sup> The child can be represented by a lawyer of their own choosing or by an appointed counsel, just as minors in any family court proceeding are.<sup>13</sup> These attorneys are ethically obligated to provide sufficient information to the court to support their position in their role as advocates for the minors. This includes the obligation to counsel their child clients about the availability of SIJ findings, and to seek SIJ findings whenever appropriate.<sup>14</sup> Many children who appear in guardianship / SIJ matters come to court having already procured representation from a pro bono or low bono attorney, a private attorney, a legal services or legal aid attorney, or an attorney from a variety of other agencies and clinics that specialize in representing children. Where a minor does not appear with her own attorney, she has the right to have one appointed to represent her. Where the minor does appear with an attorney, the court should permit the child to be represented by the lawyer she has chosen rather than appoint one that the child has not chosen, unless there is a clear conflict of interest.<sup>15</sup>

Testimony, affidavits, and other evidence presented by lawyers for children or proposed guardians through written motions and hearings are the primary and most common method through which jurists assess the applications in guardianship / SIJ matters. Where additional information is

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<sup>10</sup> The testimony of an older child, in particular, is helpful in evaluating the appropriateness of the guardian, and the preference of an older child for a particular guardian is deserving of significant weight. With younger children, whether or not to require testimony of the child will depend in part on the court's assessment of the effect on the child of providing such testimony. In all instances, courts regularly consider the age, developmental stage and emotional well-being of children in determining whether to require testimony, in framing questions and in weighing testimony.

<sup>11</sup> N.Y. Rules of Professional Conduct, Rules 1.1, 1.3, 1.7, 1.8, 3.1, and 3.3. *See also* 22 NYCRR Rule 130-1.1-a of the Rules of the Chief Administrative Judge, which requires attorneys to sign all pleadings, written motions and other papers submitted, and which deems the attorney's signature to constitute a certification that "to the best of that person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances... the presentation of the paper or the contentions therein are not frivolous..." If a judge sees that an attorney is acting in a manner inconsistent with the Rules of Professional Conduct, the judge should take appropriate action. 22 NYCRR Rule 100.3(D).

<sup>12</sup> Fam. Ct. Act §241.

<sup>13</sup> *Id.* Proposed guardians and respondents in guardianship cases who are indigent can also be appointed counsel at the discretion of the court, and are permitted to waive counsel as well if they choose. Fam. Ct. Act §262.

<sup>14</sup> NYSBA Comm. on Children and the Law, STANDARDS FOR ATTORNEYS REPRESENTING CHILDREN IN CUSTODY, VISITATION AND GUARDIANSHIP PROCEEDINGS, Standard C-8 (2015);

<sup>15</sup> *Matter of Elianne M.*, 196 A.D.2d 439 (1st Dept.1993); *Sosa v. Serrano*, 130 A.D.3d 636 (2nd Dept. 2015); *Bryan v. Singer*, 234 A.D.2d 631 (3rd Dept. 1996). Unless there is an identifiable reason to doubt the candor or competence of a retained attorney, appointing an attorney for the child *in addition* to allowing the retained attorney to remain on the case can be both confusing for the child and counter-productive.

necessary, there are other sources of information for courts and attorneys to consider. These include reports from the State Central Registry, fingerprinting results, and Court-Ordered Investigations conducted by the local social services agency or probation department, each of which is described below.<sup>16</sup>

### **State Central Registry History**

Surrogate's Court Procedure Act §1706(2) requires that a court hearing a guardianship matter ask the office of children and family services ("OCFS") to determine whether a proposed guardian, or any other resident of the proposed guardian's home who is 18 or over, has been the subject of an indicated report or is currently under investigation for a report.<sup>17</sup> Petitioners in guardianship proceedings must fill out Form OCFS-3909 at the initiation of any guardianship proceeding so that the family court can procure that information from OCFS. The State Central Registry of Child Abuse and Maltreatment (SCR) then provides the court with a summary of any indicated reports of child abuse or neglect against the nominated guardian and other residents age eighteen or older. While the existence of an indicated report, or even a finding in an Article 10 case, will usually be relevant to guardianship determinations, the weight given that information will vary depending on the circumstances of any individual case.

### **Fingerprinting**

Before making the best interests determination required in a guardianship case, jurists want as much information as possible to ensure that their decision is consistent with what will best serve the stability, security and permanency of the child. Fingerprinting can provide information on the criminal history of adults in the child's home that is useful in making that determination. Although most family courts in New York require fingerprinting as a matter of course in all guardianship cases, neither the New York Family Court Act (FCA) nor the Surrogate's Court Procedure Act (SCPA) actually require fingerprinting of potential guardians or other individuals in guardianship of the person cases.<sup>18</sup> Ordering fingerprints in any specific case is therefore at the discretion of the

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<sup>16</sup> The methods, if any, to use in a given case will depend on each judge's assessment of a variety of factors including the age of child, whether the child lives with the guardian, and whether the guardian is the child's parent, among others. In cases in which the proposed guardian is a parent, for example, the parent-child relationship should enjoy a presumption of safety, security and legitimacy, absent clear evidence to the contrary.

<sup>17</sup> Provisions of the Surrogate's Court Procedure Act apply in family court guardianship of the person cases where the Family Court Act is silent. Fam. Ct. Act §661(a).

<sup>18</sup> Most family court petitions for guardianship are filed as *guardianship of the person* matters under Family Court Act (FCA) §661(a) and the Surrogate's Court Procedure Act (SCPA). The requirements for a petition differ depending on whether the matter is a *permanent guardianship* case or a *guardianship of the person* case. A permanent guardian pursuant to FCA §661(b) is available only in cases where "guardianship and custody of a child have been committed to an authorized agency" pursuant to laws regarding permanent neglect, foster care, or other laws, or when "both parents of the child whose consent to the adoption of the child would have been required . . . are dead." *Id.* SCPA §1704 subsections (1) through (7) lists the requirements for guardianship petitions that apply to both types of guardianship cases. The requirements include, *inter alia*, information regarding the child, his/her birth parents, previously ordered guardianship appointments, whether the nominated guardian or other individuals residing with the guardian have been the subject of an indicated report, and reasons why the person nominated would be a suitable guardian. *See* SCPA §1704. The requirements listed in subsection (8) of SCPA §1704 apply only to *permanent guardian* cases. Those requirements include the results of the criminal history record check of the guardian and any adults residing in the guardian's household, if such a record check has been conducted, and the results of a search of the statewide central register of child abuse.

judge.<sup>19</sup> Ultimately the decision to exercise discretion in requiring fingerprinting rests on whether the court is satisfied, on a case-by-case basis, that the child is safe and secure under the guardian's care and that the guardian holds the child's best interests as paramount, or whether there is an identifiable cause for concern that may be allayed by procuring fingerprinting results. When the court is deciding whether or not to order fingerprints in any specific guardianship case, and which adults in a home should be required to be fingerprinted, a number of factors, including the following, can be useful:<sup>20</sup>

- **Lack of U.S.-issued Identification Documents**

In New York City, fingerprinting can be completed for adults regardless of whether the adult possesses U.S.-issued identification; outside of New York City, however, most fingerprinting centers used by family courts require that a U.S.-issued identification document be provided at the time of the fingerprinting. Many immigrants do not have such identification, and therefore are turned away by the fingerprinting centers. Family courts have tried a variety of alternatives to work around this problem, including the following:

- Allowing a social service agency to take the fingerprints and send them to Albany, with an affidavit of chain of custody;
- Using local stores that offer fingerprinting as a service;
- Sending immigrant families to police precincts to be fingerprinted.

These options present problems for immigrant families. Local stores charge anywhere from \$30-\$100, creating a financial barrier for access to a court that generally seeks to avoid such barriers as a matter of public policy.<sup>21</sup> In addition, precincts are often unwilling to take fingerprints if someone cannot prove residency, and police contact can be a frightening and intimidating experience for an undocumented individual and their family.

- **Fear of Law Enforcement Using Fingerprints for Deportation Purposes**

Many in the immigrant community fear fingerprinting for any purpose as many different databases have been available at different times to Immigration and Customs Enforcement. That fear may have the unintended and unfortunate consequence of discouraging the most suitable potential guardians from stepping forward and offering permanency and stability for children and youth.<sup>22</sup>

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<sup>19</sup> *But see Matter of Silvia N.L.P.*, 141 A.D.3d 654 (2<sup>nd</sup> Dept. 2016) (finding that dismissing a case solely because of a guardian's failure to be fingerprinted is reversible error).

<sup>20</sup> This list of factors is not exhaustive, and the specific facts of any case are always particularly relevant to weighing whether or not to require fingerprinting. Where the minor does not live with the proposed guardian, or where the minor is 18 or older, for example, fingerprinting may be less significant to assessing best interests. Similarly, it may be less important for the court to order fingerprinting of adults in the minor's household with whom the minor has little interaction.

<sup>21</sup> *See, e.g.*, Fam. Ct. Act §261.

<sup>22</sup> Some cities, such as New York City, have issued executive orders that prohibit police or other government employees from disclosing immigration status for immigration enforcement purposes. *See* NYC Exec. Order No. 34, which, among other things, prohibits police from asking about or disclosing immigration status for purposes of investigating any crime related to immigration status; and Exec. Order No. 41, which places that same prohibition on all city agency employees.

- **Lack of Interpreting Services at Fingerprinting Location**

Some individuals are wrongfully turned away or are unable to properly determine who should be fingerprinted once they present themselves to a fingerprinting location because they lack an interpreter at the appointment. Additionally, courts may have difficulty setting up the appointment if the form is not filled out to the state's satisfaction. Without an interpreter's assistance in filling out the form, significant delay can result from simple miscommunications and misunderstandings of the complex forms and systems involved in the fingerprinting process.<sup>23</sup>

- **Non-Traditional Housing and Multi-Family Dwelling Units**

Increasingly, immigrant families are residing in non-traditional living arrangements within multi-family dwelling units. New York State has one of the highest housing costs in the country. Immigrant families are often low-income. Many live in multi-dwelling units as a necessary way to reduce housing costs. Often, the various individuals living in such settings have little or no contact with each other, and different families typically have their own locked rooms. Much like domestic violence shelters, large apartment complexes and homeless shelters, fingerprinting everyone in the residence can be impracticable and not necessary to prevent harm to the child.

### **Court Ordered Investigations**

A family court judge can order an investigation of a home through the probation service or through a child protection service to ascertain the safety of a nominated guardian's home.<sup>24</sup> Where the testimony or other evidence presented is insufficient, or where the evidence presented creates concerns about the safety of the home, court-ordered investigations (COIs) conducted by the local social services agency or probation departments are another tool that courts may use to obtain additional information of the guardian's home.<sup>25</sup> Both the department of probation and child protection services agencies are required to comply with court orders for COIs in guardianship matters.<sup>26</sup>

### **Conclusion**

We hope that the guidance provided in this memorandum will clarify some of the questions and concerns related to guardianship petitions and applications for SIJ findings that are most commonly raised with Council members by the judiciary and by advocates.

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<sup>23</sup> Pursuant to NYS Governor's Executive Order 26, all State agencies are required to offer language assistance to all persons with limited English proficiency.

<sup>24</sup> Fam Ct. Act §§252(d), 1034(1)(b). Family court jurists can order §1034 investigations to determine whether an abuse or neglect proceeding should be initiated. In addition, Social Serv. L. 422(4)(e) permits courts to obtain the full array of information in any State Central Registry report if the court determines that information is necessary for the determination of an issue before the court.

<sup>25</sup> Neither departments of social services nor departments of probation may collect fees from parties for COIs in guardianship matters. Pursuant to Family Court Act Sections 653 and 252-a, such fees may only be collected by a department of probation in habeas proceedings and custody proceedings – *not* in guardianship proceedings.

<sup>26</sup> See *Matter of Sing W.C.*, 83 A.D.3d 84 (2<sup>nd</sup> Dept. 2011) (affirming authority of family court to order children's services agency to conduct investigation or home study of minor in guardianship matter who is over age 18).

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