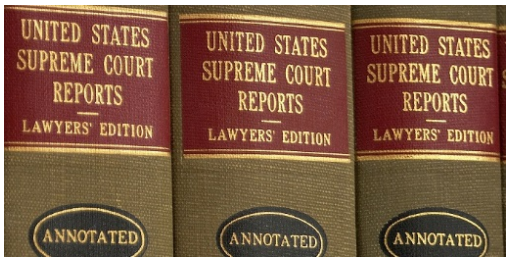
SUFFOLK ACADEMY OF LAW
The Educational Arm of the Suffolk County Bar Association
560 Wheeler Road, Hauppauge, NY 11788
(631) 234-5588



FAMILY COURT SERIES
UPDATE ON GUARDIANSHIP PRACTICE

FACULTY

Hon. Andrew A. Crecca
District Administrative Judge

Catherine E. Miller, Esq.
Randy Berler, Esq.
Celine D. Rivera, Esq.

December 1, 2021
Suffolk County Bar Association, New York

Like us on:

"The opinions, beliefs and viewpoints expressed herein are those of the authors and do not necessarily reflect the official policy, position or opinion of the Suffolk County Bar Association, Suffolk Academy of Law, their i Board of Directors or any of their members"

There's a whole new way to obtain your CLE certificate! It's fast, easy and best of all you can see the history of courses that you've attended!

Within 10 days of the course you attended, your CLE Certificate will be ready to view or print. Follow the instructions below:

1. Go to SCBA.org
2. Member Log In (upper right corner)
3. If you **do not** know your username or password, click the area below and enter your email that is on file with SCBA. Follow the prompts to reset your username and password.
4. After you log in, hover over your name and you will see "Quick Links". Below that you will see:
   a. My SCBA
   b. My CLE History
   c. Update My Information
   d. Update My Committees
5. Click on **My CLE History**, you will see the courses you have attended. Off to the right side you will see the Icon for certificates. You are now able to download the certificate, print it or save it. You may go to your history and review the courses you have taken in any given year!
6. **CLE certificates will no longer be mailed or emailed.** Certificates will be available within 10 days after the course.

HON. ANDREW A. CRECCA

Andrew A. Crecca is the District Administrative Judge of Suffolk County, overseeing all court operations for the Tenth Judicial District, Suffolk County. Prior to his appointment as District Administrative Judge in July of 2020, he served as the Supervising Judge for Matrimonial Matters. Justice Crecca also presided over Suffolk County's Integrated Domestic Violence Court for more than a decade. He was first elected to the bench in 2004 as a County Court Judge and presided over felony criminal cases in a dedicated trial part. In January of 2007, he was appointed an Acting Justice of the Supreme Court. In 2010 he was elected Justice of the New York State Supreme Court for the 10th Judicial District.

Prior to his time on the bench Justice Crecca served as a County Legislator, and maintained a private law practice concentrating in matrimonial and family law. He also served as an Assistant District Attorney in the New York County District Attorney's office from 1989 to 1994. He received his undergraduate degree from Marist College in 1986, and his law degree from St. John's University School of Law in 1989.

Justice Crecca has lectured throughout the United States and internationally on domestic violence issues, problem solving courts, matrimonial and family law, as well as on court operations. He serves as a faculty member to the *National Judicial Institute on Domestic Violence*, the *New York State Judicial Institute*, the *National Council of Juvenile and Family Court Judges*, the *Suffolk Academyof Law*, and as an Adjunct Professor at *Touro Law School*. He has also held the position of Adjunct Assistant Professor of Political Science at *Hofstra University*.

Justice Crecca is an active member of the *Suffolk County Bar Association*, and has previously served on its Board of Directors and as chair of the Bench Bar Committee. He also is a member of the *New York State Bar Association* and serves on the *Executive Committee* of the *Family Law Section*. From 2011 to 2020, Justice Crecca served as a member of the Chief Administrative Judge's *Matrimonial Practice Advisory & Rules Committee* for New York State. He also serves on the Chief Administrative Judge's *Statewide ADR Advisory Committee*, and on the Board of *The Center for Children, Families and the Law at Hofstra University School of Law*.

Justice Crecca is also a member of the *National Council of Juvenile & Family Court Judges*, the *New York State Bar Association*, the *New York State Association of Supreme Court Justices* and the *Suffolk County Matrimonial Bar Association*.

Justice Crecca lives on Long Island with his wife Donna.

Catherine Miller, Esq. is currently a Court Attorney Referee in Suffolk County Family Court. Ms. Miller maintained a private law practice for over 25 years focusing on Matrimonial and Family Law and she served on both the Attorney for Children Panel and the Suffolk County 18b Panel. Ms. Miller is a member of the Suffolk County Bar Association Board of Directors and Co-Chair of the Family Court Matrimonial Law Committee. She is a former member of the Judicial Screening Committee and Charitable Foundation and past President of the Suffolk County Matrimonial Bar Association. Ms. Miller also serves on the Child Welfare Court Family Court Improvement Project and is a member of the Family Court FOCUS steering committee. In 2017, Ms. Miller completed a Fellowship Program at Georgetown University's Judicial Institute which focused on LGBTQ Youth in the Court System.

Randy Berler, Esq.

Law Clerk to Judge Andrea Harum-Schiavoni, Suffolk County Family Court

Graduated from Clark University, 1985, B.A.

Graduated from Touro College, Jacob D. Fuchsberg Law Center, Summa Cum Laude, 1994.

1994-2001, **Assistant County Attorney**, **Suffolk County Attorney's Office**, in the General Litigation, Municipal Law and Family Court Bureaus

2001-2021-**Law Clerk**, **New York State Courts**

Admitted to Practice in the Appellate Division of the Supreme Court, Second Department, United States District Court of the Eastern District, Supreme Court of the United States.

Celine Rivera, Esq.

Ms. Rivera worked as an attorney and office manager at Amoachi & Johnson for several years, representing youth and adult clients at New York Immigration Court who applied for Asylum, Cancellation of Removal, NACARA or Special Immigrant Juvenile Status. During her three years at the firm, she also represented clients seeking Special immigrant juvenile status in the Family Court proceedings. With a passion for working with children and an expertise in International& Immigration Law, Ms. Rivera began her work as an Attorney for the Child with the Children's Law Bureau, representing children in proceedings for guardianship, custody cases, and adoption proceedings. As an AFC for over three years, Ms. Rivera has been a strong advocate for children and protected their rights.

GUARDIANSHIP/SIJS
LUNCH AND LEARN, DECEMBER 1, 2021

Pursuant to **8 U.S.C.S. § 1101(a)(27)(J)**, as amended by the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 8 C.F.R. 204.11, **a special immigrant is a resident alien who, inter alia, is under 21 years of age, is unmarried, and has been legally committed to, or placed under the custody of, an individual appointed by a state or juvenile court. Additionally, for a juvenile to qualify for special immigrant juvenile status (SIJS), a court must find that reunification of the juvenile with one or both of the juvenile's parents is not viable due to parental abuse, neglect, abandonment, or a similar basis found under state law. 8 U.S.C.S. § 1101(a)(27)(J)(i), and that it would not be in the juvenile's best interests to be returned to his or her native country or country of last habitual residence. 8 U.S.C.S. § 1101(a)(27)(J)(ii); 8 C.F.R. 204.11(c)(6)**

(Matter of Keanu S., 167 AD3d 27, 28 [2d Dept 2018])

Special Immigrant Juvenile Status: 8 CFR § 204.11(c)

(c) Eligibility. An alien is eligible for classification as a special immigrant under section 101(a)(27)(J) of the Act if the alien:

(1) Is under twenty-one years of age;

(2) Is unmarried;

(3) 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;

(4) Has been deemed eligible by the juvenile court for long-term foster care;

(5) Continues to be dependent upon the juvenile court and **eligible for long-term foster care**, such declaration, dependency or eligibility not having been vacated, terminated, or otherwise ended; and

(6) Has been the subject of judicial proceedings or administrative proceedings authorized or recognized by the juvenile court in which it has been determined that it would not be in the alien’s best interest to be returned to the country of nationality or last habitual residence of the beneficiary or his or her parent or parents; or

(7) On November 29, 1990, met all the eligibility requirements for special immigrant juvenile status in paragraphs (c)(1) through (c)(6) of this section, and for whom a petition for classification as a special immigrant juvenile is filed on Form I-360 before June 1, 1994.

(8 CFR § 204.11 (Lexis Advance through the Nov. 8, 2021 issue of the Federal Register, with the exception of the amendments appearing at 86 FR 61017))

AMENDMENT OF 8 CFR 204.11 EXPANDING THE ELIGIBILITY OF JUVENILES TO SEEK SPECIAL IMMIGRANT JUVENILE STATUS

In the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, the U.S. Congress expanded the definition of who qualifies as a "special immigrant juvenile," enabling more children to qualify for the status. (Pub. L. No. 110-457, 122 Stat. 5044 (2008). **The amendments removed the requirement that the immigrant child has to be deemed eligible for long-term foster care due to abuse, neglect, or abandonment, and replaced it with a requirement that the juvenile court find that reunification with one or both of the immigrant's parents is not viable due to abuse, neglect, abandonment or a similar basis found under State law. Pub. L. No. 110-457, 122 Stat. 5079 (2008). The amendments also expanded eligibility to include, in addition to children declared dependent on a juvenile court, those who had been placed in the custody of an individual or entity appointed by a State or juvenile court.** Pub. L. No. 110-457, 122 Stat. 5079. Following the 2008 amendments, the United States Department of Homeland Security issued a memorandum explaining that the new language added to the definition of "Special Immigrant Juvenile" meant that a petition filed by an alien on whose behalf a juvenile court appointed a guardian may now be eligible. More like this Headnote

(Matter of Hei Ting C., 109 AD3d 100, 101 [2d Dept 2013]).

The legislative history of the SIJS statute supports this interpretation of the reunification requirement (see Matter of Tompkins County Support Collection Unit v Chamberlin, 99 NY2d at 335 ["the legislative [***23] history of an enactment may also be relevant and is not to be ignored, even if words be clear" (internal quotation marks omitted)]). As set forth above, prior to the 2008 amendments, the statute required a determination that the child was eligible for long-term foster care (see Pub L 105-119, § 113, 111 US Stat 2440, 2460). The phrase "[e]ligible for long-term foster care" meant a determination "by the juvenile court that family reunification is no longer a viable option" (8 CFR 204.11 [a]). Thus, under the former version of the statute, "SIJS was only available when reunification with both parents was not possible" (In re Welfare of D.A.M., 2012 WL [****7] 6097225, *3, 2012 Minn App Unpub LEXIS 1158, *9 [2012]). **"[B]y eliminating the long-term foster-care requirement and instead requiring only a finding that 'reunification with 1 or both' parents is not viable," the statute, as amended in 2008, "requires only a finding [*112] that reunification is not viable with one of the child's parents"** (2012 WL 6097225, *4, 2012 Minn App Unpub LEXIS 1158, *10 [emphasis omitted], quoting Pub L 110-457, 122 US Stat 5044).

(Matter of Marcelina M.-G. v Israel S., 112 AD3d 100, 111-112 [2d Dept 2013])

AMENDMENT EXTENDING THE FAMILY COURT'S JURISDICTION OVER GUARDIANSHIP PROCEEDINGS IN WHICH THE CHILD ATTAINS THE AGE OF 18 TO THE AGE OF 21.

(Matter of Maria C.R. v Rafael G., 142 AD3d 165, 169-170 [2d Dept 2016])

The Family Court is a court of limited subject matter jurisdiction and "cannot exercise powers beyond those granted to it by [*170] statute" (Matter of Johna M.S. v Russell E.S., 10 NY3d 364, 366, 889 N.E.2d 471, 859 N.Y.S.2d 594; see Matter of Riedel v Vasquez, 88 AD3d 725, 726, 930 N.Y.S.2d 238). Family Court Act § 661(a) governs "[g]uardianship of the person of a minor or infant." **That statute, which had previously been interpreted as applying only to persons under the age of 18 (see Matter of Vanessa D., 51 AD3d 790, 858 N.Y.S.2d 687; Matter of Luis A.-S., 33 AD3d 793, 794, 823 N.Y.S.2d 198), was amended by the Legislature in 2008 in response to the federal law and regulations creating special immigrant juvenile status and making it available to immigrants under the age of 21** (see Merril Sobie, 2011 Supp Practice Commentaries, McKinney's Cons Laws of NY, Book 29A, Family Ct Act § 661, 2016 Cum Pocket Part at 135-136). The statute now provides, in pertinent part, that HN2 **"[f]or purposes of appointment of a guardian of the person pursuant to this part, the terms infant or minor shall include a person who is less than twenty-one years old who consents to the appointment or continuation of a guardian after the age of eighteen"** [****3] (Family Ct Act § 661[a]; see Matter of Trudy-Ann W. v Joan W., 73 AD3d 793, 901 N.Y.S.2d 296).

(Matter of Maria C.R. v Rafael G., 142 AD3d 165, 169-170 [2d Dept 2016])

THE PURPOSE OF SIJS:

(Matter of Keanu S., 167 AD3d 27, 33 [2d Dept 2018])

HN4 "**[T]he impetus behind the enactment of the SIJS scheme is to protect a child who is abused, abandoned, or neglected and to provide him or her with an expedited immigration process" (Matter of Hei Ting C., 109 AD3d at 106). As previously observed by this Court, intended beneficiaries of the SIJS provisions are " 'those juveniles for whom it was created, namely abandoned, neglected, or abused children' " (Matter of Marcelina M.-G. v Israel S., 112 AD3d 100, 108, 973 NYS2d 714 [2013], quoting HR Rep 105-405, 105th Cong, 1st Sess at 130, reprinted in 1997 US Code Cong & Admin News at 2941, 2954; see Matter of Fifo v Fifo, 127 AD3d 748, 750-751, 6 NYS3d 562 [2015]; Matter of Hei Ting C., 109 AD3d at 103). Applications for SIJS specific findings have generally been granted where dependency upon the court was established by way of guardianship, adoption, or custody (see Matter of Hei Ting C., 109 AD3d at 106). In addition, this Court has recognized that, under proper circumstances, a child involved in a family offense proceeding involving allegations of abuse or [****4] neglect may properly be the subject of such a [**527]**

determination as an intended beneficiary of the SIJS provisions (see Matter of Fifo v Fifo, 127 AD3d at 751).

THREE BODIES OF LAW UTILIZED IN THE FAMILY COURT GUARDIANSHIP/SIJS PROCEEDINGS:

Family Court Act- Specifically Family Court §661(a) defines the Jurisdiction of the Family Court to determine applications for Guardianship of a minor or infant.

(a) **Guardianship of the person of a minor or infant.** When making a determination regarding the guardianship of the person of a minor or infant, **the provisions of the surrogate's court procedure act shall apply to the extent they are applicable to guardianship of the person** of a minor or infant and do not conflict with the specific provisions of this act**. For purposes of appointment of a guardian of the person pursuant to this part, the terms infant or minor shall include a person who is less than twenty-one years old who consents to the appointment or continuation of a guardian after the age of eighteen.**
(Family Ct Act § 661 (Consol., Lexis Advance through 2021 released Chapters 1-579))

Note: If a child is under the age of 18, the guardianship order is effective until the child turns 18. A new guardianship order may be issues upon application of Petitioner to restore the matter for purposes of issuing a guardianship order for the child until the age of 21, upon the consent of the child.

Note: Family Court Act §661(b) deals with "Permanent Guardianship of a child", and is generally not applicable to the guardianship petitions that are filed. This section involves children who are in the custody of an authorized agency, or where both parents have consented to the adoption of the child.

Family Court Act § 657(c). Certain provisions relating to the guardianship and custody of children by persons who are not the parents of such children:

(c) Notwithstanding any other provision of law to the contrary, persons possessing a lawful order of **guardianship or custody of a child shall have the right and responsibility to make decisions, including issuing any necessary consents, regarding the child's protection, education, care and control, health and medical needs, and the physical custody of the person of the child.** Provided, however, that nothing in this subdivision shall be construed to limit the ability of a child to consent to his or her own medical care as may be otherwise provided by law.
(Family Ct Act § 657 (Consol., Lexis Advance through 2021 released Chapters 1-579))

Note: This citation may be used for proposed guardians who are not parents of the subject child. Otherwise, identical language appears in SCPA §1705.

NEGLECT AND SIJS:

Family Court Act § 1012. Definitions:

(f) "Neglected child" means a child less than eighteen years of age
(i) whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care:
(A) in supplying the child with adequate food, clothing, shelter or education in accordance with the provisions of part one of article sixty-five of the education law, or medical, dental, optometrical or surgical care, though financially able to do so or offered financial or other reasonable means to do so, or, in the case of an alleged failure of the respondent to provide education to the child, notwithstanding the efforts of the school district or local educational agency and child protective agency to ameliorate such alleged failure prior to the filing of the petition; or
(B) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof, including the infliction of excessive corporal punishment; or by misusing a drug or drugs; or by misusing alcoholic beverages to the extent that he loses self-control of his actions; or by any other acts of a similarly serious nature requiring the aid of the court; provided, however, that where the respondent is voluntarily and regularly participating in a rehabilitative program, evidence that the respondent has repeatedly misused a drug or drugs or alcoholic beverages to the extent that he loses self-control of his actions shall not establish that the child is a neglected child in the absence of evidence establishing that the child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as set forth in paragraph (i) of this subdivision; or
(ii) who has been abandoned, in accordance with the definition and other criteria set forth in subdivision five of section three hundred eighty-four-b of the social services law, by his parents or other person legally responsible for his care.

(Family Ct Act § 1012 (Consol., Lexis Advance through 2021 released Chapters 1-599))

SIJS BASED UPON EDUCATIONAL NEGLECT:
Matter of Dennis X.G.D.V., 158 A.D.3d 712
Supreme Court of New York, Appellate Division, Second Department

February 14, 2018, Decided

2016-10296 (Docket No. G-8613-15)

Reporter
158 A.D.3d 712 * | 71 N.Y.S.3d 135 ** | 2018 N.Y. App. Div. LEXIS 1060 *** | 2018 NY Slip Op 01073 **** | 2018 WL 845798

[****1] In the Matter of Dennis X.G.D.V., Appellant.

Core Terms

reunification, juvenile, viable, parental neglect, credibility, reargument, immigrant, renewal, specific finding

Case Summary

Overview
HOLDINGS: [1]-The family court erred by not making a finding that reunification of a child with his mother in El Salvador was not viable due to parental neglect, 8 U.S.C.S. § 1101(a)(27)(J)(i), because the mother did not arrange for transportation when gang members prevented the child from attending school and left the child home alone at night in the neighborhood where he encountered the gang violence, and the child was expelled from one school due to excessive tardiness.

Outcome
Motion to reargue granted, and upon reargument, prior decision and order recalled and vacated. Trial court order reversed, motion granted, and matter remitted with instructions.

LexisNexis® Headnotes

Immigration Law > Types of Immigrants > Special Immigrants
HN1 Types of Immigrants, Special Immigrants
Pursuant to 8 U.S.C.S. § 1101(a)(27)(J) (as amended by the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044) and 8 C.F.R. § 204.11, a "special immigrant" is a resident alien who, inter alia, is under 21 years of age, is unmarried, and has been legally committed to, or placed under the custody of, an individual appointed by a state or juvenile court. Additionally, for a juvenile to qualify for special immigrant juvenile status, a court must find that reunification of the juvenile with one or both of the juvenile's parents is not viable due to parental abuse, neglect, abandonment, or a similar basis found under state law, § 1101(a)(27)(J)(i), and that it would not be in the juvenile's best interests to be returned to his or her native country or country of last habitual residence, § 1101(a)(27)(J)(ii), § 204.11(c)(6). More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Civil Procedure > Appeals > Standards of Review
HN2 Appeals, Standards of Review
While the credibility assessment of a hearing court is accorded considerable deference on appeal, where a family court's credibility determination is not supported by the record, an appellate court is free to make its own credibility assessments and overturn the determination of the hearing court. More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Headnotes/Summary

Headnotes
Aliens—Immigration—Special Immigrant Juvenile Status—Reunification with Parents Not Viable Based on Neglect

Counsel: [***1] Fried, Frank, Harris, Shriver & Jacobson, LLP, New York, NY (Jennifer L. Colyer and Michael P. Sternheim of counsel), for appellant.

Judges: RUTH C. BALKIN, J.P., SHERI S. ROMAN, SYLVIA O. HINDS-RADIX, HECTOR D. LASALLE, JJ. ROMAN, HINDS-RADIX and LASALLE, JJ., concur. BALKIN, J.P., dissents.

Opinion
[**135] [*712] Motion by the appellant, inter alia, for leave to reargue an appeal from an order of the Family Court, Queens County, dated August 22, 2016, which was determined by decision and order of this Court dated August 9, 2017.

Upon the papers filed in support of the motion and no papers having been filed in opposition or in relation thereto, it is

Ordered that the motion is granted to the extent that leave [*713] to reargue is granted, and upon reargument, the decision and order of this Court dated August 9, 2017 (153 AD3d 628, 57 NYS3d 415), is recalled and vacated, the following decision and order is substituted therefor, nunc pro tunc to August 9, 2017, and the motion is otherwise denied:

Appeal by the child from an order of the Family Court, Queens County (Nicolette M. Pach, J.H.O.), dated August 22, 2016. The order, insofar as appealed from, upon renewal and reargument, adhered to the original determination in a prior order [***2] of that court dated March 29, 2016, in effect, denying that branch of the child's motion [**136] which was for a specific finding that reunification of the child with one or both of his parents is not viable due to parental neglect.

Ordered that the order dated August 22, 2016, is reversed insofar as appealed from, on the facts, without costs or disbursements, upon renewal and reargument, the determination in the order dated March 29, 2016, in effect, denying that branch of the child's motion which was for a specific finding that reunification of the child with one or both of his parents is not viable due to parental neglect is vacated, that branch of the motion is granted, it is found that reunification of the child with one or both of his parents is not viable due to parental neglect, and the matter is remitted to the Family Court, Queens County, for the entry of an order making the requisite declaration and specific findings so as to enable the child to petition the United States

Citizenship and Immigration Services for special immigrant juvenile status, which includes the finding that reunification of the child with one or both of his parents is not viable on the ground of parental neglect. [***3]

In April 2015, Dennis X.G.D.V. (hereinafter the child) filed a petition pursuant to Family Court Act article 6 for the father to be appointed as his guardian. The child subsequently [****2] moved for the issuance of an order making the requisite declaration and specific findings so as to enable him to petition the United States Citizenship and Immigration Services for special immigrant juvenile status (hereinafter SIJS) pursuant to 8 USC § 1101 (a) (27) (J). In an order dated March 29, 2016, made after a hearing, the Family Court found that the child was under 21 years of age, unmarried, and dependent on the court, and that it would not be in his best interests to be returned to El Salvador, his previous country of nationality and last habitual residence. However, the court, in effect, denied that branch of the child's motion which was for a specific finding that reunification of the child with one or both of his parents is not [*714] viable on the ground of parental neglect. Thereafter, the child moved for leave to renew and reargue that branch of his prior motion. In an order dated August 22, 2016, the court, upon renewal and reargument, adhered to the original determination in the order dated March 29, 2016.

HN1 Pursuant to 8 USC § 1101 (a) (27) (J) (as amended by the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub L 110-457, 122 US Stat 5044) and 8 CFR 204.11, [***4] a "special immigrant" is a resident alien who, inter alia, is under 21 years of age, is unmarried, and has been legally committed to, or placed under the custody of, an individual appointed by a state or juvenile court. Additionally, for a juvenile to qualify for SIJS, a court must find that reunification of the juvenile with one or both of the juvenile's parents is not viable due to parental abuse, neglect, abandonment, or a similar basis found under state law (see 8 USC § 1101 [a] [27] [J] [i]; Matter of Marvin E.M. de P. [Milagro C.C.—Mario Enrique M.G.], 121 AD3d 892, 893, 994 NYS2d 377 [2014]; Matter of Maria P.E.A. v Sergio A.G.G., 111 AD3d 619, 620, 975 NYS2d 85 [2013]; Matter of Trudy-Ann W. v Joan W., 73 AD3d 793, 795, 901 NYS2d 296 [2010]), and that it would not be in the juvenile's best interests to be returned to his or her native country or country of last habitual residence (see 8 USC § 1101 [a] [27] [J] [ii]; 8 CFR 204.11 [c] [6]; Matter of Marvin E.M. de P. [Milagro C.C.—Mario Enrique M.G.], 121 AD3d at 893; Matter of Maria P.E.A. v Sergio A.G.G., 111 AD3d at 620; Matter of Trudy-Ann W. v Joan W., 73 AD3d at 795).

[**137] HN2 While the credibility assessment of a hearing court is accorded considerable deference on appeal (see Matter of Arthur G. [Tiffany M.], 112 AD3d 925, 926, 978 NYS2d 286 [2013]; Matter of Marte v Biondo, 104 AD3d 947, 960 NYS2d 914 [2013]; Matter of Aranova v Aranov, 77 AD3d 740, 741, 909 NYS2d 125 [2010]), where, as here, the Family Court's credibility determination is not supported by the record, this Court is free to make its own credibility assessments and overturn the determination of the hearing court (see Matter of Jasmine W. [Michael J.], 132 AD3d 774, 775, 18 NYS3d 636 [2015]; Matter of Arthur G. [Tiffany M.], 112 AD3d at 926; Matter of Serenity S. [Tyesha A.], 89 AD3d 737, 739, 931 NYS2d 693 [2011]). Based upon our independent factual review, we conclude [***5] that the record supports a finding that reunification of the child with his mother is not a viable option based upon parental neglect. **The record reflects that the mother failed to meet the educational needs of the child (see Matter of Wilson A.T.Z. [Jose M.T.G.—Manuela Z.M.],**

147 AD3d 962, 963, 48 NYS3d 415 [2017]). The child testified that, although he was prevented from attending school by gang members who beat him while walking to school, the mother did not arrange [*715] for transportation, which was within her financial means, but instead, told him to stay home. Additionally, the child was expelled from one school due to excessive tardiness, and he failed the seventh grade (see id.; see also Matter of Kiamal E. [Kim R.], 139 AD3d 1062, 1063, 30 NYS3d 830 [2016]; Matter of Justin R. [Gilbert R.], 127 AD3d 758, 759, 7 NYS3d 232 [2015]). Further, the mother did not provide adequate supervision, often leaving the then eight-year-old child home alone at night in the neighborhood where he had encountered the gang violence (see Matter of Alan B., 267 AD2d 306, 307, 700 NYS2d 200 [1999]).

The child's remaining contentions either are without merit or need not be addressed in light of our determination.

Accordingly, the Family Court should have, upon renewal and reargument, granted that branch of the child's motion which was for a specific finding that reunification with one or both of his parents is not viable on the ground of parental neglect. Since the record is sufficient for [***6] this Court to make its own findings of fact and conclusions of law, we find that reunification of the child with one or both of his parents is not viable due to parental neglect (see Matter of Varinder S. v Satwinder S., 147 AD3d 854, 856, 47 NYS3d 76 [2017]). Roman, Hinds-Radix and LaSalle, JJ., concur.

Dissent by: BALKIN

Dissent
Balkin, J.P., dissents, and votes to affirm the order insofar as appealed from, with the following memorandaum: Under 8 USC § 1101 (a) (27) (J), as amended, a "special immigrant" is a resident alien who is, inter alia, under 21 years of age, unmarried, and dependent upon a juvenile court or legally committed to an individual appointed by a state or juvenile court (see Matter of Trudy-Ann W. v Joan W., 73 AD3d 793, 795, 901 NYS2d 296 [2010]). For juveniles to qualify for special immigrant juvenile status, courts must find that their reunification with one or both parents is not viable due to, among other things, parental abuse, neglect, or abandonment, and that it would not be in their best interests to be returned to their native country (see Matter of Marvin E.M. de P. [Milagro C.C.—Mario Enrique M.G.], 121 AD3d 892, 893, 994 NYS2d 377 [2014]; Matter of Trudy-Ann W. v Joan W., 73 AD3d at 795; 8 USC § 1101 [a] [27] [J]; 8 CFR 204.11 [c] [6]).

Here, the Family Court, upon renewal and reargument, declined to find that the [**138] mother abandoned, neglected, or abused the child. The court's finding rested, in large part, on its determination that the child was not credible. Although we have the power to conduct our own "independent factual review," we [***7] generally accord deference to the Family Court's credibility determinations and are reluctant to disturb them [*716] unless they are clearly unsupported by the record (see Matter of Porter v Moore, 149 AD3d 1082, 1083, 53 NYS3d 174 [2017]; Matter of Andrew R. [Andrew R.], 146 AD3d 709, 710, 46 NYS3d 87 [2017]; Matter of

Brandon V., 133 AD3d 769, 769-770, 20 NYS3d 385 [2015]). I find no basis on this record to reject the court's credibility determinations, which the court explained in detail, both in its original determination of March 29, 2016, and in its order upon renewal and reargument dated August 22, 2016. Moreover, even aside from the court's credibility determinations as to the child, I agree with the court's well-founded conclusion that the mother has always been, and continues to be, a resource for her son.

Accordingly, I would affirm that part of the Family Court's order as declined to find that reunification of the child with his mother is not viable on the basis of neglect, abandonment, or abuse (see Matter of Christian P.S.-A. [Humberto R.S.-B.—Laura S.A.-C.], 148 AD3d 1032, 1034, 49 NYS3d 546 [2017]).

Matter of Briceyda M. A. X. (Hugo R. A. O.--Maria H. X. C.), 190 AD3d 752, 753-754 [2d Dept 2021

While the credibility assessment of a hearing court is accorded considerable deference on appeal, [***4] where, as here, the Family Court's credibility determination is not supported by the record, this Court is free to make its own credibility assessments and overturn the determination of the hearing court'" (Matter of Norma U. v Herman T.R.F., 169 AD3d 1055, 1056-1057, 94 N.Y.S.3d 636, quoting Matter of Dennis X.G.D.V., 158 AD3d 712, 714, 71 N.Y.S.3d 135). Here, based upon our independent factual review, the record supports a finding that reunification of the

children with their father is not viable due to the father's abandonment of the children Briceyda M. A. X. and Dulce P. A. X., and educational [*754] neglect of the child Ingrid C. A. X. (see Matter of Victor R.C.O. , 101 N.Y.S.3d 196[Canales], 172 AD3d 1071, 1072, 101 N.Y.S.3d 196; Matter of Rina M.G.C. [Oscar L.G.-Ana M.C.H.], 169 AD3d 1031, 1033, 94 N.Y.S.3d 616; Matter of Dennis X.G.D.V., 158 AD3d at 714-715; Matter of Enis A.C.M. [Blanca E.M.-Carlos V.C.P.], 152 AD3d 690, 692, 59 N.Y.S.3d 396; Matter of Diaz v Munoz, 118 AD3d 989, 991, 989 N.Y.S.2d 52). Further, the record supports a finding that it would not be in the best interests of the children to return to Guatemala, their previous country of nationality or country of last habitual residence (see Matter of Guardianship of Keilyn GG. [Marlene HH.], 159 AD3d 1295, 1297, 74 N.Y.S.3d 378; Matter of Diaz v Munoz, 118 AD3d at 991; Matter of Marcelina M.-G. v Israel S., 112 AD3d 100, 109, 973 N.Y.S.2d 714).

(Matter of Briceyda M. A. X. (Hugo R. A. O.--Maria H. X. C.), 190 AD3d 752, 753-754 [2d Dept 2021])

ABUSE/SIJS:

§ 1012. Definitions
(e) “Abused child” means a child less than eighteen years of age whose parent or other person legally responsible for his care
(i) **inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ, or**
(ii) creates or allows to be created a substantial risk of physical injury to such child by other than accidental means which would be likely to cause death or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ, or
(iii)(A) commits, or allows to be committed an offense against such child defined in article one hundred thirty of the penal law; (B) allows, permits or encourages such child to engage in any act described in sections 230.25, 230.30, 230.32 and 230.34-a of the penal law; (C) commits any of the acts described in sections 255.25, 255.26 and 255.27 of the penal law; (D) allows such child to engage in acts or conduct described in article two hundred sixty-three of the penal law; or (E) permits or encourages such child to engage in any act or commits or allows to be committed against such child any offense that would render such child either a victim of sex trafficking or a victim of severe forms of trafficking in persons pursuant to 22 U.S.C. 7102 as enacted by public law 106-386 or any successor federal statute; (F) provided, however, that (1) the corroboration requirements contained in the penal law and (2) the age requirement for the application of article two hundred sixty-three of such law shall not apply to proceedings under this article.

(Family Ct Act § 1012 (Consol., Lexis Advance through 2021 released Chapters 1-579))

Note: If seeking a finding of “Abuse”, Petitioner must be mindful of the definition of abuse pursuant to the Family Court Act.

ABANDONMENT:

§ 115. Jurisdiction of family court
(a) The family court has exclusive original jurisdiction over
(iv) proceedings to permanently terminate parental rights to guardianship and custody of a child: (A) by reason of permanent neglect, as set forth in part one of article six of this act and paragraph (d) of subdivision four of section three hundred eighty-four-b of the social services law, (B) by reason of mental illness, intellectual disability and severe or repeated child abuse, as set forth in paragraphs (c) and (e) of subdivision four of section three hundred eighty-four-b of the social services law, and (C) by reason of the death of one or both parents, where no guardian of the person of the child has been lawfully appointed, **or by reason of abandonment of the child for a period of six months immediately prior to the filing of the petition, where a child is under the jurisdiction of the family court as a result of a placement in foster care by the family court pursuant to article ten or ten-A of this act or section three hundred fifty-eight-a of the social** services law, unless the court declines jurisdiction pursuant to section three hundred eighty-four-b of the social services law;

Social Services Law §384-b
(a) For the purposes of this section, a child is "abandoned" by his parent if such parent evinces an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or agency, although able to do so and not prevented or discouraged from doing so by the agency. In the absence of evidence to the contrary, such ability to visit and communicate shall be presumed.

(Social Services Law § 384-b (Consol., Lexis Advance through 2021 released Chapters 1-599))

(Family Ct Act § 115 (Consol., Lexis Advance through 2021 released Chapters 1-599))

DEPENDENT ON A JUVENILE COURT, THOSE WHO HAD BEEN PLACED IN THE CUSTODY OF AN INDIVIDUAL OR ENTITY APPOINTED BY A STATE JUVENILE COURT:
The "appointment of a guardian constitutes the necessary declaration of dependency on a juvenile court" for special immigrant juvenile status purposes (Matter of Antowa McD., 50 AD3d 507, [*796] 856 NYS2d 576 [2008]). Since we have appointed [***7] Alcie S. as Trudy-Ann's guardian, Trudy-Ann is dependent on a juvenile court within the meaning of 8 USC § 1101 (a) (27) (J)

(Matter of Trudy-Ann W. v Joan W., 73 AD3d 793, 795-796 [2d Dept 2010])

Here, the subject child is under the age of 21 and unmarried, and since we have appointed the petitioner as the subject child's guardian, the subject child is dependent on a juvenile court within the meaning of 8 USC § 1101(a)(27)(J)(i) (see Matter of Grechel L.J., 167 AD3d at 1013; Matter of Axel S.D.C. v Elena A.C., 139 AD3d at 1052; Matter of Maura A.R.-R. [Santos F.R.—Fidel R.], 114 AD3d 687, 689, 979 N.Y.S.2d 701; Matter of Trudy-Ann W. v Joan W., 73 AD3d at 796).

(Matter of Jose E. S. G., 193 AD3d 856, 858 [2d Dept 2021])

DEATH AS A "SIMILAR BASIS":

REUNIFICATION WITH ONE OR BOTH PARENTS IS NOT VIABLE DUE TO ABUSE, NEGLECT, ABANDONMENT OR SIMILAR BASIS:

An excerpt from Immigration after review of a Family Court SIJS Order:

"a legal conclusion from the juvenile court is required that parental death constitutes abuse, neglect, abandonment , or is legally equivalent to a similar basis under state law."

(Matter of Carlos A.M. v Maria T.M., 141 AD3d 526, 528 [2d Dept 2016])

Based upon our independent factual review, the record establishes that the child's father is deceased, and therefore, reunification of the child with the father is not possible (see Matter of Luis R. v Maria Elena G., 120 AD3d 581, 583, 990 NYS2d 851 [2014]; Matter of Emma M., 74 AD3d 968, 902 NYS2d 651 [2010]). Further, the Family Court erred with respect to its recital of the best interest element. HN2 **The law does not require a finding that "it is in [the child's] best interest to remain in the United States," but that "it would not be in the [child's] best interest to be returned to [his or her] previous country of nationality or country of last habitual residence" (8 USC § 1101 [a] [27] [J] [ii]).** Here, the record reflects that it would not be in [***5] the child's best interest to be returned to El Salvador, her previous country of nationality and last habitual residence.

(Matter of Carlos A.M. v Maria T.M., 141 AD3d 526, 528 [2d Dept 2016])

Based upon our independent factual review, the record establishes that the child's father is deceased, and therefore, reunification is not possible (see Matter of Cristal M.R.M., 118 AD3d 889, 987 NYS2d 614 [2014]). **Since the statutory reunification requirement may be satisfied upon a finding that reunification is not viable with just one parent, we need not address the petitioner's [*583] contention that the record supports the conclusion that the child's reunification with his mother was not a viable option** (see Matter of Gabriel H. M. [Juan B. F.], 116 AD3d at 857; Matter of Marcelina M.-G. v Israel S., 112 AD3d 100, 110-113, 973 NYS2d 714 [2103]).

(Matter of Luis R. v Maria Elena G., 120 AD3d 581, 582-583 [2d Dept 2014])

(Matter of Denia M. E. C. v Carlos R. M. O., 161 AD3d 853, 855 [2d Dept 2018])

Thus, the Family Court erred in denying the mother's motion for the issuance of an order making the requisite declaration and special findings so as to enable the child to petition for SIJS. [***5] Since the record is sufficient for this Court to make its own findings of fact and conclusions of law, **we find that the child is eligible to petition for SIJS status, that reunification of the child with one or both of his parents is not viable due to the death of his father**, and that it would not be in the best interests of the child to be returned to Honduras.

(Matter of Denia M. E. C. v Carlos R. M. O., 161 AD3d 853, 855 [2d Dept 2018])

(Matter of Jose YY., 158 AD3d 200, 202 [3d Dept 2018])
There is no dispute that the child was under the age of 21 and unmarried when he filed the motion at issue. Family Court denied the application upon finding that he failed to meet the third, fourth and fifth [***4] factors. The court erred on each count. The third factor of dependency was established by virtue of the court having already appointed a permanent guardian for the child (see Matter [**735] of Fifo v Fifo, 127 AD3d 748, 749, 6 NYS3d 562 [2015]; Matter of Trudy-Ann W. v Joan W., 73 AD3d 793, 794-795, 901 NYS2d 296 [2010]). **The record further establishes that both parents are deceased making reunification impossible. This orphan status, effectively leaving the child abandoned and/or a destitute child, falls within the "similar basis" category of factor four** (see Family Ct Act §§ 1012 [e], [f]; 1092 [a] [1]; Matter of Carlos A.M. v Maria T.M., 141 AD3d 526, 528, 35 NYS3d 406 [2016]; Matter of Victor C.-G. v Santos C.-T., 140 AD3d 951, 953, 34 NYS3d 117 [2016]; Matter of Luis R. v Maria Elena G., 120 AD3d 581, 582, 990 NYS2d 851 [2014]).

(Matter of Jose YY., 158 AD3d 200, 202 [3d Dept 2018])

Surrogates Court Procedure Act (§1702-1707):

§ 1702. Jurisdiction
1. Where an infant has no guardian the court may appoint a guardian of his person or property, or of both, in the following cases:
(a) **Where the infant is domiciled in that county or has sojourned therein immediately preceding the application.**
(b) Where the infant is a non-domiciliary of the state but has property situate in that county.

(SCPA § 1702 (Consol., Lexis Advance through 2021 released Chapters 1-579))

§ 1703. Petition for appointment; by whom made

A petition for the appointment of a guardian of the person or property, or both, of an infant may be made by any person on behalf of the infant or if the infant be over the age of fourteen years, it may be made by the infant. A petition for appointment as a guardian of the property of an infant may also be made by the public administrator of the county in which the infant resides where no one else is available to serve as guardian. The court may grant such a petition of the public administrator upon its certification that all other efforts to appoint a guardian have been exhausted. A petition for appointment as a permanent guardian of an infant or child may be brought by any person on behalf of the infant or child.

(SCPA § 1703 (Consol., Lexis Advance through 2021 released Chapters 1-579))

§ 1704. Petition for appointment; contents

A petition for the appointment of a guardian of an infant must show:

1. The full name, domicile and date of birth of the infant.

2. **The names of the parents** whose consent to the adoption of a child would have been required pursuant to section one hundred eleven of the domestic relations law or who was entitled to notice of an adoption proceeding pursuant to section one hundred eleven-a of the domestic relations law, and whether or not they are living or have had their parental rights terminated pursuant to section three hundred eighty-three-c, section three hundred eighty-four or section three hundred eighty-four-b of the social services law or section six hundred thirty-one of the family court act, and if living, **their domiciles**, the name and address of the person with whom the infant resides and the names and addresses of the nearest distributees of full age who are domiciliaries, if both parents are dead.

3. Whether the infant has had at any time a guardian appointed by will or deed or an acting guardian in socage or guardianship and custody committed pursuant to section three hundred eighty-three-c, three hundred eighty-four or three hundred eighty-four-b of the social services law or section six hundred thirty-one of the family court act.

4. The estimated value of the real and personal property and of the annual income therefrom to which the infant is entitled.

5. If the infant is a non-domiciliary married person and the petition relates to personal property only, that the property is not subject to the control or disposition of the person's spouse by the law of his or her domicile, and the name and domicile of his or her spouse.

6. **Whether the petitioner has knowledge that a person nominated to be a guardian therein, or any individual eighteen years of age or over who resides in the home of the proposed guardian is a subject of an indicated report, as such terms are defined in section four hundred twelve of the social services law, filed with the statewide central register of child abuse and maltreatment pursuant to title six of article six of the social services law, or has been the subject of or the respondent in a child protective proceeding commenced under article ten of the family court act, which proceeding resulted in an order finding that the child is an abused or neglected child.**

7. **The petition may state the reasons why a person nominated would be a suitable guardian and if either parent be living why either of them should not be appointed guardian**.

8. In addition, the petition for appointment of a permanent guardian of an infant or child **shall include:**

(a) an assessment to be performed by the local social services district, which shall contain:

(i) the full name and address of the person seeking to become the guardian;

(ii) the ability of the guardian to assume permanent care of the child;

(iii) the child's property and assets, if known;

(iv) the wishes of the child, if appropriate;

(v) **the results of the criminal history record check with the division of criminal justice services of the guardian and any person eighteen years of age or older residing in the guardian's household conducted by the office of children and family services pursuant to subdivision two of section three hundred seventy-eight-a of the social services law if such a criminal history record check has been completed;**

(vi) the results of a search of the statewide central register of child abuse and maltreatment records regarding the guardian and any person eighteen years of age or older residing in the guardian's household, including whether such person has been the subject of an

indicated report conducted pursuant to subparagraph (e) of paragraph (A) of subdivision four of section four hundred twenty-two of the social services law, if such a search has been conducted; and
(vii) the results of all inspections and assessments of the guardian's home and the child's progress while placed in the home, if any;
(b) a certified copy of the order or orders terminating the parental rights of the child's parents or approving the surrender of the child or the death certificates of the child's parents, as applicable;
(c) the recommendation of the authorized agency involved, if any; and
(d) the suitability, ability and commitment of the permanent guardian to assume full legal responsibility for the child and raise the child to adulthood.

(SCPA § 1704 (Consol., Lexis Advance through 2021 released Chapters 1-579))

§ 1705. Persons to be served
1. Upon presentation of the petition process shall issue:
(a) **To the parent or parents, and if the infant is married, to the spouse, if such persons are within the state and their residences therein are known, or if there be none, to the grandparents who are within the county.**
(b) To the person having the care and custody of the infant or with whom he resides.
(c) **If the application is made in behalf of an infant over the age of 14 years by any person, to the infant.**
2. **No process shall be necessary to a parent who has abandoned the infant or is deprived of civil rights or divorced from the parent having legal custody of the infant or an incompetent or who is otherwise judicially deprived of the custody of the infant or in case the infant is married to a spouse who has abandoned the infant or is deprived of civil rights or divorced or an incompetent**.
3. The court shall ascertain so far as practicable what relatives of the infant are domiciled in its county or elsewhere and with whom the infant resides and it may issue process to any relative or class of relatives to show cause why the appointment should not be made.

(SCPA § 1705 (Consol., Lexis Advance through 2021 released Chapters 1-579))

§ 1706. Proceedings thereupon

1. Where process is not issued or upon the return of process, the court shall ascertain the age of the infant, the amount of his or her personal property, the gross amount of the rents and profits of his or her real estate during his or her minority and the sufficiency of the security offered by the proposed guardian. **With respect to applications for appointment as a guardian of a child, the guardian shall have the right and responsibility to make decisions, including issuing any necessary consents, regarding the child's protection, education, care and control, health and medical needs, and the physical custody of the person of the child.** A permanent guardian may consent to the adoption of the child. Provided, however, that nothing in this

subdivision shall be construed to limit the ability of a child to consent to his or her own medical care as may be otherwise provided by law. If the youth is over the age of fourteen years, the court shall ascertain his or her preference for a suitable guardian. Notwithstanding any other section of law, where the youth is over the age of eighteen, he or she shall consent to the appointment of a suitable guardian.

2. **The court shall inquire of the office of children and family services and such office shall inform the court whether or not a person nominated to be a guardian of such infant, or any individual eighteen years of age or over who resides in the home of the proposed guardian is a subject of an indicated report or in a report which is under investigation at the time of the inquiry,** as such terms are defined in section four hundred twelve of the social services law, filed with the statewide central register of child abuse and maltreatment pursuant to title six of article six of the social services law. The office shall, upon completion of the investigation, inform the court as to the outcome of such investigation.

(SCPA § 1706 (Consol., Lexis Advance through 2021 released Chapters 1-579))

SERVICE OF PROCESS:

While SCPA §1705 States, "No process shall be necessary to a parent who has abandoned the infant or is deprived of civil rights or divorced from the parent having legal custody of the infant..."

This section of the SCPA was implemented for Guardianship Proceedings in Surrogate's Court, and when implemented, did not contemplate a Guardianship proceeding in which Special Findings are being sought in Family Court. Petitioners' Attorneys frequently ask the Court to waive service over a parent relying on SCPA §1705, however, there are two issues in which Courts may find this problematic:

First, the Court is being asked to waive service upon a parent, based upon an abandonment, prior to making a finding of abandonment. At this stage, abandonment is based upon allegations and not based upon an evidentiary hearing.

Second, the SCPA §1705, which states that "No process shall be necessary to a parent who has abandoned the infant...." refers to the Guardianship Petition and not the Motion for Special Findings.
With respect to the Service of the Motion for Special Findings, the Court may rely on the CPLR, which applies to Family Court Proceedings:

FCA: § 165. Procedure
(a) Where the method of procedure in any proceeding in which the family court has jurisdiction is not prescribed by this act, the procedure shall be in accord with rules adopted by the administrative board of the judicial conference or, if none has been adopted, with the provisions of the civil practice act to the extent they are suitable to the proceeding involved. **Upon the**

effective date of the CPLR, where the method of procedure in any proceeding in which the family court has jurisdiction is not prescribed, the provisions of the civil practice law and rules shall apply to the extent that they are appropriate to the proceedings involved.

CPLR 2103(b)(2) and CPLR 2103 2103(c), allows for service of motion upon an unrepresented party to be effectuated by mail to the last known address. (See Matter of Ramirez v Palacios below.)

Matter of Ramirez v Palacios, 136 A.D.3d 666
Supreme Court of New York, Appellate Division, Second Department

February 3, 2016

2015-06125 (Docket No. V-10530-13)

Reporter
136 A.D.3d 666 * | 25 N.Y.S.3d 242 ** | 2016 N.Y. App. Div. LEXIS 680 *** | 2016 NY Slip Op 00681 ****

[****1] In the Matter of Elida Edith Villatoro Ramirez, Appellant, v Raul Antonio Palacios, Respondent.

Core Terms

immigrant, juvenile, custody, mother's motion, legally committed, special finding, juvenile court, inter alia, reunification, abandonment, appointed, unmarried, viable, best interest, motion papers, issuance, notice of motion, habitual

Case Summary

Overview
HOLDINGS: [1]-The family court should have granted a mother's motion for an order making special findings so as to enable her child to apply for special immigrant juvenile status pursuant to 8 U.S.C.S. § 1101(a)(27)(J) because the child was unmarried and under 21 years of age, reunification with her father was not viable due to parental abandonment, and it would not be in her best interests to return to El Salvador; [2]-The mother was not required to personally serve the father with the motion papers because she appropriately served the motion papers by mailing them to the father's last known address pursuant to CPLR 2103(b)(2) and (c).

Outcome
Order reversed.

LexisNexis® Headnotes

Immigration Law > Types of Immigrants > Special Immigrants
HN1 Types of Immigrants, Special Immigrants
Pursuant to 8 U.S.C.S. § 1101(a)(27)(J), as amended by the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, and 8 C.F.R. § 204.11, a "special immigrant" is a resident alien who, inter alia, is under 21 years of age, is unmarried, and has been legally committed to, or placed under the custody of, an individual appointed by a State or juvenile court. Additionally, for a juvenile to qualify for special immigrant juvenile status, a court must find that reunification of the juvenile with one or both of the juvenile's parents is not viable due to parental abuse, neglect, abandonment, or a similar basis found under State law. 8 U.S.C.S. § 1101(a)(27)(J)(i), and that it would not be in the juvenile's best interests to be returned to his or her native country or country of last habitual residence. 8 U.S.C.S. § 1101(a)(27)(J)(ii), 8 C.F.R. § 204.11(c)(6). More like this Headnote

Shepardize® - Narrow by this Headnote (1)

Headnotes/Summary

Headnotes
Aliens—Immigration—Special Immigrant Juvenile Status

Process—Service of Process

Motions and Orders—Motion Papers—Party Not Prejudiced by Mistake in Notice of Motion—Determination on Merits Appropriate

Counsel: [***1] Bruno Joseph Bembi, Hempstead, NY, for appellant.

Gail Jacobs, Great Neck, NY, attorney for the child.

Judges: THOMAS A. DICKERSON, J.P., L. PRISCILLA HALL, SHERI S. ROMAN, SANDRA L. SGROI, JJ. DICKERSON, J.P., HALL, ROMAN and SGROI, JJ., concur.

Opinion
[**243] [*667]
Appeal from an order of the Family Court, Nassau County (Christopher Pizzolo, Ct. Atty. Ref.), dated March 31, 2015. The order, without a hearing, in effect, denied the mother's motion for the issuance of an order, inter alia, making special findings so as to enable the subject child, Milagro G.P.R., to petition the United States Citizenship and Immigration Services for special immigrant juvenile status pursuant to 8 USC § 1101 (a) (27) (J).

Ordered that the order is reversed, on the law and the facts, without costs or disbursements, the mother's motion for the issuance of an order, inter alia, making special findings so as to enable the subject child, Milagro G.P.R., to petition the United States Citizenship and Immigration Services for special immigrant juvenile status pursuant to 8 USC § 1101 (a) (27) (J) is granted, it is declared that Milagro G.P.R. has been legally committed to, or placed under the custody of, an individual appointed by a State or juvenile court, and it is found [***2] that Milagro G.P.R. is unmarried and under 21 years of age, that reunification with one of her parents is not viable due to parental abandonment, and that it would not be in her best interests to return to El Salvador, her previous country of nationality or last habitual residence.

In November 2013, the mother commenced this proceeding for custody of the subject child, Milagro G.P.R., who was born in El Salvador. In June 2014, the mother moved for the issuance of an order, inter alia, making special findings so as to enable the child to petition the United States Citizenship and Immigration Services for special immigrant juvenile status (hereinafter SIJS) pursuant to 8 USC § 1101 (a) (27) (J). In an order dated August 18, 2014, the mother was awarded sole custody of the child. In an order dated March 31, 2015, **the Family Court, in effect, denied the mother's motion on the grounds that the mother failed to personally serve the father with the motion papers and that the notice of motion was "defective" because it erroneously stated that it was made on the "Court's own motion."**

Under the circumstances of this case, the mother was not required to personally serve the father with the motion papers. [*3] Rather, the mother appropriately served the motion papers by mailing them to the father's last known address (see CPLR 2103 [b] [2]; [c]). Further, since no substantial right of any party was prejudiced by the mistake in the mother's notice of motion, the Family Court should have disregarded the mistake [*668] and determined the motion on the merits (see CPLR 2001; Matter of Gomez v Sibrian, 133 AD3d 658, 20 NYS3d 110 [2015]).**

[**244] HN1 Pursuant to 8 USC § 1101 (a) (27) (J) (as amended by the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub L 110-457, 122 US Stat 5044) and [****2] 8 CFR 204.11, a "special immigrant" is a resident alien who, inter alia, is under 21 years of age, is unmarried, and has been legally committed to, or placed under the custody of, an individual appointed by a State or juvenile court. Additionally, for a juvenile to qualify for SIJS, a court must find that reunification of the juvenile with one or both of the juvenile's parents is not viable due to parental abuse, neglect, abandonment, or a similar basis found under State law (see 8 USC § 1101 [a] [27] [J] [i]; Matter of Marcelina M.-G. v Israel S., 112 AD3d 100, 973 NYS2d 714 [2013]; Matter of Trudy-Ann W. v Joan W., 73 AD3d 793, 795, 901 NYS2d 296 [2010]), and that it would not be in the juvenile's best interests to be returned to his or her native country or country of last habitual residence (see 8 USC § 1101 [a] [27] [J] [ii]; 8 CFR 204.11 [c] [6]; Matter of Trudy-Ann W. v Joan W., 73 AD3d at 795).

Here, the child is under the age of 21 and unmarried, and has been "legally committed [***4] to, or placed under the custody of . . . an individual . . . appointed by a State or juvenile court" within the meaning of 8 USC § 1101 (a) (27) (J) (i) (see Matter of Pineda v Diaz, 127 AD3d 1203, 1204, 9 NYS3d 93 [2015]). Furthermore, based upon our independent factual review, we

find that the record fully supports a finding that reunification of the child with the father is not a viable option due to abandonment (see Matter of Diaz v Munoz, 118 AD3d 989, 991, 989 NYS2d 52 [2014]), and that it would not be in the best interests of the child to be returned to El Salvador (see Matter of Marcelina M.-G. v Israel S., 112 AD3d at 114-115). Accordingly, the Family Court should have granted the mother's motion for an order making the requisite special findings so as to enable the child to apply for SIJS. Inasmuch as the record is sufficient for this Court to make its own findings of fact and conclusions of law, we grant the mother's motion, declare that the child has been legally committed to, or placed under the custody of, an individual appointed by a State or juvenile court, and find that the child is unmarried and under 21 years of age, that reunification with one of her parents is not viable due to parental abandonment, and that it would not be in her best interests to return to El Salvador (see Matter of Diaz v Munoz, 118 AD3d at 991; Matter of Marcelina M.-G. v Israel S., 112 AD3d at 115; Matter of Trudy-Ann W. v Joan W., 73 AD3d at 795). Dickerson, J.P., Hall, Roman and Sgroi, JJ., concur.

(Matter of Ramirez v Palacios, 136 AD3d 666 [2d Dept 2016])

SERVICE (CUSTODY/SIJS):

Matter of Ferrera v Serrano, 189 A.D.3d 1230

Supreme Court of New York, Appellate Division, Second Department

December 16, 2020, Decided

2020-04326, 2020-04327, (Docket No. V-6549-19)

Reporter
189 A.D.3d 1230 * | 138 N.Y.S.3d 533 ** | 2020 N.Y. App. Div. LEXIS 7765 *** | 2020 NY Slip Op 07567 **** | 2020 WL 7379716

[****1] In the Matter of Marvin Golman Gutierrez Ferrera, appellant, v Glenda A. Benitez Serrano, respondent.

Notice: THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION. THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE OFFICIAL REPORTS.

Core Terms

specific finding, inter alia, Immigration, issuance, dismiss a petition, father's motion, attesting, verify, affidavit of service, place of business, serving process, due diligence, adjourned, juvenile, custody, summons, server, affix, mail

Counsel: [***1] Bruno Joseph Bembi, Hempstead, NY, for appellant.
Judges: CHERYL E. CHAMBERS, J.P., HECTOR D. LASALLE, ANGELA G. IANNACCI, LINDA CHRISTOPHER, JJ. CHAMBERS, J.P., LASALLE, IANNACCI and CHRISTOPHER, JJ., concur.
Opinion

[*1230] [**534] DECISION & ORDER
In a proceeding pursuant to Family Court Act article 6, the father appeals from (1) an order of the Family Court, Nassau County (Sharon N. Clarke, Ct. Atty. Ref.), dated February 14, 2020, and (2) an order of the same court also dated February 14, 2020. The first order, after a hearing, dismissed the petition without prejudice. The second order denied the father's motion for the issuance of an order, inter alia, making specific findings so as to enable the subject child to petition the United States Citizenship and Immigration Services for special immigrant juvenile status pursuant to 8 USC § 1101(a)(27)(J).

ORDERED that the orders are affirmed, without costs or disbursements.

The father filed a petition for custody of the subject child for the purpose of obtaining an order, inter alia, making specific findings so as to enable the child to petition the United States Citizenship and Immigration Services for special immigrant juvenile status (hereinafter SIJS) pursuant to 8 USC § 1101(a)(27)(J). Thereafter, the father moved for the issuance of [***2] an order making the requisite declaration and specific findings so as to enable the child to petition for SIJS.

Along with the petition, the father submitted affidavits of service attesting that, after three unsuccessful attempts to serve the mother at a residence in Honduras, the "affix and mail" method of service was utilized (see CPLR 308[4]). However, since the process server had not attested to any efforts he had made to verify that the address at which service was attempted was, in fact, the mother's residence, the Family Court twice adjourned the matter to allow the father time to [*1231] verify the mother's address. As of the final adjourned date, the father had not submitted any further information or an updated affidavit of service. The court therefore dismissed the petition without prejudice. The court further denied the father's motion for the issuance of an order, inter alia, making the [**535] requested specific findings so as to enable the child to petition for SIJS.

If service cannot be effected, with due diligence, pursuant to CPLR 308(1) or (2), a party may serve process by affixing the summons and petition to the door of the recipient's "actual place of business, dwelling place or usual place of abode," and [***3] by mailing them either to the last known residence or actual place of business (CPLR 308[4]; see also Domestic Relations Law § 75-g; CPLR 313). "The due diligence requirement of CPLR 308(4) must be strictly observed, given the reduced likelihood that a summons served pursuant to that section will be received" (Gurevitch v Goodman, 269 AD2d 355, 355, 702 N.Y.S.2d 634; see McSorley v Spear, 50 AD3d 652, 653, 854 N.Y.S.2d 759).

Here, where the father listed the mother's address as "unknown" on the petition and testified at a hearing that he had no information about the mother's whereabouts since the parties had separated 13 or 14 years earlier, the process server's three attempts to serve process at an address in Honduras, without attesting to any efforts to verify that this was the mother's address, did not constitute due diligence (see Holbeck v Sosa-Berrios, 161 AD3d 957, 958, 77 N.Y.S.3d 516; McSorley v Spear, 50 AD3d at 653). Accordingly, we agree with the Family Court's determination dismissing the petition without prejudice.

Furthermore, we agree with the Family Court's determination denying the father's motion for the issuance of an order, inter alia, making specific findings so as to enable the child to petition for SIJS, since, in light of the dismissal of the custody petition, it could not be shown that the child was dependent upon the Family Court (see 8 USC § 1101[a][27][J][i]; 8 CFR 204.11; Matter of Hei Ting C., 109 AD3d 100, 104, 969 N.Y.S.2d 150).

CHAMBERS, J.P., LASALLE, IANNACCI and CHRISTOPHER, JJ., concur.

WAIVER CASE: **CUSTODY/SIJS**

Matter of Gomez v Sibrian, 133 A.D.3d 658
Supreme Court of New York, Appellate Division, Second Department

November 12, 2015, Decided

2015-03740 (Docket No. V-1009-14)

Reporter
133 A.D.3d 658 * | 20 N.Y.S.3d 110 ** | 2015 N.Y. App. Div. LEXIS 8313 *** | 2015 NY Slip Op 08165 ****

[****1] In the Matter of Carminda Sanchez Gomez, Appellant, v Fredy Garcia Sibrian, Respondent.

Core Terms

immigrant, juvenile, custody, issuance, mother's motion, special finding, inter alia, legally committed, juvenile court, reunification, abandonment, appointed, unmarried, viable, waive, best interest, motions, service of process, right to notice, motion papers, consented, habitual, hearings

Case Summary

Overview
HOLDINGS: [1]-A mother was not required to personally serve a father as he had waived service of process and his right to notice of any future hearings on this matter in the family court, including of a hearing on the mother's motions for special findings to enable the child to petition for special immigrant juvenile status under 8 U.S.C.S. § 1101(a)(27)(J); [2]-As no substantial right of any party was prejudiced, the court should have disregarded the mistake in the mother's notices of motions and ruled on the merits under CPLR 2001; [3]-The child was under 21 and unmarried, and had been legally committed to, or placed under the custody of an individual appointed by a State or juvenile court for § 1101(a)(27)(J)(I) purposes; [4]-Reunification of the child with the father was not a viable option due to abandonment and it was not in the child's best interests to be returned to Honduras.

Outcome
Order reversed. Mother's motions granted. Findings made.

LexisNexis® Headnotes

Immigration Law > Types of Immigrants > Special Immigrants
HN1 Types of Immigrants, Special Immigrants
Pursuant to 8 U.S.C.S. § 1101(a)(27)(J) (as amended by the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044, and 8 C.F.R. § 204.11), a "special immigrant" is a resident alien who, inter alia, is under 21 years of age, is unmarried, and has been legally committed to, or placed under the custody of, an individual appointed by a State or juvenile court. Additionally, for a juvenile to qualify for special immigrant juvenile status, a court must find that reunification of the juvenile with one or both of the juvenile's parents is not viable due to parental abuse, neglect, abandonment, or a similar basis found under State law (§ 1101(a)(27)(J)(i)), and that it would not be in the

juvenile's best interests to be returned to his or her native country or country of last habitual residence (§§ 1101(a)(27)(J)(ii) and 204.11(c)(6)). More like this Headnote

Shepardize® - Narrow by this Headnote (4)

Headnotes/Summary

Headnotes
Aliens—Immigration—Special Immigrant Juvenile Status

Counsel: [***1] Bruno Joseph Bembi, Hempstead, N.Y., for appellant.

Lisa Siano, Merrick, N.Y., attorney for the child.

Judges: L. PRISCILLA HALL, J.P., SHERI S. ROMAN, SANDRA L. SGROI, SYLVIA O. HINDS-RADIX, JJ. HALL, J.P., ROMAN, SGROI and HINDS-RADIX, JJ., concur.

Opinion
[*658] [**110] Appeal from an order of the Family Court, Nassau County (Christopher Pizzolo, Ct. Atty. Ref.), dated March 31, 2015. The order, without a hearing, in effect, denied the mother's motions for the issuance of an order, inter alia, making special findings so as to enable the subject child, Jose Fredy Garcia Sibrian, to petition the United States Citizenship and Immigration [**111] Services for special immigrant juvenile status pursuant to 8 USC § 1101 (a) (27) (J).

Ordered that the order is reversed, on the law and the facts, without costs or disbursements, the mother's motions for the issuance of an order, inter alia, making special findings so as to enable the subject child, Jose Fredy Garcia Sibrian, to petition the United States Citizenship and Immigration Services for special immigrant juvenile status pursuant to 8 USC § 1101 (a) (27) (J) are granted, it is declared that Jose Fredy Garcia Sibrian has been legally committed to, or placed under the custody of, an individual appointed by a State [***2] or juvenile court, and it is found that Jose Fredy Garcia Sibrian is unmarried and under 21 years of age, that reunification with one of his parents is not viable due to parental abandonment, and that it would not be in his best interests to return to Honduras, his previous country of nationality or last habitual residence.

In January 2014, the mother commenced this proceeding for custody of the subject child, Jose Fredy Garcia Sibrian, who was born in Honduras. In March 2014, the father, who also lived in Honduras, executed a document consenting, inter alia, to an award of custody of the child to the mother, to "waive[ ] the issuance of service of process in this matter," and to "waive[ ] the right to notice of any future hearings on this matter in the Family Court of Nassau County." In May 2014, the mother moved for the issuance of an order, inter alia, making special findings so as to enable the child to petition the United States

Citizenship and Immigration Services (hereinafter USCIS) for special immigrant juvenile status (hereinafter SIJS) pursuant to 8 USC § 1101 (a) (27) (J). In an order dated August 20, 2014, [*659] the mother was awarded sole custody of the child upon the father's consent. Thereafter, the [***3] mother, prior to a determination on her earlier motion, again moved for the issuance of an order, among other things, making special findings so as to enable the child to petition for SIJS. **In an order dated March 31, 2015, the Family Court, in effect, denied the mother's motions on the grounds that the mother failed to personally serve the father with the motion papers and that the motions were "defective" because they erroneously stated that they were made on the "Court's own motion."**

Under the circumstances of this case, the mother was not required to personally serve the father with the motion papers. The father consented to "waive[ ] the issuance of service of process in this matter," and to "waive[ ] the right to notice of any future hearings on this matter in the Family Court of Nassau County," which would include a hearing on the subject motions. Further, since no substantial right of any party was prejudiced by the mistake in the mother's notices of motion, the court should have disregarded the mistake and determined the motions on the merits (see CPLR 2001).

HN1 Pursuant to 8 USC § 1101 (a) (27) (J) (as amended by the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub L 110-457, 122 [***4] US Stat 5044) and 8 CFR 204.11, a "special immigrant" is a resident alien who, inter alia, is under 21 years of age, is unmarried, and has been legally committed to, or placed under the custody of, an individual appointed by a State or juvenile court. Additionally, for a juvenile to qualify for SIJS, a court must find that reunification of the juvenile with one or both of the juvenile's parents is not viable due to parental abuse, neglect, abandonment, or a similar basis found under State law (see 8 USC § 1101 [a] [27] [J] [i]; Matter of Marcelina M.-G. v Israel S., 112 AD3d 100, 973 NYS2d 714 [2013]; Matter of Trudy-Ann W. v Joan W., 73 AD3d 793, 795, [**112] 901 NYS2d 296 [2010]), and that it would not be in the juvenile's best interests to be returned to his or her native country or country of last habitual residence (see 8 USC § 1101 [a] [27] [J] [ii]; 8 CFR 204.11 [c] [6]; Matter of Trudy-Ann W. v Joan W., 73 AD3d at 795).

Here, the child is under the age of 21 and unmarried, and has been "legally committed to, or placed under the custody of . . . an individual appointed by a State or juvenile court" within the meaning of 8 USC § 1101 (a) (27) (J) (I) (see Matter of Pineda v Diaz, 127 AD3d 1203, 1204, 9 NYS3d 93 [2015]). Furthermore, based upon our independent factual review, we find that the record fully supports a finding that reunification of the child [*660] with the father is not a viable option due to abandonment (see Matter of Pineda v Diaz, 127 AD3d at 1204; Matter of Marcelina M.-G. v Israel S., 112 AD3d at 104), and that it would not be in the best interests of the child to be returned to Honduras (see Matter of Gabriela Y.U.M. [Palacios], 119 AD3d 581, 583-584, 989 NYS2d 117 [2014]; Matter of Trudy-Ann W. v Joan W., 73 AD3d at 796). Accordingly, the Family Court should [***5] have granted the mother's motions for an order making the requisite special findings so as to enable the child to apply for SIJS. Inasmuch as the record is sufficient for this Court to make its own findings of fact and conclusions of law, the mother's motions are granted, we declare that the child has been legally committed to, or placed under the custody of, an individual appointed by a State or juvenile court, and we find that the child is unmarried and under 21 years of age, that reunification with one of his parents is not

viable due to parental abandonment, and that it would not be in his best interests to return to Honduras (see Matter of Diaz v Munoz, 118 AD3d 989, 991, 989 NYS2d 52 [2014]; Matter of Marcelina M.-G. v Israel S., 112 AD3d at 115; Matter of Trudy-Ann W. v Joan W., 73 AD3d at 795).

In light of our determination, we need not reach the mother's remaining contentions. Hall, J.P., Roman, Sgroi and Hinds-Radix, JJ., concur.

(Matter of Gomez v Sibrian, 133 AD3d 658 [2d Dept 2015])

NUNC PRO TUNC:

Supreme Court of New York, Appellate Division, Second Department

July 13, 2016, Decided

2014-11722 (Docket No. G-8216-14)

Reporter
142 A.D.3d 165 * | 35 N.Y.S.3d 416 ** | 2016 N.Y. App. Div. LEXIS 5360 *** | 2016 NY Slip Op 05503 ****

[****1] **In the Matter of Maria C. R. (Anonymous), appellant, v Rafael G. (Anonymous), respondent.**

Core Terms

juvenile court, special finding, guardianship petition, immigrant, appointed, years old, guardianship, declaration, alien, fingerprinted, adjourned, juvenile, subject matter jurisdiction, appointment of a guardian, declared dependent, birthday, eligible

Case Summary

Overview
HOLDINGS: [1]-The family court properly dismissed a guardianship petition because the family court lacked jurisdiction to determine the petition once the subject child turned 21 years old, Family Ct Act § 661, and, without guardianship being conferred, the family court lacked authority to issue an order making special findings and a declaration allowing the child to petition the USCIS for special immigrant juvenile status.

Outcome
Order affirmed.

LexisNexis® Headnotes

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Limited Jurisdiction
Immigration Law > Asylum, Refugees & Related Relief > Refugee Status > Eligibility for Refugee Status
View more legal topics
HN1 Jurisdiction Over Actions, Limited Jurisdiction
A family court is a court of limited subject matter jurisdiction and cannot exercise powers beyond those granted to it by statute. Family Ct Act § 661(a) governs guardianship of the person of a minor or infant. Section 661, which had previously been interpreted as applying only to persons under the age of 18, was amended by the Legislature in 2008 in response to the federal law and regulations creating special immigrant juvenile status and making it available to immigrants under the age of 21. More like this Headnote

Shepardize® - Narrow by this Headnote (2)

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions
Family Law > Guardians > Appointment
HN2 Subject Matter Jurisdiction, Jurisdiction Over Actions
See Family Ct Act § 661(a). More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Family Law > Guardians > Appointment
View more legal topics
HN3 Guardians, Appointment
While SCPA 1707(2) provides that the term of appointment of a guardian does not expire when the child turns 18 where the child consents to the continuation of or appointment of a guardian after his or her eighteenth birthday, that provision states that in such case the term of appointment expires on the child's twenty-first birthday, or after such other shorter period as the court establishes upon good cause shown. More like this Headnote

Shepardize® - Narrow by this Headnote (3)1

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions
View more legal topics
HN4 Subject Matter Jurisdiction, Jurisdiction Over Actions
Where a court is divested of subject matter jurisdiction, it cannot exercise such jurisdiction by virtue of an order nunc pro tunc. More like this Headnote

Shepardize® - Narrow by this Headnote (3)1

Family Law > Guardians > Appointment
Immigration Law > Asylum, Refugees & Related Relief > Refugee Status > Eligibility for Refugee Status
View more legal topics
HN5 Guardians, Appointment
In 2008, Congress amended the special immigrant juvenile status (SIJS) provision. In the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Congress expanded the definition of who qualified as a "special immigrant juvenile," enabling more children to qualify for that status. Pub. L. No. 110-457, 122 Stat. 5044. These amendments, inter alia, broadened eligibility to include, in addition to children declared dependent on a juvenile court, those who had been placed in the custody of an individual or entity appointed by a State or juvenile court. Pub. L. No. 110-457, 122 Stat. 5044, amending 8 U.S.C.S. § 1101(a)(27)(J). Following the 2008 amendments, the United States Department of Homeland Security issued a memorandum explaining that the new language added to the definition of "Special Immigrant Juvenile" meant that a petition filed by an alien on whose behalf a juvenile court appointed a guardian now may be eligible. Thus, as per the 2008 amendments, a "special immigrant" is a resident alien who is under 21 years old, is unmarried, and has been either declared dependent on a juvenile court or legally committed to the custody of an individual appointed by a state or juvenile court. § 1101(a)(27)(J)(i); 8 C.F.R. § 204.11. More like this Headnote

Shepardize® - Narrow by this Headnote (1)

Family Law > Guardians > Appointment
Immigration Law > Asylum, Refugees & Related Relief > Refugee Status > Eligibility for Refugee Status

View more legal topics
HN6 Guardians, Appointment
In New York, a child may request that the family court, recognized as a juvenile court under federal regulations, 8 C.F.R. § 204.11(a), issue an order making special findings and a declaration as part of the process to petition the U.S. Citizenship and Immigration Service for special immigrant juvenile status (SIJS). Specifically, the findings of fact must establish that: (1) the child is under 21 years of age; (2) the child is unmarried; (3) the child is dependent upon a juvenile court or legally committed to an individual appointed by a state or juvenile court, 8 U.S.C. § 1101(a)(27)(H)(i); (4) reunification with one or both parents is not viable due to abuse, neglect, abandonment, or a similar basis, § 1101(a)(27)(J)(i); and (5) it is not in the child's best interests to be returned to his or her home country. § 1101(a)(27)(J)(ii); 8 C.F.R. § 204.11(c). With the declaration and special findings, the eligible child may then seek the consent of the U.S. Department of Homeland Security for SIJS. § 1101(a)(27)(J)(iii). Moreover, pursuant to federal law, a child may not be denied special immigrant status under SIJS after December 23, 2008 based on age if the immigrant was a child on the date on which the immigrant applied for such status. 8 U.S.C.S. § 1232(d)(6). The term "child" for purposes of this statute means an unmarried person under twenty-one years of age. § 1101. More like this Headnote

Shepardize® - Narrow by this Headnote (5)1

Family Law > Guardians > Appointment
Immigration Law > Asylum, Refugees & Related Relief > Refugee Status > Eligibility for Refugee Status
View more legal topics
HN7 Guardians, Appointment
In order for an immigrant child to petition the U.S. Citizenship and Immigration Service for special immigrant juvenile status, a court must make certain special findings. Included among these are that the child is under 21 years of age; that the child is unmarried; and that the child has been declared dependent upon a juvenile court or legally committed to an individual appointed by a state or juvenile court. The requirement that a child be dependent upon the juvenile court or, alternatively, committed to the custody of an individual appointed by a state or juvenile court, ensures that the process is not employed inappropriately by children who have sufficient family support and stability to pursue permanent residency in the United States through other, albeit more protracted, procedures. More like this Headnote

Shepardize® - Narrow by this Headnote (1)

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions
Immigration Law > Asylum, Refugees & Related Relief > Refugee Status > Eligibility for Refugee Status
Family Law > Guardians > Appointment
View more legal topics
HN8 Subject Matter Jurisdiction, Jurisdiction Over Actions
8 U.S.C.S. § 1232(d)(6) only states that special immigrant juvenile status (SIJS) status may not be denied simply because a child "ages out" during the SIJS process. It does not, and indeed cannot, be read to confer subject matter jurisdiction on a family vourt to grant a guardianship

petition for a "child" who is already 21 years old. Guardianship status, which the family court can only grant to individuals under 21, is a condition precedent to a declaration allowing a child to seek SIJS. More like this Headnote

Shepardize® - Narrow by this Headnote (5)1

Counsel: [***1] Bruno Joseph Bembi, Hempstead, NY, for appellant.

Theresa Kloeckener, Lynbrook, NY, attorney for the child.

Judges: L. PRISCILLA HALL, J.P., LEONARD B. AUSTIN, SANDRA L. SGROI, SYLVIA O. HINDS-RADIX, JJ. HALL, J.P., AUSTIN and HINDS-RADIX, JJ., concur.

Opinion by: SGROI

Opinion
[*167] [**417] APPEAL from an order of the Family Court (Elaine J. Stack, J.H.O.), dated November 26, 2014, and entered in Nassau County. The order, without a hearing, dismissed the guardianship petition.

SGROI, J.

OPINION & ORDER
On July 30, 2014, the petitioner filed a petition in the Family Court, Nassau County, pursuant to Family Court Act article 6, to be appointed as guardian of a child who was then 20 years old. The petitioner also sought an order making special findings so as to allow the child to apply for special immigrant juvenile status under federal law. A hearing on the petition was repeatedly adjourned for various reasons, and ultimately scheduled to take place in January 2015. In the interim, however, on October 16, 2014, the child attained the age of 21 years. As a result, the Family Court, Nassau County, issued an order dated November 26, 2014, which, without a hearing, dismissed the guardianship petition "due to lack of jurisdiction." On this appeal, we examine the [***2] propriety of that order and whether certain federal statutes may, in effect, extend the Family Court's jurisdiction to entertain a guardianship petition and issue an order of special findings.

Background
We begin with the underlying factual background to this petition and appeal. Maria L. R. (hereinafter the mother) and Rafael G. (hereinafter the father) are the parents of Santos A. G. R. (hereinafter the child), who was born to them in El Salvador in October 1993. According to the child's affidavit, which was made part of the application in this case, the mother died in 2007 or 2008, when the child was about 14 years old, and the father thereafter essentially abandoned the

child and his 10 siblings. The child further averred that when the mother was alive, the father "fought with her a great deal" while the child was present, "was usually drunk," and "would grab [the] mother and threaten to beat her," and that after the mother died, the father "drank a great deal and found another woman and left [the children] alone at home" and "did not support [the children]." According to the child, the children were supported in El Salvador by an older brother living in the United States who sent [***3] "money to pay for our necessities."

[*168] In 2010, the child left El Salvador and came to the United States to live with a brother in Texas. He lived with the brother for about one year, and then came to New York, where he lived with another brother for two years. In or around December 2013, the child moved in with his friend, Maria C. R. (hereinafter the petitioner). According to the child, the petitioner "has been like a mother to me," [**418] "helps me a lot," and "gives me food, . . . clothing, and a place to live."

Also, according to his affidavit, the child has had virtually no contact and no support from the father since coming to the United States. The child stated that the father has "never asked [****2] me to return to live with him," "has no plan to live with me in the future," and "has no plans for my future." Finally, the child averred that he was "afraid" to return to El Salvador because "[w]hen I was living in El Salvador there were numerous people killed or robbed by the various criminal gangs in my home town."

The Petition and Motion for an Order of Special Findings

On July 30, 2014, when the child was 20 years old, the petitioner filed a petition in Family Court, Nassau County, pursuant to Family Court Act article 6, to [***4] be appointed guardian of the child. The petitioner alleged that "I have taken care of [the child] since I've met him, making sure his needs are met," "I encourage him to continue going to school and better his life," "I feed him and give him all the emotional support he needs," and "I will continue caring for him into adulthood and even after that I will always take care of him." On July 19, 2014, the child consented to the appointment of a guardian until he reached the age of 21.

By notice of motion dated September 1, 2014, the petitioner moved for an order, inter alia, making special findings so as to enable the child to petition the United States Citizenship and Immigration Services (hereinafter USCIS) for special immigrant juvenile status (hereinafter SIJS) pursuant to 8 USC § 1101(a)(27)(J). This motion was supported by, inter alia, the above-referenced affidavit of the child, and a "Waiver of Process, Renunciation, or Consent to Guardianship" form signed by the father, who consented to the appointment of the petitioner as guardian, and who acknowledged that "I have abandoned my son" and "I have no plans to support him in the future."

Court Proceedings

On September 19, 2014, the Family Court adjourned [***5] commencement of a hearing on the petition and the motion until [*169] October 3, 2014, so that the petitioner's husband could be

fingerprinted, and to await a response from the Office of Children and Family Services (hereinafter OCFS) to the petition and motion. The court also appointed an attorney for the child.

On October 3, 2014, the Family Court further adjourned the hearing date to October 14, 2014, to await processing of the fingerprints, which had been obtained on October 2, 2014, and for "a report from OCFS." At that time, the petitioner's attorney informed the court that the child would be turning 21 years old on October 16, 2014, and requested a "temporary order of guardianship today" and to "take the testimony on the issue of special findings this morning." The court denied those requests.

On November 26, 2014, the Family Court noted that the fingerprints had been furnished and received an assurance from the petitioner that she was willing to assume guardianship over the child. The court then indicated that it would grant the order of guardianship, instructed the petitioner to wait for that order, and scheduled a hearing on the petitioner's motion for January 14, 2015. Following [***6] a recess, the court informed the petitioner that, after examining "the papers more closely I realized that [the child] is already 21 years old . . . [and therefore] I am without the jurisdiction to give you an order of guardianship at this time."

[**419] In an order dated November 26, 2014, the Family Court issued an "Order on Motion" denying the petitioner's motion for the issuance of an order, inter alia, making special findings so as to enable the child to petition for SIJS. In a separate order, also dated November 26, 2014, the Family Court dismissed the guardianship petition, with prejudice, "due to lack of jurisdiction."

Discussion

The petitioner contends that it was error for the Family Court to twice adjourn the proceeding when the child was about to turn 21 years old, and that there was sufficient evidence in the record to grant the guardianship petition and motion for special findings prior to the child's 21st birthday. The attorney for the child argues that there was no jurisdictional defect to granting the guardianship petition, since it was filed prior to the child's 21st birthday, and since the Family Court could grant the guardianship petition nunc pro tunc to the date the petition [***7] was filed.

HN1 The Family Court is a court of limited subject matter jurisdiction and "cannot exercise powers beyond those granted to it by [*170] statute" (Matter of Johna M.S. v Russell E.S., 10 NY3d 364, 366, 889 N.E.2d 471, 859 N.Y.S.2d 594; see Matter of Riedel v Vasquez, 88 AD3d 725, 726, 930 N.Y.S.2d 238). Family Court Act § 661(a) governs "[g]uardianship of the person of a minor or infant." That statute, which had previously been interpreted as applying only to persons under the age of 18 (see Matter of Vanessa D., 51 AD3d 790, 858 N.Y.S.2d 687; Matter of Luis A.-S., 33 AD3d 793, 794, 823 N.Y.S.2d 198), was amended by the Legislature in 2008 in response to the federal law and regulations creating special immigrant juvenile status and making it available to immigrants under the age of 21 (see Merril Sobie, 2011 Supp Practice Commentaries, McKinney's Cons Laws of NY, Book 29A, Family Ct Act § 661, 2016 Cum Pocket Part at 135-136). The statute now provides, in pertinent part, that HN2 "[f]or purposes of appointment of a guardian of the person pursuant to this part, the terms infant or minor shall include a person who is less than twenty-one years old who consents to the appointment or

continuation of a guardian after the age of eighteen" [****3] (Family Ct Act § 661[a]; see Matter of Trudy-Ann W. v Joan W., 73 AD3d 793, 901 N.Y.S.2d 296).

By the clear wording of the statute, the Family Court's subject matter jurisdiction to grant the guardianship petition herein expired on the date of the child's 21st birthday, or October 16, 2014 (see Matter of Luis A.-S., 33 AD3d at 794). HN3 While SCPA 1707(2) provides that the term of appointment of a guardian does not expire when the child [*8] turns 18 where the child "consents to the continuation of or appointment of a guardian after his or her eighteenth birthday," that provision states that in such case the term of appointment "expires on [the child's] twenty-first birthday, or after such other shorter period as the court establishes upon good cause shown" (emphasis added). Nor is there any authority for the contention by the attorney for the child that "there was no jurisdictional defect" because the Family Court "had full statutory authority to issue Letters of Guardianship nunc pro tunc to the date of the filing of the petition." Indeed, the opposite is true. HN4 Where a court is divested of subject matter jurisdiction, it cannot exercise such jurisdiction by virtue of an order nunc pro tunc (see Davis v State of New York, 22 AD2d 733, 733, 253 N.Y.S.2d 267 ["(w)here, as here, the subject matter is jurisdictional, the error cannot be corrected by an order nunc pro tunc"]; see also [**420] Stock v Mann, 255 NY 100, 103, 174 N.E. 76).**

It would, of course, have been better practice for the Family Court to have timely ruled on the guardianship petition. [*171] Indeed, while the court twice adjourned this matter to await fingerprint results, there is no statutory fingerprinting requirement in a guardianship proceeding, and it appears to be simply [***9] a matter of Family Court protocol that any individual over the age of 18 living in the proposed guardian's home must be fingerprinted prior to the commencement of a hearing (see Matter of Herson O.A.M. [Ana D.V.—Gloria E.M.L.], 128 AD3d 827, 9 N.Y.S.3d 349). **Of course, the fingerprinting of members of the household does facilitate criminal background checks to ensure that appointment of the guardian would be in the child's best interests. However, this would serve little purpose where, as here, the child was already living in the proposed guardian's home, and the granting of the guardianship petition would have changed nothing other than to facilitate the issuance of an order making the requisite special findings to enable the child to petition for SIJS. We further observe that the proper course of action in cases where a Family Court Judge is refusing to commence a special findings hearing or is allegedly improperly delaying a proceeding may be to file a mandamus petition to compel the court to promptly conduct the hearing and render a determination on the motion (see Matter of Levy v Rooney, 129 AD3d 728, 9 N.Y.S.3d 588; Matter of Orok-Edem v Family Ct., Kings County, 17 AD3d 470, 792 N.Y.S.2d 344).**

Nevertheless, regardless of whether the Family Court improvidently exercised its discretion in adjourning this matter, as explained above, it correctly concluded that once the child had reached [*10] the age of 21 years, it lacked the authority to grant a guardianship petition (see Matter of Hei Ting C., 109 AD3d 100, 106, 969 N.Y.S.2d 150).**

Special Findings

We now turn to the issue of whether federal statutory law can be utilized to counter the above conclusion, at least to the extent of extending the Family Court's jurisdiction to entertain a guardianship petition and related motion for SIJS findings in circumstances such as those at bar where the child attains the age of 21 after the petition has been filed. We begin with a background discussion of the SIJS statute.

In 1990, Congress created SIJS to address the issue of undocumented and unaccompanied children. These children lacked lawful immigration status and were subject to the threat of deportation and vulnerable to exploitation. As originally enacted, the legislation defined an eligible immigrant as being one who "has been declared dependent on a juvenile court [*172] located in the United States and has been deemed eligible by that court for long-term foster care" (Immigration Act of 1990, Pub L 101-649, tit I, § 153[a], 104 US Stat 4978, 5005, adding 8 USC § 1101[a][27][J][i] [emphasis added]).HN5 In 2008, Congress amended the SIJS provision. In the "William Wilberforce Trafficking Victims Protection Reauthorization Act of [***11] 2008," Congress expanded the definition of who qualified as a "special immigrant juvenile," enabling more children to qualify for that status (Pub L 110-457, 122 US Stat 5044). These amendments, inter alia, broadened eligibility to include, in addition to children declared dependent on a juvenile court, those who had been placed in the custody of "an individual or entity appointed by a State or juvenile court" (Pub L 110-457, 122 US Stat 5044, amending 8 USC § 1101[a][27][J] [**421] [emphasis added]). Following the 2008 amendments, the United States Department of Homeland Security (hereinafter the Department of Homeland Security) issued a memorandum explaining that the new language added to the definition of "Special Immigrant Juvenile" meant that "a petition filed by an alien on whose behalf a juvenile court appointed a guardian now may be eligible" (Department of Homeland Security, Mem. of Donald Neufeld, Acting Assoc. Dir of Dom. Ops., & Pearl Chang, Acting Chief of Off. of Policy & Strategy, Trafficking Victims Protection Reauthorization Act of 2008: Special [****4] Immigrant Juvenile Status Provisions [Mar. 24, 2009] [emphasis added]). Thus, as per the 2008 amendments, a "special immigrant" is a resident alien who [***12] is under 21 years old, is unmarried, and has been either declared dependent on a juvenile court or legally committed to the custody of an individual appointed by a state or juvenile court (see 8 USC § 1101[a][27][J][i]; 8 CFR 204.11).

HN6 In New York, a child may request that the Family Court, recognized as a juvenile court under federal regulations (see 8 CFR 204.11[a]), issue an order making special findings and a declaration as part of the process to petition USCIS for SIJS (see e.g. Matter of Jisun L. v Young Sun P., 75 AD3d 510, 905 N.Y.S.2d 633). Specifically, the findings of fact must establish that: (1) the child is under 21 years of age; (2) the child is unmarried; (3) the child is dependent upon a juvenile court or legally committed to an individual appointed by a state or juvenile court (see 8 USC § 1101[a][27][J][i]); (4) reunification with one or both parents is not viable due to abuse, neglect, abandonment, or a similar basis (see 8 USC § 1101[a][27][J][i]); and (5) it is not [*173] in the child's best interests to be returned to his or her home country (see 8 USC § 1101[a][27][J][ii]; 8 CFR 204.11[c]). With the declaration and special findings, the eligible child may then seek the consent of the Department of Homeland Security for SIJS (see 8 USC § 1101[a][27][J][iii]). Moreover, pursuant to federal law, a child "may not be denied special immigrant status under [SIJS] after December 23, 2008 based on age if [***13] the alien was a child on the date on which the alien applied for such status" (8 USC § 1232[d][6]). "The term

child' for purposes of this statute means an unmarried person under twenty-one years of age" (8 USC § 1101).

Given this background, the question arises as to whether a New York Family Court may still issue an order making special findings and a declaration allowing a child to petition the USCIS for SIJS where, as here, the child has reached 21 years of age but no order of guardianship has yet been obtained. We conclude that, under such circumstances, a special findings order cannot be granted.

As noted, HN7 in order for an alien child to petition the USCIS for SIJS, a court must make certain special findings. Included among these are that the child is under 21 years of age; that the child is unmarried; and that the child has been [*174] declared dependent upon a juvenile court or legally committed to an individual appointed by a state or juvenile court. "The requirement that a child be dependent upon the juvenile court or, alternatively, committed to the custody of an individual appointed by a state or juvenile court, ensures that the process is not employed inappropriately by children who have sufficient family support [***14] and stability to pursue permanent residency in the United States through other, albeit more protracted, procedures" (Matter of Hei Ting C., 109 AD3d at 106).

[**422] In the case at bar, the request to the Family Court for the SIJS declaration was made when the child was under 21, and, as indicated, federal law states that "an alien . . . may not be denied [SIJS] . . . based on age if the alien was a child on the date on which the alien applied for such status" (8 USC § 1232[d][6]); (i.e, when the child submits Form I-360 "Petition for Amerasian, Widow[er] or Special Immigrant" to the Department of Homeland Security, USCIS) . In addition, it appears clear that federal law permits an alien, who is under the age of 21, to apply for SIJS status even though he or she has yet to be declared dependent upon a State juvenile court. Indeed, the application form specifically asks whether the child has been declared a dependent of a juvenile court; and if the answer is "no," the form requests an explanation. Such inquiry indicates that the application may be filed in a situation such as the one at bar where the child was about to turn 21 but had yet to obtain the special findings from Family Court.

However, no such application was filed in this case, nor had the Family [***15] Court issued any order before the subject child turned 21 years old. **Thus, even though the child filed his Family Court petition before he turned 21, once he attained that age, the Family Court was divested of subject matter jurisdiction to grant the guardianship petition. Consequently, after that point, the Family Court could not have made a special finding, as is necessary to the SIJS declaration, that the "child is dependent upon a juvenile court or legally committed to an individual appointed by a state or juvenile court." Nor does the federal statute alter this fact. HN8 The statute only states that SIJS status may not be denied simply because a child "ages out" during the SIJS process. It does not, and indeed cannot, be read to confer subject matter jurisdiction on the Family Court to grant a guardianship petition for a "child" who is already 21 years old. Therefore, even assuming that the child in this case met all of the other requirements for an SIJS declaration, and even if he had filed his application form with the Department of Homeland Security before he turned 21 years old, his ineligibility for a guardianship petition precluded the Family Court from issuing such a declaration. [***16] Put differently, guardianship status, which the Family**

Court can only grant to individuals under 21, is a condition precedent to a declaration allowing a child to seek SIJS.

In sum, once the subject child turned 21 years old, the Family Court no longer [**5] possessed authority to determine the guardianship petition. Furthermore, since dependency upon a juvenile court is a prerequisite for the issuance of an order making the declaration and specific findings to enable a child to petition for SIJS, the Family Court also properly denied the petitioner's SIJS motion**. Accordingly, the order dated November 26, 2014, is affirmed.

HALL, J.P., AUSTIN and HINDS-RADIX, JJ., concur.

ORDERED that the order dated November 26, 2014, is affirmed, without costs or disbursements.

(Matter of Maria C.R. v Rafael G., 142 AD3d 165 [2d Dept 2016])

Matter of Vincenta E.V. v. Alexander R.G., 161 A.D.3d 1180
Supreme Court of New York, Appellate Division, Second Department

May 30, 2018, Decided

2017-11179, 2017-11180, 2017-11181, (Docket No. G-7005-17)

Reporter
161 A.D.3d 1180 * | 78 N.Y.S.3d 435 ** | 2018 N.Y. App. Div. LEXIS 3800 *** | 2018 NY Slip Op 03849 **** | 2018 WL 2425167

[****1] In the Matter of Vincenta E.V., Appellant, v Alexander R.G., Respondent.

Core Terms

specific finding, Immigration, declaration, guardianship petition, mother's motion, issuance, appeals, appointment of a guardian, requisite, birthday, dispense, juvenile, orders, turns

Headnotes/Summary

Headnotes
Guardian and Ward—Appointment of Guardian—Child Dependent on Family Court—Special Immigrant Juvenile Status—Child over Age of 21

Counsel: [***1] Bruno J. Bembi, Hempstead, NY, for appellant.

Judges: ALAN D. SCHEINKMAN, P.J., SHERI S. ROMAN, SANDRA L. SGROI, JOSEPH J. MALTESE, JJ. SCHEINKMAN, P.J., ROMAN, SGROI and MALTESE, JJ., concur.

Opinion
[**435] [*1180] In a proceeding pursuant to Family Court Act article 6, the mother appeals from three orders of the Family Court, Nassau County (Robert LoPresti, Ct. Atty. Ref.), all dated September 20, 2017. The first order, after a hearing, dismissed the mother's guardianship petition. The second order, after a hearing, denied, as academic, the mother's motion to dispense with service of the petition on the father. The third order, after a [*1181] hearing, denied the mother's motion for the issuance of an order, inter alia, making specific findings so as to enable the subject child to petition the United States Citizenship and Immigration Services for special immigrant juvenile status pursuant to 8 USC § 1101 (a) (27) (J).

Ordered that the appeals are dismissed as academic, without costs or disbursements.

In July 2017, the mother commenced this proceeding pursuant to Family Court Act article 6 to be appointed guardian of the subject child for the purpose of obtaining an order declaring that the child is dependent on the Family Court and making specific findings so as to enable him to petition [***2] the United States Citizenship and Immigration Services for special immigrant juvenile status (hereinafter SIJS) pursuant to 8 USC § 1101 (a) (27) (J). Thereafter, the mother moved to dispense with service of the petition on the father, and separately moved for the issuance of an order making the [**436] requisite declaration and specific findings so as to

enable the child to petition for SIJS. The Family Court, in three orders, all dated September 20, 2017, dismissed the guardianship petition and, thereupon, denied the mother's motions. On September 25, 2017, the child turned 21 years old.

"**Generally, courts are precluded 'from considering questions which, although once live, have become moot by passage of time or change in circumstances' " (Matter of Brianna L. [Marie A.], 103 AD3d 181, 185, 956 NYS2d 518 [2012], quoting Matter of Hearst Corp. v Clyne, 50 NY2d 707, 714, 409 NE2d 876, 431 NYS2d 400 [1980]). Where, as here, a child who consented to the appointment of a guardian after his or her 18th birthday turns 21, the term of appointment of the guardian "expires on [the child's] twenty-first birthday" (SCPA 1707 [2]). Consequently, once the child turns 21, the court "is divested of subject matter jurisdiction, [and] cannot exercise such jurisdiction by virtue of an order nunc pro tunc" (Matter of Maria C.R. v Rafael G., 142 AD3d 165, 170, 35 NYS3d 416 [2016]; see [****2] Matter of Jose D.H.-P. v Maria M.N. de P., 148 AD3d 1020, 1021, 49 NYS3d 730 [2017]; Matter of Lourdes B.V.I. v Jose R.D.L.C.Q., 144 AD3d 909, 910, 42 NYS3d 41 [2016]). Thus, the guardianship [***3] petition cannot be granted at this juncture.**

Furthermore, since guardianship status, which the Family Court can only grant to individuals under 21, is a condition precedent to a declaration allowing a child to seek SIJS, the petitioner's motion for the issuance of an order declaring that the child is dependent on the court and making the requisite specific findings so as to enable him to petition for SIJS has also been rendered academic (see Matter of Jose D.H.-P. v Maria [*1182] M.N. de P., 148 AD3d at 1021; Matter of Lourdes B.V.I. v Jose R.D.L.C.Q., 144 AD3d at 910-911; Matter of Maria C.R. v Rafael G., 142 AD3d at 174).

Accordingly, the appeals must be dismissed. Scheinkman, P.J., Roman, Sgroi and Maltese, JJ., concur.

(Matter of Vincenta E.V. v Alexander R.G., 161 AD3d 1180 [2d Dept 2018])

MOTION TO AMEND SIJS ORDER

Matter of Juan R.E.M. (Juan R.E.), 154 A.D.3d 725
Supreme Court of New York, Appellate Division, Second Department

October 4, 2017, Decided

2017-09396 (Docket No. G-7358-16)

Reporter
154 A.D.3d 725 * | 61 N.Y.S.3d 669 ** | 2017 N.Y. App. Div. LEXIS 6971 *** | 2017 NY Slip Op 06977 ****

[****1] In the Matter of Juan R.E.M. Juan R.E., Appellant.

Core Terms

special finding, amend, words, father's motion, guardianship petition, numbered paragraph, Immigration, subject matter jurisdiction, specific finding, declaration, appointed, birthday, deem, declaration of dependency, protect a child, specific threat, juvenile court, gang member, ten years, reunification, substituting, abandonment, constitutes, requisite, deleting, issuance, juvenile, violence, viable, lived

Case Summary

Overview
HOLDINGS: [1]-The trial court erred in denying a father's motion to amend its special findings order entered in response to the CIS's request for evidence regarding his son's petition for special immigrant juvenile status because the fact that the son had turned 21 did not deprive the court of subject matter jurisdiction to amend the order, since the guardianship petition was granted under Family Ct Act § 661(a) before the son's 21st birthday; [2]-It would not be in the best interests of the son to be removed from the U.S., where he had lived for more than 10 years, and returned to El Salvador because his mother was unable to protect him from harm by gang members in that country.

Outcome
The order was reversed.

LexisNexis® Headnotes

Civil Procedure > Preliminary Considerations > Jurisdiction > Subject Matter Jurisdiction
Immigration Law > Admission of Immigrants & Nonimmigrants
Family Law > Guardians > Appointment
View more legal topics
HN1 Jurisdiction, Subject Matter Jurisdiction
Where a child who consented to the appointment of a guardian after his or her 18th birthday turns 21, the court is divested of subject matter jurisdiction in the guardianship proceeding. However, where the guardianship petition was granted prior to the child's 21st birthday, there is no jurisdictional impediment to the issuance of an order making the requisite declaration and specific findings to enable the child to petition for special immigrant juvenile status. More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Headnotes/Summary

Headnotes
Aliens—Immigration—Special Immigrant Juvenile Status

Counsel: [***1] Harold A. Solis, New York, NY (Leah Glowacki of counsel), for appellant.

Judges: RUTH C. BALKIN, J.P., JOSEPH J. MALTESE, BETSY BARROS, FRANCESCA E. CONNOLLY, JJ. BALKIN, J.P., MALTESE, BARROS and CONNOLLY, JJ., concur.

Opinion
[**670] [*725] Appeal from an order of the Family Court, Suffolk County (George F. Harkin, J.), dated August 23, 2017. The order denied the father's motion to amend a prior special findings order of that court dated December 7, 2016, in accordance with a "Request for Evidence" received from the United States Citizenship and Immigration Services in connection with the subject child's petition for special immigrant juvenile status.

Ordered that the order dated August 23, 2017, is reversed, on the facts, without costs or disbursements, and the father's motion to amend the special findings order dated December 7, 2016, is granted to the extent of (1) deleting from the third numbered paragraph thereof the words "or has been committed to or placed in the custody of a state agency or department, or an individual or entity appointed by the state or Family Court," and substituting therefor the words "since the Family [*726] Court granted the guardianship petition in this proceeding pursuant to [***2] Family Court Act § 661 (a) and the child is under 21 years of age, which constitutes the necessary declaration of dependency on a juvenile court (see Matter of Enis A.C.M. [Carlos V.C.P.], 152 AD3d 690, 691, 59 NYS3d 396)"; (2) deleting from the fourth numbered paragraph thereof the name "Veronica," and substituting therefor the name "Juan"; (3) adding to the fourth

numbered paragraph thereof, after the words "of at least ten years," the words "(see Social Services Law § 384-b [5] [a])"; (4) adding to the fifth numbered paragraph thereof, after the words "removed from the United States," the words ", where he has lived for more than 10 years,"; and (5) adding to the fifth numbered paragraph thereof, after the words "of his birth parent or parents," the words "because the mother is unable to protect the child from harm by gang members in El Salvador, who had made specific threats of violence against the child's sister (see Matter of Carlos A.M. v Maria T.M., 141 AD3d 526, 528-529, 35 NYS3d 406)," and the motion is otherwise denied.

In April 2016, Juan R.E.M. (hereinafter the child) filed a petition pursuant to Family Court Act article 6 to have his father appointed as his guardian for the purpose of obtaining an order declaring that he is dependent on the Family Court and making specific findings that he is unmarried and under 21 years of age, that reunification with his mother is not viable due to parental [***3] abuse, neglect, or abandonment, and that it would not be in his best interests to be returned to El Salvador, his previous country of nationality and last habitual residence, so as to enable him to petition the United States Citizenship and Immigration Services (hereinafter USCIS) for special immigrant juvenile status (hereinafter SIJS) pursuant to 8 USC § 1101 (a) (27) (J). In November 2016, the father moved for the issuance of an order making the requisite declaration and specific findings so as to enable the child to petition for SIJS. In an order dated December 7, 2016, the Family Court granted [****2] the guardianship petition. In a separate order, also dated December 7, 2016, the Family Court granted the father's motion (hereinafter the special findings order).

On December 30, 2016, the child submitted an I-360 petition for SIJS to USCIS. Thereafter, USCIS sent the child a document entitled "Request for Evidence," stating that the special findings order was deficient in several respects, and that additional information was needed to process the child's SIJS petition. The father moved to amend the special findings order to address the deficiencies identified by USCIS. In an order dated [*727] August 23, 2017, the Family [***4] Court denied the father's motion to amend the special findings order on the ground of lack of subject matter [**671] jurisdiction since the child, who was born in May of 1996, had turned 21 years old. The father appeals from that order.

HN1 **Where a child who consented to the appointment of a guardian after his or her 18th birthday turns 21, the court is divested of subject matter jurisdiction in the guardianship proceeding (see Matter of Lourdes B.V.I. v Jose R.D.L.C.Q., 144 AD3d 909, 910, 42 NYS3d 41; Matter of Maria C.R. v Rafael G., 142 AD3d 165, 170, 35 NYS3d 416). However, where the guardianship petition was granted prior to the child's 21st birthday, there is no jurisdictional impediment to the issuance of an order making the requisite declaration and specific findings to enable the child to petition for SIJS (see Matter of Alejandro V.P. v Floyland V.D., 150 AD3d 741, 54 N.Y.S.3d 31; Matter of Maria C.R. v Rafael G., 142 AD3d at 174). Here, since the guardianship petition was granted on December 7, 2016, prior to the child's 21st birthday, the Family Court improperly determined that it lacked subject matter jurisdiction to entertain the father's motion to amend the special findings order.**

Furthermore, under the circumstances presented, we deem it appropriate to grant the father's motion to amend the special findings order to clarify that the Family Court exercised its jurisdiction to grant the guardianship petition in this proceeding pursuant

[*5] to Family Court Act § 661 (a) and the child is under 21 years of age, which constitutes the necessary declaration of dependency on a juvenile court (see Matter of Enis A.C.M. [Blanca E.M.-Carlos V.C.P.], 152 AD3d 690, 691, 59 NYS3d 396). We also deem it appropriate to amend the special findings order to specify that it would not be in the best interests of the child to be removed from the United States, where he has lived for more than 10 years, and returned to El Salvador because the mother is unable to protect the child from harm by gang members in El Salvador, who had made specific threats of violence against the child's sister (see Matter of Carlos A.M. v Maria T.M., 141 AD3d 526, 528-529, 35 NYS3d 406). Since the special findings order set forth the basis for its finding that reunification of the child with the mother was not viable on the ground of parental abandonment, stating that "[the] mother evinced her intent to forego parental rights and responsibilities when she failed to emotionally and financially support [the child] for a period of at least ten years," we do not deem it appropriate to amend that finding, except to correct the name of the subject [*728**
(Matter of Juan R.E.M. (Juan R.E.), 154 AD3d 725 [2d Dept 2017])In July 2014,

LEAVE TO RENEW/REARGUE AND CONSISTENCY BETWEEN TESTIMONY AND THE AFFIDAVITS IN THE MOTION:

Matter of Leslie J.D. (Maria A.A.G.—Silvia D.), 167 A.D.3d 1004
Supreme Court of New York, Appellate Division, Second Department

December 26, 2018, Decided

2018-04257 (Docket No. G-8801-14)

Reporter
167 A.D.3d 1004 * | 88 N.Y.S.3d 897 ** | 2018 N.Y. App. Div. LEXIS 8868 *** | 2018 NY Slip Op 08930 **** | 2018 WL 6778941

[****1] In the Matter of Leslie J.D. Maria A.A.G., Appellant; Silvia D. et al., Respondents.

Prior History: Matter of Leslie J.D. (Maria A.A.G.-Sylvia D.), 136 AD3d 902, 26 NYS3d 129, 2016 N.Y. App. Div. LEXIS 1177 (Feb. 17, 2016)

Core Terms

prior motion, specific finding, issuance, leave to renew, inter alia, immigrant, prior determination, new facts, juvenile, appeals

Headnotes/Summary

Headnotes

Aliens—Immigration—Special Immigrant Juvenile Status

Counsel: [***1] Bruno J. Bembi, Hempstead, NY, for appellant.

Judges: JOHN M. LEVENTHAL, J.P., LEONARD B. AUSTIN, COLLEEN D. DUFFY, ANGELA G. IANNACCI, JJ. LEVENTHAL, J.P., AUSTIN, DUFFY and IANNACCI, JJ., concur.

Opinion

[**897] [*1004] In a proceeding pursuant to Family Court Act article 6, the petitioner appeals from an order of the Family Court, Nassau County (Tammy S. Robbins, J.), dated March 2, 2018. The order denied [*1005] the petitioner's motion, in effect, for leave to renew her prior motion for the issuance of an order, inter alia, making specific findings so as to enable the subject child, Leslie J. D., to petition the United States Citizenship and Immigration Services for special immigrant juvenile status pursuant to 8 USC § 1101 (a) (27) (J), which had been denied in an order of the same court (Elaine Jackson Stack, J.H.O.) dated April 1, 2015.

Ordered that the order dated March 2, 2018, is affirmed, without costs or disbursements.

In July 2014, the petitioner commenced this proceeding pursuant to Family Court Act article 6 to be appointed guardian of Leslie J.D. (hereinafter the child), for the purpose of obtaining an order declaring that the child is dependent on the Family Court and making specific findings so as to enable the child to petition for special immigrant juvenile status [***2] (hereinafer SIJS) pursuant to 8 USC § 1101 (a) (27) (J). Although the Family Court awarded guardianship of the child to the petitioner, in an order dated April 1, 2015 (hereinafter the April 2015 order), the court, after a hearing, denied the petitioner's motion for the issuance of an order, inter alia, making specific findings so as to enable the child to petition for SIJS. In a decision and order dated February 17, 2016, this Court affirmed the April 2015 order (see Matter of Leslie J.D. [Maria A.A.G.—Sylvia D.], 136 AD3d 902, 904, 26 NYS3d 129 [2016]).

Prior to the issuance of this Court's decision and order affirming the April 2015 order, the petitioner moved in the Family Court, in effect, for leave to renew her prior motion for the issuance of an order, inter alia, making specific findings so as to enable the child to petition for SIJS. In an order dated November 12, 2015, the Family Court denied that motion. This Court affirmed that determination (see Matter of Leslie J.D. [Maria A.A.G.—Sylvia D.], 140 AD3d 1162, 1164, 35 NYS3d 205 [2016]).

In January 2018, the petitioner again moved, in effect, for leave to renew her prior motion for the issuance of an order, inter alia, making specific findings so as to enable the child to petition for SIJS. The petitioner included an affidavit from the child in her motion papers. In an order dated March 2, 2018, the Family Court denied that [***3] motion. The petitioner appeals.

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination" (CPLR 2221 [e] [2]) and "shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR

2221 [e] [3]). Here, the child's affidavit in support of the motion did not address why the petitioner [898] previously [*1006] failed to submit the purported new facts asserted in the affidavit, which existed and were known by the child at the time of the original motion (see CPLR 2221 [e] [3]). Since the child's affidavit also did not indicate that her testimony in the initial hearing was mistaken, assert that her relationship with the parents had changed after the time of the hearing, or otherwise explain inconsistencies between her prior testimony and the affidavit, the petitioner failed to show how such facts would change the prior determination (see CPLR 2221 [e] [2]; Matter of Leslie J.D. [Maria A.A.G.—Sylvia D.], 140 AD3d at 1164).**

Accordingly, we agree with the Family Court's determination denying the petitioner's motion, in effect, for leave to renew her prior motion.

The petitioner's remaining contention is raised for the first time on appeal and is not properly before [***4] this Court. Leventhal, J.P., Austin, Duffy and Iannacci, JJ., concur.

(Matter of Leslie J.D. (Maria A.A.G.—Silvia D.), 167 AD3d 1004 [2d Dept 2018])

SCBA Lawyers Helping Lawyers Committee

The SCBA Lawyers Helping Lawyers Committee provides free and confidential assistance to those in the legal community who are concerned about their alcohol or drug use and/or mental health or wellbeing or that of a colleague or family member.

Assistance is available to the legal community including attorneys, members of the judiciary, law students, and family members dealing with alcohol or substance abuse disorder, other addictive disorders, anxiety, depression, vicarious trauma, age related cognitive decline and other mental health concerns that affect one's well-being and professional conduct.

Please call the
Lawyers Helping Lawyers Helpline at (631) 697-2499
to speak with an attorney who will provide support and recommend resources. All calls are private and confidentiality is protected under Judiciary Law Section 499. (Lawyer Assistance Committee)

Feel Free to Join Us at Our Weekly Recovery Meeting