ON THEIR OWN: HOW WE CAN HELP IMMIGRANT CHILDREN FIND A WAY SPECIAL IMMIGRANT JUVENILES

The United States Customs and Border Protection agency, a federal executive agency, has as its mission to protect the national security of the United States. A tall order. It does so by apprehending undocumented migrants seeking to enter the United States. It did so in 2014 with almost 480,000 apprehensions on the southwest border of the United States. (Congressional Advisory "Unaccompanied Children Summary" June 2014) Approximately 2,800 of those were children from various countries such as El Salvador, Honduras, Guatemala and Mexico. Perhaps, this influx may be attributed to the Federal Government's executive order which allows undocumented children to apply for deferred action and employment authorization. (See, Crane v. Johnson (5th Cir. No. 14-10049, April 2015) Immigration court dockets are clogged. Two year waiting times for a hearing are over two years in Chicago (TRAC, http://trac.syr.edu/immigrationreports (9/28/15)

This migration of unaccompanied minors may be a reflection of the turmoil in the countries from where they originate (See, State of Texas v. United States (No. 14-cv-254 (S.D. Tex.) The purpose of this article is not to engage in the efficacy of the federal government's order or the policies of foreign nations. The focus here, is how, we as lawyers, can help undocumented unaccompanied minors find refuge.

The Immigration and Nationality Act (INA) provides that special immigrant juveniles (SIJ) or court dependents can qualify for lawful permanent resident status if they meet certain requirements. (8 USC 1101(a)(27)(J)).

The requirements for such eligibility for the juvenile are s/he is:

- under twenty one years of age
- is unmarried
- has been declared dependent upon a juvenile court located in the United States in accordance with State law governing such declarations of dependency, while the alien

was in the United States and under the jurisdiction of the court

- has been deemed eligible by the juvenile court for long term foster care
- continues to be dependent upon the juvenile court and eligible for long term foster care; and
- has been subject of a judicial or administrative proceedings authorized or recognized by the juvenile court in which it has been determined that it would not be in the minor's best interest to be returned to the country of nationality or last habitual residence of the beneficiary or his or her parents

In Illinois, a minor is defined as a person who has not reached the age of 18 years of age except for purposes under the Illinois Uniform Transfers to Minors Act (760 ILCS 20/2(12) where a minor is a person who has not attained the age of 21. (755 ILCS 5/11-1)

The Illinois Probate Act relating to a guardianship for a minor does not require a minor to be a United States citizen. An Illinois court may not appoint a guardian for a minor unless the minor has a living parent whose parental rights have not been terminated; whose whereabouts are known, and who is willing and able to make and carry out day-to-day child care decision unless the parent or parents voluntarily relinquish physical custody; fail to object to a guardian's appointment; or the parent or parents consent in a notarized written document or by personally appearing in open court with consent (755 ILCS 11-5 (b-1). In Re: Guardianship of Tatyanna T. 2012 IL. App. (1st) 112 957: In Re: A.W. 2013 IL App. (5th) 130104.

Accordingly, the guardianship statute for a minor provides a protocol like in many states (See, In Re: H.S.P. v. J.K. (S. Ct. N.J. App. Div. 435 N.J.Super. 147) (2014) (HSP); In re: Matter of Marcelina M.G. v. Israel S. (112 A.D. 3d 100 (2013) ("Marcelina"), where an undocumented minor child can be declared a ward of the court if it is in the minor's best interests.

Practice Pointer

This may seem complicated. It is not. You can file a guardianship case for a minor whom is undocumented regardless of the minor's immigration status. Your client need not be in foster care. The

minor must be only deemed eligible for such status, nothing more.

In re: A.M. (2013 IL App. (3d) 120809) (A.M.) provides a good analysis of the prerequisites for a valid guardianship judgment in a minor's case. Basically, an Illinois a circuit court lacks jurisdiction if there is a living parent, whose whereabouts are known and whose parental rights have not been terminated and who is willing to make and carry out day-to-day decisions for the minor. Additionally, if such parent is available there is a rebuttable presumption that parent is willing and able to make and carry out such child care decisions. (755 ILCS 5-11 (b))

In A.M. a trial court decision to grant guardianship to petitioners was reversed where it failed to conduct a hearing on the adoptive parent's fitness. The latter is distinct from the best interests of the child. The fitness hearing must come first. (In re: Guardianship of A.G.G. (406 Ill. App. 3d 389 (2011). If the parent is found fit then the best interest inquiry is not reached.

For a minor, this is significant, not just for state court jurisdictional purposes, but for SIJ eligibility. The Guardianship order should recite the parent has been served with process and has either agreed to the proposed judgment or has been defaulted. Also, the guardianship order should include the following statement:

> This matter comes up on the petition for guardian of (Name), a minor. The petitioner is (Name). After being duly advised the court orders:
>
> 1. The court finds the minor has been neglected, abandoned, or abused by his mother and/or his father. Minor would be eligible for long term foster care in a state agency because of such abandonment, neglect, or abuse. The minor is dependent on the court and a ward of this court.
> 2. The court determines that family reunification is no longer viable. The minor is unmarried and under 21 years of age. The court finds that it is not in the best interest of the minor for him to return to his (Country or last country of residence with his parent(s).
> 3. Petitioner is appointed guardian of the estate and person of Minor. Bond and surety is waived. The guardian is awarded care and custody of Minor.

Practice Pointer:

The state's court order must make explicit findings, that: (1) abuse, neglect, or abandonment has occurred by 1 or both of the minor's parents; (2) the minor is eligible for long term foster care; is dependent on the court, and family reunification is no longer a viable option; (3) it is not in the minor's best interest to

return to the country of which he is a national or last resided with his parents. This is called a "best interests") or predicate order. It is not a finding of SIJ status, that is a federal government decision.

Illinois has now followed this precedent (In re: Estate of Nina L. (2015 IL App (1st) 152237) [Nina]

In Nina, the petitioners whom were unrelated to Nina, a 17 year old Taiwanese native, established a guardianship in probate court. They requested the trial court enter a predicate order so Nina could apply for SIJ status. The trial court refused to do so. Justice Mason reversed the trial court. In an unusual conclusion the Appellate Court made all the predicate finding for SIJ status. I believe this happened, since Nina was turning 18 seven days after the opinion was filed. The court's opinion incorporates a thoughtful and well reasoned analysis of a state court's authority in issuing an SIJ predicate order. Read it.

A split in authority exists among state courts as to whether the availability of one parent precludes a state court order finding abandonment, abuse or neglect by a parent. Remember, the state court order is not a finding of SIJ status, it is a predicate to such a finding by the federal government.

The language of the statute says a state court must find that "reunification with 1 or both of the minor's parents is not viable due to abuse, neglect, abandonment, or a similar basis under State law. (8 U.S.C. 1101 (a)(27)(J)(I) The Supreme court of Nebraska interpreting that statute found the "1 or both" language to ambiguous since it might be interpreted to denote that a court could find that either reunification with a single parent is not feasible or reunification with both parents is not feasible. (In re: Erick M. 820 N.W. 2d 639 644-647 (2012) Other Courts have found differently. See also, H.S.P., Marcelina. No published Illinois precedent discusses this issue.

Practice Pointer

In preparing the state court predicate SIJ order provide that both parents agree to a finding of neglect, abandonment or abuse.

The determination of SIJ status is not confined to a juvenile court. The regulations implementing

8 USC 1101 (A)(27)(j) state that a juvenile court is "a court located in the United States having jurisdiction under state law to make judicial determinations about the custody and care of juveniles (8CFR 204.11(a)). This could be a probate court, a family court, or any tribunal which has the authority under state law to make decisions about the care and custody of juveniles (see, Simbaina v. Bunay Md. 2014 (221 Md.App. 440). Of course, what constitutes a "juvenile court" can vary depending on the state where the case is filed. In California for example, the superior court or trial court which was sitting in probate had the authority to make SIJ findings since no separate jurisdictional basis exists for differentiating between either court. (B.F. v. Superior Court 143 Cal. Rptr. 3d 730) (207 Cal.App.4th 621) (2012)

The only limitation on whether a state court judge is constrained in making a SIJ finding is where the minor is in the custody of the federal government. More importantly, a minor is only in constructive custody of the federal government when the minor is subject to a final order of deportation, (Matter of Perez-Quintanilla, Special Immigrant Proceeding (AAO 2007) (Perez)

The District Director of United States Citizenship and Immigration Services (CIS) denied the SIJ petition of Perez, an 18 year old Nicaraguan national. CIS refused the application on two grounds. First, that the Department of Homeland Security had not specifically consented to a state juvenile court's jurisdiction to determine the minor's custody status. And, the minor had not established his continued eligibility for long term foster care in Florida even though a state court had extended its jurisdiction over the minor.

CIS found Perez to be in the federal government's constructive custody because he was in removal proceedings. The Administrative Appeals Office (AAO) found that decision erroneous. It said

specific consent from DHS was not necessary since Perez was not the subject of a final order of deportation (Pena v. Meissner 232 F. 3d 896 (9th Cir. 2000).

Also, CIS found Perez was no longer eligible for long term foster care since Florida law said when he turned 18 he was no longer eligible for foster care. (See 8 CFR 204.11 (c)(5)) Of course, Perez was not in foster care and a Florida court in its best interests order had concluded otherwise extending its jurisdiction over Perez until he turned 22 years of age.

The AAO held the crux of the state court's best interests order was that family reunification was no longer a viable option. Whether Perez failed to meet all of Florida's requirements to be placed in foster care was not necessary. The key being that Perez was still dependent on the court and family reunification was not a viable option as stated in the state court's order(s). The CIS ruling denying SIJ status was reversed.

Practice Pointer:

Ascertain whether the minor is subject to final order of removal. You can do this by finding out if your client had a removal hearing since he will have an order issued by the Executive Office of Immigration Review (EOIR) showing that fact.

Your client has now received a best interests or predicate order from an Illinois probate, family or juvenile court. S/he still is undocumented for federal immigration purposes. What do you do?

Federal law provides that your client may petition CIS for SIJ status on form I-360. This petition must be supported by among other documentary evidence with:

- the dependency or best interests order of the state court
- a birth certificate or proof of age and identity

Additionally your client can seek adjustment of status to lawful permanent resident status with the filing of form I-485 an application for lawful permanent residence. This can occur even if your client

violated the terms of his immigration status or entered the United States without inspection (8 CFR 245.1(a)(1)(ii)(e)(3)) Your client will have to appear for an interview in connection with these applications at CIS. Once approved, your client will be a lawful permanent resident.

Conclusion.

Congress, in its wisdom has provided a vehicle to help undocumented foreign children immigrants to achieve lawful immigration status in this country. It did so relying on our state court judges to make determinations of what is in a child's best interests. Although this interplay between state and federal government actors is unusual, it provides a mechanism for us, as advocates, to provide a meaningful remedy. In some small way this article may help you achieve for those among us whom need it most. So, these minor children can find a way home.

Patrick M. Kinnally