

Filed 10/4/16 D.M. v. Armando B.

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

D.M.,

Plaintiff and Appellant,

v.

ARMANDO B.,

Defendant and Respondent.

B265367

(Los Angeles County  
Super. Ct. No. BF052646)

APPEAL from a judgment of the Superior Court of Los Angeles County.  
Michelle Williams Court, Judge. Reversed and remanded for further proceedings.

Latham & Watkins, Daniel Scott Schecter, Terence L. Finley Jr., Leigh K. Richart;  
Los Angeles Center for Law and Justice, Sarah Reisman for Plaintiff and Appellant.

No appearance for Defendant and Respondent.

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A parent petitioned for special findings under the Immigration and Nationality Act (INA), a prerequisite for children who enter the United States without documentation and wish to apply for federal Special Immigrant Juvenile (SIJ) status. (8 U.S.C. § 1101.) An SIJ application must include a state court finding that the child cannot reunify with one or both parents due to neglect, abuse, or abandonment. Applying Family Code section 7822, the trial court found that the child's mother, appellant D.M., could not establish abandonment because she did not meet certain statutory requirements.

We conclude that the trial court should have evaluated the issue of abandonment under Family Code section 3402, not Family Code section 7822. Accordingly, the judgment is reversed; on remand, the trial court shall determine whether the subject child was abandoned under Family Code section 3402.

### **THE PETITION**

In March 2015, D.M. petitioned to establish a parental relationship and obtain custody of her children Bryan B. (born in Guatemala in 2001) and A.B. (born in the U.S. in 2007).<sup>1</sup> Appellant alleged that respondent Armando B. is the father of both children. Respondent was personally served with the petition at his place of employment in Hawthorne, California, but has not appeared in this action.

Appellant asked the trial court to issue findings that (1) Bryan is a dependent of the juvenile court or under the custody of an individual appointed by a state court; (2) Brian's reunification with one or both of his parents is not viable due to abuse, neglect or abandonment, and (3) it is not in Bryan's best interest to return to his country of nationality. Appellant acknowledged that these findings alone do not confer SIJ status. Instead, they would enable Bryan to apply to the U.S. Citizenship and Immigration Services for SIJ status.

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<sup>1</sup> The appeal does not address A. because she is a U.S. citizen.

## FACTS UNDERLYING THE PETITION

Bryan lived in his native Guatemala with his parents for the first years of his life. During that period, respondent was verbally and physically abusive toward appellant, beating her with objects such as a belt or dog leash, even when Bryan was present. Respondent was emotionally detached: he did not take appellant to the hospital when she went into labor; did not visit her during the three days she was hospitalized after giving birth; did not come to see his newborn son until five days after birth; never helped care for Bryan by feeding, bathing or holding him; and only occasionally gave appellant money for food.

Appellant and respondent came to the U.S. in 2006, leaving Bryan with his maternal grandparents.<sup>2</sup> The couple lived together in the U.S., where appellant gave birth to their daughter A.. In 2008, they separated. Appellant testified that she sent \$200 to Guatemala every month, for Bryan's support. Respondent sent money for Bryan only three times, in an unknown amount. Bryan has not seen or spoken to respondent since 2006, and has no recollection of his father.

Bryan does not have fond memories of his life in Guatemala or his grandfather, whom he described as an abusive alcoholic. While drinking, the grandfather was violent and a couple of times hit Bryan with a tree branch. He screamed and cursed at Bryan, who was fearful and hid in his room. The grandfather stopped hitting Bryan in 2010.

Bryan shared a room with his grandmother and his aunt, in Guatemala. The home was furnished and had television. He had ample clothing, attended school, and mostly ate beans as the family had nothing else, save for an occasional chicken. Bryan was obliged to fetch wood for the kitchen fire, which necessitated a half-hour walk. On one outing, Bryan fell while cutting wood: his forehead struck a rock, requiring stitches and

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<sup>2</sup> Appellant was vague about dates. She declared that Bryan lived with her until he was two years old; testified that she lived with the boy until he was three; then stated that she came to the U.S. in 2006, when Bryan was four or five years old.

leaving a scar. Bryan was scared to go outside, owing to violence and lawlessness, and saw a dead body in the street two years earlier.

Bryan left Guatemala out of fear and despair in 2014. His caregivers fought, and his grandfather came home intoxicated and yelled at everyone. He missed his mother, whom he knew only from telephone conversations, and had no one to confide in. There was no future in Guatemala, so he escaped into Mexico, where soldiers extorted money from him. A “coyote” (smuggler) guided Bryan into the U.S., where he was detained by immigration authorities. He was eventually transferred to California, where his mother collected him from the airport in August 2014. He is enrolled in school, has adapted well to life in the U.S., and his mother provides for all of his needs.

### **THE TRIAL COURT’S RULING**

After considering the petition and hearing evidence, the trial court issued its statement of decision and order on May 7, 2015. It found that a parent-child relationship exists between appellant and her children, and gave appellant sole legal and physical custody. Respondent did not appear at the child custody mediation or at the hearing. Appellant remained in contact with her children, while respondent did not, and appellant alleged that respondent was physically and verbally abusive toward her years ago, in Guatemala. The children are bonded to appellant.

Moving to the SIJ findings requested by appellant, the trial court found that Bryan is placed in the custody of an individual appointed by a state court, namely, appellant. The court determined that appellant did not satisfy the statutory requirements in the Family Code for declaring an abandonment. Even if a finding of abandonment were made, no evidence supports a finding that reunification with respondent is not viable. The parties moved to the U.S. together and had a second child here. Respondent lives in the Los Angeles area, and appellant knows where he works. Bryan was separated from both of his parents for the same length of time, while living in Guatemala with his grandparents. Despite the passage of time, Bryan was able to reunify successfully with appellant. Finally, the court found that returning Bryan to Guatemala to live with his

maternal grandparents is not in his best interest, though the availability of another adult relative in that country is unknown. The appeal is timely.

## **DISCUSSION**

### *Background and Evolution of the SIJ Law*

The INA authorizes the federal government to grant SIJ status to undocumented migrant children who are under state judicial supervision. (8 U.S.C. § 1101(a)(27)(J)(i); *Garcia v. Holder* (9th Cir. 2011) 659 F.3d 1261, 1264, fn. 1; *Perez-Olano v. Gonzalez* (C.D.Cal. 2008) 248 F.R.D. 248, 252.)<sup>3</sup> With federal approval, a qualifying child may remain in the U.S. and apply for permanent resident status. (8 U.S.C. § 1255(h); *Perez-Olano*, at p. 252.)

The SIJ provisions seek “to protect abused, neglected, or abandoned children who, with their families, illegally entered the United States. Congress provided an alternative to deportation for these children. Rather than being deported along with abusive or neglectful parents, or deported to parents who had abandoned them once in the United

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<sup>3</sup> The statute reads: “(J) an immigrant who is present in the United States—  
(i) who has been declared dependent on a juvenile court located in the United States or whom such a court has 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 located in the United States, and whose reunification with 1 or both of the immigrant’s parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law;  
(ii) for whom it has been determined in administrative or judicial proceedings that it would not be in the alien’s best interest to be returned to the alien’s or parent’s previous country of nationality or country of last habitual residence; and  
(iii) in whose case the Secretary of Homeland Security consents to the grant of special immigrant juvenile status, except that—  
(I) no juvenile court has jurisdiction to determine the custody status or placement of an alien in the custody of the Secretary of Health and Human Services unless the Secretary of Health and Human Services specifically consents to such jurisdiction; and  
(II) no natural parent or prior adoptive parent of any alien provided special immigrant status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this Act.” (8 U.S.C. § 1101(a)(27)(J).)

States, such children may seek special status to remain in the United States.” (*Yeboah v. United States DOJ* (3d Cir. 2003) 345 F.3d 216, 221.)

As enacted in 1990, a predicate SIJ order required findings that a juvenile is dependent on a U.S. court; eligible for long-term foster care; and the juvenile’s best interests would not be served by a return to the country of nationality. (*Zhen-Hua Gao v. Jenifer* (6th Cir. 1999) 185 F.3d 548, 552.) Responding to concerns of misuse by visiting foreign students, Congress amended the law in 1997 to require findings that a dependent child legally committed to or placed in state custody be deemed eligible by a juvenile court for long-term foster care due to abuse, neglect, or abandonment; that it would not be in the child’s best interest to return to the country of nationality; and that the Attorney General consent to using the dependency order as a precondition to SIJ status. (*Yeboah v. United States DOJ, supra*, 345 F.3d at pp. 221-222.)

A third amendment, in 2008, expanded eligibility to immigrant children placed in the custody of an individual or entity appointed by a state or juvenile court. The requirement that the child be deemed eligible for long-term foster care was removed. Instead, a court must find that “reunification with 1 or both of the immigrant’s parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law.”<sup>4</sup> (Pub. Law 110-457, § 235(d)(1)(A); *In re Matter of Marcelina M.-G.* (N.Y.App.Div. 2013) 112 A.D.3d 100, 108.)

Although the federal government has exclusive jurisdiction over immigration, the state courts are charged with determining whether reunification is not viable due to abuse, neglect or abandonment, and whether the child’s best interests militate against return to his or her native land. (*Leslie H. v. Superior Court* (2014) 224 Cal.App.4th 340, 348-349.) SIJ findings may be made by any division of the superior court, including juvenile and family courts. (Code Civ. Proc., § 155, subd. (a).)

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<sup>4</sup> Language requiring the express consent of the Attorney General to a dependency order was eliminated and replaced with consent from the Secretary of Homeland Security to the grant of special immigrant juvenile status. (Pub. Law 110-457, § 235(d)(1)(A).)

### The Trial Court's Findings

When a request for SIJ findings is made, the trial court is tasked with three steps. First, it must determine whether an immigrant child has been declared a dependent of the juvenile court *or* legally committed to or placed under the custody of a state agency or an individual appointed by a state court. Second, it must determine if reunification with one or both of the child's parents is not viable due to abuse, neglect, abandonment or other basis. Third, it must determine if it is in the child's best interest to be returned to the country of nationality. (*Eddie E. v. Superior Court* (2013) 223 Cal.App.4th 622, 627-628; *Leslie H. v. Superior Court, supra*, 224 Cal.App.4th at p. 350.) The court's factual findings are reviewed under the substantial evidence standard. (*Leslie H.*, at p. 347.)

#### **1. Custody Given to an Individual Appointed by the Court**

California appellate decisions addressing SIJ findings fall into several categories. There are juvenile dependency cases. (*In re Y.M.* (2012) 207 Cal.App.4th 892 [a dependent child, abused by her father and a victim of sexual trafficking, may seek SIJ findings].) There are juvenile delinquency cases. (*Leslie H. v. Superior Court, supra*, 224 Cal.App.4th 340, 350-351 [SIJ law applies to minor adjudged to be a delinquent]; *Eddie E. v. Superior Court* (2015) 234 Cal.App.4th 319 [a minor declared a ward of the court after committing crimes may seek SIJ findings because a parent abandoned him]; *In re Israel O.* (2015) 233 Cal.App.4th 279; *In re Christian H.* (2015) 238 Cal.App.4th 1085.) Orphaned children seeking a court-appointed guardian are also covered. (*B.F. v. Superior Court* (2012) 207 Cal.App.4th 621.) In the cited cases, it is clear that the child has been committed to or placed under the custody of the state.<sup>5</sup>

It is not entirely clear whether a parent such as appellant, who has custody of a non-dependent, non-delinquent, non-orphaned child is "an individual . . . appointed by a

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<sup>5</sup> In a recent case, a minor seeking SIJ findings was not dependent, delinquent, or orphaned; rather, he entered the U.S. without documentation and settled in Los Angeles with his mother. (*Alex R. v. Superior Court* (2016) 248 Cal.App.4th 1, 5-6.) The issue was solely whether the child's father had to be given notice before the trial court appointed a guardian ad litem. (*Id.* at pp. 8-13.)

State or juvenile court” within the meaning of the SIJ law. (See 8 C.F.R. § 204.11 (2012) [SIJ law applies to dependents of the juvenile court following a determination that family reunification is not a viable option].) For purposes of this appeal, we shall assume, without deciding, that if a parent is given custody of a child by the family court, the child falls within the scope and intent of the SIJ law.

## **2. Abandonment**

The trial court found that the evidence did not support a finding that reunification with one or both of Bryan’s parents was not viable due to abuse, neglect, abandonment, or similar basis. In reaching this determination, the trial court relied upon Family Code section 7822, as requested by appellant, and found that certain statutory requirements had not been satisfied. On appeal, appellant argues that the trial court erroneously relied upon Family Code section 7822; she now contends that the trial court should have relied upon the Uniform Child Custody Jurisdiction and Enforcement Act (Fam. Code, § 3402). We agree and conclude that the definition of abandonment found in Family Code section 3402 should apply. After all, the SIJ statute focuses on the child’s current ability to reunify with one or both parents; whether the parents’ abandonment was intentional or unintentional, its impact on the child’s welfare and ability to be cared for in his home country is the same. For that reason, proof of intentional abandonment is not required, as it is under Family Code section 7822, subdivision (a).

Because the trial court, through no fault of its own,<sup>6</sup> relied upon the wrong statute in assessing whether Bryan had been abandoned, we must remand the matter for determination under Family Code section 3402, keeping in mind that the notice requirements of Family Code sections 7881 and 7822 do not apply.

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<sup>6</sup> Although not raised by appellant, we could refuse to reach this issue under the doctrine of invited error. But courts have recognized that application of the doctrine of invited error is discretionary and should not be applied when to do so would result in a manifest injustice. (*People v. Ketchel* (1966) 63 Cal.2d 859, 866, fn. 3; *Allen v. Foster* (Mo. 1984) 668 S.W.2d 277, 280; *United States v. Barrow* (6th Cir. 1997) 118 F.3d 482, 491; *Fryman v. Federal Crop Ins. Corp.* (6th Cir. 1991) 936 F.2d 244, 251.) Applying the doctrine of invited error here could result in a manifest injustice.

**3. Return to Guatemala**

The trial court found that it would not be in Bryan’s best interest to return to live with his maternal grandparents in Guatemala, although the option of returning him to live with another adult relative “is unknown.” Appellant does not challenge this finding, so we do not address it.

**DISPOSITION**

The judgment is reversed and the matter is remanded for further proceedings.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

\_\_\_\_\_, P. J.  
BOREN

We concur:

\_\_\_\_\_, J.  
ASHMANN-GERST

\_\_\_\_\_, J.  
CHAVEZ