PRACTICE ADVISORY[1]
JULY 29, 2019

STRATEGIES FOR OBTAINING SIJS FACTUAL FINDINGS IN VIRGINIA AFTER JULY 1, 2019

This practice advisory analyzes the recent Virginia bill signed into law by Governor Ralph Northam on March 18, 2019 and provides general practice strategies to help advocates obtain Special Immigrant Juvenile Status (SIJS) factual findings (sometimes referred to as "predicate orders") in light of the new law, which took effect on July 1. This practice advisory will also address strategies for amending or retrying cases where the judge did not enter an order with the necessary factual findings to support a child's application to U.S. Citizenship & Immigration Services (USCIS) for SIJS. The new law, an amendment to section 16.1-241 of the Code of Virginia, will aid immigrant children fleeing abuse, neglect, or abandonment in their home countries in seeking protection from deportation in Virginia.

Context and Text of the Statute

Across the country, many immigrant children facing deportation proceedings seek SIJS. SIJS is unique in that it requires a state court to issue an order with specific factual findings before the child may even attempt to seek SIJS relief from the federal government. In *Canales v. Torres-Orellana*, 800 S.E.2d 208 (Va. Ct. App. 2017), a precedent-setting case, the Virginia Court of Appeals created significant confusion regarding state judges' ability to issue some of the factual findings required in these orders. As a result, judges across the Commonwealth denied or modified the language needed in the order to demonstrate SIJS eligibility before USCIS. Virginia became one of the most difficult states in the nation to obtain those factual findings.

During the 2019 General Assembly session, Legal Aid Justice Center and other advocates worked closely with legislators and the Governor's office to pass several bills that overturned the *Canales* case and restored Virginia immigrant children's ability to apply for SIJS. The bills also addressed the needs of other children before the Juvenile and Domestic Relations District Courts (J&DR courts), easing the way for any Virginia child to seek a state court's assistance in

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proving eligibility for other benefits such as adoption assistance, Temporary Assistance for Needy Families (TANF), and timely public school enrollment. Sen. Scott Surovell (D-Mount Vernon) introduced SB 1758 and Del. Marcus Simon (D-Falls Church) introduced HB 2679. The bills initially took different approaches to fixing this issue, and each passed their respective chambers with an overwhelming bipartisan majority of votes. The bills were then placed into committees of conference in an attempt to gain consensus, and identical bills emerged that combined the approach of both. These bills garnered unanimous support in the House, and received only two dissenting votes in the Senate. Governor Northam signed both bills on March 18, 2019, and they took effect on July 1, 2019.

While the Virginia Court of Appeals in *Canales* called into question whether Virginia J&DR courts had jurisdiction to determine whether it is in the best interests of the child to return to his or her home country, newly added section 16.1-241(A1) of the Code of Virginia makes clear that J&DR courts *do* have jurisdiction to adjudicate that question and any other required factual findings.

Specifically, the language of the statute gives Virginia J&DR courts "exclusive original jurisdiction . . . over all cases, matters and proceedings involving . . . [m]aking specific findings of fact required by state or federal law to enable a child to apply for or receive a state or federal benefit." Va. Code Ann. § 16.1-241(A1) (2019). This section of Virginia Code does not *require* courts to enter any particular factual findings required by state or federal law, it merely establishes that they have jurisdiction to do so. Nor does it address any other aspect of J&DR proceedings, custody or otherwise, including standing or service of process.

This text is broad, ensuring that abused, neglected, or abandoned children are protected under the law. The United States has a long history of protecting abused, neglected, and abandoned children, and this change in law will clarify and restore Virginia courts' authority to make the factual findings necessary to protect children seeking protection from abuse, neglect, and abandonment. This amendment to the Code of Virginia is consistent with Virginia's longstanding values.

Case Strategies After July 1, 2019

Initial Filings. Although this statute may arguably provide a basis for filing standalone SIJS petitions, submitting an attorney-drafted petition for custody which incorporates the factual basis for a grant of custody and the facts that give rise to the child's eligibility for SIJS remains best practice. *See* Appendix for sample petition.

Since section 16.1-241 of the Code of Virginia is a jurisdictional statute, there is arguably a basis for filing standalone SIJS petitions. Nevertheless, it is the position of the authors of this practice advisory that standalone SIJS petitions for custody cases should be avoided generally. Such orders are unlikely to satisfy the requirement of 8 U.S.C. § 1101(a)(27)(J)(i) that the child be "declared dependent on a juvenile court located in the United States or [] legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court". Standalone SIJS petitions may also fail to satisfy USCIS policy that the SIJS factual findings should not be sought primarily or solely for immigration

benefits. This is especially so given USCIS's increase in Requests for Evidence and Notices of Intent to Deny questioning whether the juvenile court entered the factual findings in accordance with state law. Keep in mind that SIJS petitions or motions may be appropriate to file in conjunction with foster care, CHINS, or delinquency proceedings.

In drafting motions and proposed orders, continue to cite to state law and authority rather than the Immigration and Nationality Act or Title 8 of the U.S. Code. Moreover, in light of USCIS's heightened scrutiny of SIJS petitions and increased numbers of Requests for Evidence (RFE), it is imperative to place emphasis on the statutory "best interest" factors set forth in section 20-124.3 of the Code of Virginia. Submit a single proposed custody order that incorporates the SIJS findings, instead of two separate orders. *See* Appendix for a sample order. As with the petition, refer to state authority and not federal statutes.

Although this law effectively overruled *Canales* as of July 1, 2019, advocates may still encounter judges who refuse to make the requested factual findings. As noted below, the statutory text does not *require* courts to enter any particular factual findings. If confronted with this situation, consider requesting additional time to brief the issues and concerns presented by the court and/or prepare the case for appeal to Circuit Court. Remember that cases appealed from J&DR to Circuit Court are reviewed *de novo*. At the Circuit Court level, make sure to build a robust record and actively preserve issues for appeal by noting your objection to the entrance of the order as required in Rule 5A:18 of the Rules of the Supreme Court of Virginia. Be sure to note your objections with specificity. Per the *Canales* opinion, "[o]rdinarily, endorsement of an order '[s]een and objected to' is not specific enough to meet the requirements of Rule 5A:18." 800 S.E.2d at 214 (citation omitted). Feel free to contact any of the authors of this practice advisory to discuss case selection and strategies for any possible appeal to the Virginia Court of Appeals.

Third-Party Custody. While the new statute does not itself require courts to enter any particular factual findings, there is a strong argument that in cases involving custody claims by nonparents or third parties, courts *must* make findings regarding certain factors to overcome the parental presumption favoring biological parents over nonparents or third parties. In Virginia, custody of a child may be awarded to nonparents as long as they have a "legitimate interest" pursuant to section 20-124.1 of the Code of Virginia. Although courts typically extend a broad interpretation of a nonparent's "legitimate interest," Virginia has also long recognized the preference of biological parents over third parties in custody determinations.

In *Bailes v. Sours*, 340 S.E.2d 824 (Va. 1986), the Supreme Court of Virginia established the parental presumption standard. Under *Bailes*, nonparents overcome the parental presumption if they demonstrate by clear and convincing evidence that one or more of the following factors applies: (1) parental unfitness, (2) a previous order of divestiture, (3) voluntary relinquishment, (4) abandonment, or (5) special facts and circumstances constituting an extraordinary reason for taking a child from its parent. Therefore, in cases where the petitioner is a nonparent or third party and the factual circumstances present issues of parental abuse, abandonment, or neglect, or where a parent has voluntarily relinquished custody to a nonparent, the court is required to consider these factors and issue findings with respect to whether the parental presumption has

been properly rebutted. *See Boyce v. Bush*, No. 2044-96-3, 1997 WL 205132 (Va. Ct. App., Apr. 29, 1997).

Strategies for Cases *Adjudicated* Prior to July 1, 2019

Cases where the child is still under the age of eighteen. In cases where the court entered custody but refused to enter the SIJS findings at all or to the satisfaction of USCIS, practitioners should file a Motion to Amend or Review Order (Form DC-630). The main question here is whether a change in law is considered a material change in circumstances to make a custody modification. The short answer is yes.

In Virginia, when determining whether to modify a custody order, the court must apply the two-pronged *Keel* test: (1) whether there has been a change in circumstances since the most recent custody award and (2) whether a change in custody would be in the best interests of the child. *Keel v. Keel*, 303 S.E.2d 917, 921 (Va. 1983).

The case law is clear that a judge may consider statutory factors in determining the best interest of the child "after a material change of circumstances has been established." *Ohlen v. Shively*, 430 S.E.2d 559, 561 (Va. Ct. App. 1993). However, less clear is whether a change in applicable statutory factors could be considered "material" for purposes of modifying a custody order. Factors that have been considered changed circumstances in the past have included:

- Changes involving the children such as maturity and special educational needs. *Keel*, 303 S.E.2d at 921.
- Changes in the home life of the noncustodial parent, such as remarriage, creation of a stable home, and ability to provide emotional and financial support for the children. *Id.*
- The custodial parent's home life changing for the worse, resulting in risk of physical or mental harm to the children. *See Khalid-Schieber v. Hussain*, 827 S.E.2d 6, 11-12 (Va. Ct. App. 2019).
- One parent relocating, resulting in a change in home life and educational circumstances. *See Sullivan v. Jones*, 595 S.E.2d 36, 41 (Va. Ct. App. 2004).
- An improvement in one parent's schedule as the other's employment obligations increased. *See Peple v. Peple*, 364 S.E.2d 232, 237 (Va. Ct. App. 1988).

The case law surrounding child support modifications provides a stronger basis to hold that a change of law can be a material change in circumstances. Once a child support award has been entered, only a "material change in circumstances will justify modification of the support award." *Milam v. Milam*, 778 S.E.2d 535, 541 (Va. Ct. App. 2015). In *Slonka v. Pennline*, the court found the 1992 amendment to Code § 20–108.2(G), creating a new category for shared custody arrangements, as sufficiently "substantive" to justify a modification. 440 S.E.2d 423, 425 (Va. Ct. App. 1991). Additionally, in *Cooke v. Cooke*, the court held that "[a] '*substantive* guideline amendment which result[s] in a significant disparity in the parties' support obligations' constitutes a material change in circumstances created by the Code itself" and thus "an amended guideline may . . . justify review of a prior order." 474 S.E.2d 159, 161 (Va. Ct. App. 1996) (emphasis in original) (citation omitted). However, in *Head v. Head* only a few months later, the court stated that it was "technically incorrect" that a legislative amendment

could be a material change in circumstances and rather was an "exception." 480 S.E.2d 780, 785 (Va. Ct. App. 1997). Yet, the court in *Head* made no reference to *Cooke* in its ruling, and no case has ever directly overturned *Cooke*.

Although unpublished and thus not binding precedent, *Ford v. Johansen*, No. 1125-16-2, 2017 WL 487098 (Va. Ct. App. Feb. 7, 2017), suggests a way to resolve the discrepancy between *Cooke* and *Head*. *Ford* acknowledges past confusion but holds that "regardless of the inconsistent nomenclature we have used, the standard for a legislative change requiring a circuit court to revisit a prior child support award has remained the same. For a legislative amendment to the guidelines to require a circuit court to revisit a prior child support award, the legislative change itself must be substantive and significant." *Ford*, 2017 WL 487098, at *8.

Ford concluded that a change of law itself *is* a changed circumstance if it meets the substantive and significant test. *Id.* The holding appears to go even further than *Cooke*, which held that a material change in circumstances can be "created" by a legislative change. 474 S.E.2d at 161. Therefore, in light of the newly enacted legislation, filing a Motion to Amend or Review Order would be proper.

Lastly, if the court already awarded custody without the SIJS findings, it may be wise to move to amend custody through a different angle. For example, if the custodial parent married and the minor is now living with the custodial parent and stepparent, the stepparent can join in on the amended petition. In that case, the change of circumstances to amend the petition could be the result of a marriage. The stepparent may even want to adopt the minor[2] in which case the findings could be woven into the adoption order.

Cases where the child is over the age of eighteen. USCIS has routinely denied cases where the court entered a final order after the child turned eighteen, even though several Virginia statutes permit J&DR courts to modify orders after the child turns eighteen. USCIS denial language usually states that because the minor reached the age of majority on or before the date of the court order, the court lacked authority to determine parental custody. Thus, the best practice is to have the order entered before the child turns eighteen. Where this is not possible, consider seeking a *nunc pro tunc* order.

While there is not a *nunc pro tunc* statute in Virginia specifically referring to custody, some jurisdictions are amenable to entering such an order to make the record "speak the truth." *Council v. Commonwealth*, 94 S.E.2d 245, 247 (Va. 1956). The court may use its inherent power to amend the record when "the justice and truth of the case requires it." *Id.* at 248. *See also* Va. Code Ann. § 16.1-227 (2019) (granting courts "all necessary and incidental powers and authority, whether legal or equitable in their nature."). Furthermore, in *E.C. v. Virginia Dep't of Juvenile Justice*, the court held that a case is not moot where an actual controversy remains. 722 S.E.2d 827, 831 (2012). In the SIJS context, courts may assert that a case is moot if custody has already been awarded because there is no remaining case or controversy. However, the collateral consequence of immigration protection as a result of abuse, neglect, or abandonment is a

[2] It is important that you seek the advice of an adoption attorney if pursing this option. Whether the child's country of origin is a signatory to the Hague Convention will determine what steps are required for the adoption.

remaining case or controversy that renders the case not moot. Thus, under *E.C.*, the court may exercise such powers.

RFEs, NOIDs and Appeals. If for some reason you are unable to finalize the order until after the minor's eighteenth birthday, argue the following Virginia statutes which give J&DR courts' judges authority to enter orders after the child turns eighteen.

- Section 20-146.13 of the Code of Virginia states:

> a court of the Commonwealth that has made a child custody determination consistent with § 20-146.12 or 20-146.14 has exclusive, continuing jurisdiction as long as the child, a parent of the child, or any person acting as a parent of the child continues to live in the Commonwealth.

This means that so long as a Virginia J&DR court made an initial child custody determination before the child turned eighteen, it has the authority to take exclusive, continuing jurisdiction as long as the parent of the child continues to live in Virginia.

- Section 16.1-242 of the Code of Virginia states that when:

> jurisdiction has been obtained by the court in the case of any child, such jurisdiction, which includes the authority to suspend, reduce, modify, or dismiss the disposition of any juvenile adjudication, may be retained by the court until such person becomes 21 years of age, except when the person is in the custody of the Department.

Based on this Code of Virginia section, a Virginia judge may modify any finding until the child turns 21 and thus may rely on the immigration law definition of a child, contrary to what the RFEs, NOIDs and denials assert.

Despite this law, beginning in 2018, USCIS took a major departure from the way they used to handle SIJS application and began denying cases where a judge entered a final order regarding children between the ages of 18 and 21. There were successful class action law suits filed in several states, like New York, California and Washington, challenging these denials. For example, a judge in New York issued an injunction in March 2019 halting this major change by USCIS and granted class status to the plaintiffs, allowing them to proceed anonymously. *R.F.M. v. Nielsen*, 365 F. Supp. 3d 350, 383 (S.D.N.Y. 2019). *See also Moreno Galvez v. Cissna*, 2:19-cv-321 (W.D. Wash., filed Mar. 5, 2019), *available at* https://www.nwirp.org/wp-content/uploads/2019/03/Moreno-Galvez-v-Cissna-_-Complaint.pdf. Ultimately, various courts have ruled against USCIS's decisions denying SIJS due to orders entered between the ages of 18 and 21, but only in the context of a class action lawsuit.[3]

[3] If anyone has received denials due to the judge entering the final order between the ages of 18 and 21, please email rachel@poarchlaw.com.

Therefore, do everything necessary for the judge to enter the order before the minor's eighteenth birthday. Otherwise, it will be an uphill battle with USCIS and may require federal litigation in order to initiate an injunction and obtain relief.

Strategies for Cases *Filed* Before 7/1/2019

It is well established that new legislation conferring substantive rights or obligations does not apply retroactively, but legislation changing procedural rules or regulations will apply at the time of the relevant proceeding. *See Crawford v. Halsted*, 61 Va. 211 (Va. 1871). *See also Virginia & West Virginia Coal Co. v. Charles*, 254 F. 379, 383 (4th Cir. 1918); *Wyatt v. Va. Dept. of Social Services*, 397 S.E.2d 412, 414 (Va. Ct. App. 1990); *Walke v. Dallas, Inc.*, 161 S.E.2d 722 (Va. Ct. App. 1968) ("As a general rule statutes relating to remedies and procedure are given a retrospective construction. . . . [S]tatutes relating to practice and procedure generally apply to pending actions and those subsequently instituted, although the cause of action may have arisen before." (Internal citations omitted.)). "The mode of conducting a suit, or the rules of practice regulating it, are not the subject of vested rights." *Crawford*, 61 Va. At 224. Rather, "it is the demand or claim that cannot be interfered with by legislative enactment." *Id.* at 225. For statutes that do not create a "new cause of action and take away no existing right[s] or remed[ies]" and that "only provide a forum for asserting an existing right . . . the law in force at the time of the trial must prevail." *Walke*, 161 S.E.2d at 724-25. Further, "procedural provisions of the statute in effect on the date of trial control the conduct of the trial insofar as practicable." *Smith*, 248 S.E.2d at 148.

The new law is a jurisdictional statute, clarifying the proper jurisdiction for evaluating factual findings required by a state or federal statute. Rather than conferring any new substantive rights onto any individual, it merely establishes that the J&DR courts have jurisdiction "over all cases, matters and proceedings involving…making specific findings of fact required by state or federal law to enable a child to apply for or receive a state or federal benefit." Va. Code Ann. § 16.1-241(A1).

The opinion in *Canales* addressed whether the J&DR Court had jurisdiction, more precisely whether Virginia J&DR courts or a federal adjudicator were the proper venue to hear and make findings as required by 8 U.S.C. § 1101(a)(27)(J)(ii). The new statute clearly states that J&DR courts *do* have jurisdiction to adjudicate that question and any other factual question "required by a state or federal law to enable a child to apply for or receive a state or federal benefit." Because the new statute clarifies in what venue findings may be issued, rather than any substantive right, the change in law is procedural rather than substantive in nature; therefore it should apply at the time of the hearing or trial, regardless of when the initial case was filed.

Please see the attached appendix for sample petitions and orders.