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IN THE SUPREME COURT OF CALIFORNIA

BIANKA M.,

Petitioner,

v.

THE SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,

Respondent;

GLADYS M.,

Real Party in Interest.

AFTER A PUBLISHED DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION THREE · CASE NO. B267454

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TABLE OF CONTENTS

PAGE

ISSUES PRESENTED 1

INTRODUCTION 2

STATEMENT OF THE CASE 6

A. SIJS Carefully Allocates Federal and State Responsibility in a Framework Designed to Protect Children Who Suffered Abandonment, Abuse or Neglect. 6

B. Bianka is a Special Immigrant Juvenile 8

C. Bianka Did Everything the Law Required of Her to Obtain a Custody Order and SIJS Findings. 10

D. The Court of Appeal Affirmed the Family Court's Order, Foreclosing Bianka's Ability to Obtain SIJS. 15

LEGAL DISCUSSION 19

I. A California Court Improperly Usurps the Authority of the Federal Government by Denying a Child's Request for SIJS Findings Based on a Conclusion that the Proceeding in Which the Request is Made is not "Bona Fide" 19

A. The Court of Appeal Erroneously Inferred Authority to Deny a Request for SIJS Findings It Deemed Not "Bona Fide" from Superseded and Inoperative Federal Law Rather than Section 155. 24

B. Like Federal Law, California Law Does Not Permit the State's Courts to Withhold SIJS Findings Based on a Conclusion that a Child's Request for the Findings is Not "Bona Fide." 28

II. A California Family Court May Not Deny a Child's Request for SIJS Findings on the Ground that the Parentage of the Child's Non-Custodial Alleged Parent Has Not Been Adjudicated 29

A. The Permissive Joinder Rule Does Not Mandate Adjudication of a Non-Custodial Alleged Father's Paternity Before Making a Custody Order or SIJS Findings........ 31

B. Bianka's Request for SIJS Findings Did Not Impliedly Seek to Adjudicate Her Alleged Father's Hypothetical Custody Rights or His Paternity........ 34

C. Due Process Did Not Require or Permit the Family Court to Refuse to Make SIJS Findings Without First Adjudicating Bianka's Alleged Father's Paternity........ 38

D. Bianka's Request for SIJS Findings Was Not Tantamount to Termination of Her Alleged Father's Hypothetical Parental Rights........ 39

CONCLUSION........ 43

TABLE OF AUTHORITIES

Page(s)

Cases

B.F. v. Superior Court
(2012) 207 Cal.App.4th 621 .... 8, 18, 24, 40

Bank of California Nat. Ass'n v. Superior Court in & for City & Cty. of San Francisco
(1940) 16 Cal.2d 516 32

Bianka M. v. Superior Court
(2016) 245 Cal.App.4th 406 .... *passim*

Bryan S. v. Superior Court
(Feb. 24, 2015, B267454), unpublished [Second Dist., Div. Five] 30

Cty. of San Diego v. Gorham
(2010) 186 Cal.App.4th 1215 17

In re Dakota S.
(2000) 85 Cal.App.4th 494 39

DeCanas v. Bica
(1976) 424 U.S. 351 29

Eddie E. v. Superior Court
(2015) 234 Cal.App.4th 319 .... *passim*

Elder O. v. Superior Court
(Sept. 3, 2015, B266546), unpublished [Second Dist., Div. Eight] 30

In re Erick M.
(2012) 284 Neb. 340 .... 20, 21, 23

In re Estate of Nina L. ex rel. Howerton (Ill.App.Ct. 2015) 41 N.E.3d 930 20

Francisco G. v. Superior Court
(2001) 91 Cal.App.4th 586 34

PAGE

Gabriel P. v. Suedi D.
(2006) 141 Cal.App.4th 850 .... 35, 39

Geier v. American Honda Motor Co., Inc.
(2000) 529 U.S. 861 28

In re Guardianship of Ann S.
(2009) 45 Cal.4th 1110 .... 39, 41

H.S.P. v. J.K.
(2015) 223 N.J. 196 20

Howard v. Data Storage Associates, Inc.
(1981) 125 Cal.App.3d 689 16

In re Israel O.
(2015) 233 Cal.App.4th 279 .... *passim*

LeCroy Research Systems Corp. v. United States
(2d Cir.1984) 751 F.2d 123 26

Lehr v. Robertson
(1983) 463 U.S. 248 41

Leslie H. v. Superior Court
(2014) 224 Cal.App.4th 340 .... *passim*

Marcelina M.-G. v. Israel S.
(N.Y.App.Div. 2013) 973 N.Y.S.2d 714 8

In re Mario S.
(N.Y.Fam.Ct. 2012) 38 Misc.3d 444 [954 N.Y.S.2d 843] 21

In re Marriage of Burgess
(1996) 13 Cal.4th 25 .... 12, 28

In re Marriage of Leonard
(1981) 122 Cal.App.3d 443 33

In re Marriage of Nurie
(2009) 176 Cal.App.4th 478 39

In re Paul W.
(2007) 151 Cal.App.4th 37 38

PAGE

Strathvale Holdings v. E.B.H
(2005) 126 Cal.App.4th 1241 18

Tedori v. United States
(9th Cir.2000) 211 F.3d 488 26

In re Y.M.
(2012) 207 Cal.App.4th 892 6

Yocum v. United States
(Fed.Cl. 2005) 66 Fed.Cl. 579 26

In re Zacharia D.
(1993) 6 Cal.4th 435 .... 34, 42

Statutes

8 U.S.C. § 1101 .... 8, 27

Civ. Code, § 413.10 13

Civ. Code, § 415.10 13

Code Civ. Proc., § 155 .... *passim*

Code Civ. Proc., § 387 38

Fam. Code, § 3010 35

Fam. Code, § 3011 37

Fam. Code, § 3020 .... 12, 16, 36, 37

Fam. Code, § 3402 28

Fam. Code, § 3406 33

Fam. Code, § 3408 13

Fam. Code, § 3409 38

Fam. Code, § 3421 .... 12, 28, 32

Fam. Code, § 3422 42

PAGE

Fam. Code, § 7610 35

Fam. Code, § 7611 35

Fam. Code, § 7635 .... 12, 13

Fam. Code, § 7666 13

Prob. Code, § 1510 33

Prob. Code, § 1514 11

Prob. Code, § 1600 11

Welf. & Inst. Code, § 300 11

Welf. & Inst. Code, § 325 12

Welf. & Inst. Code, § 650 12

Rules and Regulations

8 C.F.R. § 204.11 .... 7, 26, 27

8 C.F.R. § 204.11(d) (2014) 23

Cal. Rules of Court, rule 5.130 11

Cal. Rules of Court, rule 5.24 .... 30, 31, 32

Other Authorities

3–35 Immigration Law and Procedure § 35.09[3][a] [Matthew Bender 2013] 23

Assem. Bill No. 1603, approved by Governor Jun. 27, 2016, Assem. Weekly Hist. (2015-2016 Reg. Sess.) 24

Sen. Rules Comm., Off. of Sen. Floor Analyses, Rep. on Assem. Bill No. 1603 (2015-2016 Reg. Sess.) Jun. 16, 2016 8

Uniform Child Custody Jurisdiction and Enforcement Act (Fam. Code, §§ 3400-3465) 12

PAGE

United Nations High Commissioner for Refugees, Children on the Run (Mar. 2016) 9

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Issues Presented

In ruling on a child's request under Code of Civil Procedure section 155 for findings necessary to enable the child to petition the United States Citizenship and Immigration Services for classification as a Special Immigrant Juvenile:

1. Does a California court improperly usurp the authority of the federal government by denying the child's request based on a conclusion that the proceeding in which the request is made is not "bona fide"?

2. May a California family court deny the child's request on the ground that the parentage of the child's non-custodial alleged parent has not been adjudicated?

Introduction

For over a quarter century, it has been the federal government's policy to provide humanitarian relief in the form of Special Immigrant Juvenile Status ("SIJS") to abandoned, abused and neglected children born abroad. Section 155 of the Code of Civil Procedure ("section 155") implements the important but limited role of California courts in effectuating this policy by making certain factual findings ("SIJS findings") the federal government requires to determine whether or not to exercise its discretion to grant a child's petition for SIJS. Reflecting the California Legislature's commitment to facilitating access to SIJS for eligible children, section 155 gives the State's courts both jurisdiction and an obligation to make SIJS findings when supported by the evidence.

SIJS is intended to provide relief for children like Bianka. Abandoned by her alleged father before birth, Bianka left Honduras in August 2013 when she was ten years old to escape rampant gang violence and reunite with her mother in the United States. Immigration authorities detained Bianka when she crossed the border and placed her in a shelter in Texas, later releasing Bianka to her mother Gladys, who had previously come to California to better provide for her daughter. Bianka now lives in a safe, stable family environment that unquestionably promotes her health, safety and welfare, in stark contrast to the situation she left behind in

Honduras. Yet, because she lacks legal status, Bianka remains in jeopardy of deportation.

SIJS is one of the few realistic paths to legal status available to Bianka. She pursued that path as the law required her to do, bringing an action in the Los Angeles Superior Court ("Family Court") in which she requested SIJS findings. As part of these proceedings, Bianka sought an order from the Family Court placing her in her mother's custody. The court was empowered to make this custody order at any point in the proceeding because Bianka demonstrated that it would serve her best interests. Both federal immigration policy and state family law make the child's best interests central to the court's determination. SIJS aims not only to prevent deportation of a child who has suffered abandonment, abuse or neglect, but also to ensure the child will be cared for in this country if SIJS is granted. Thus, a court must find that the child has been placed in the custody of a court-appointed individual. The order Bianka requested would enable this SIJS finding.

The Family Court denied Bianka's request for a custody order and SIJS findings. The court concluded it could not issue the requisite custody order (and therefore could not make the needed SIJS findings) unless Bianka first joined her alleged father as a necessary party, and established personal jurisdiction over him. Only in this way, the Family Court believed, could it protect Bianka's alleged father's due process rights as a

parent and ensure that there was a "justiciable controversy" – in short, a fight over custody – for it to resolve.

Bianka sought writ review from the Court of Appeal. The Court of Appeal denied the writ. (*Bianka M. v. Superior Court* (2016) 245 Cal.App.4th 406 ("*Bianka M.*").) The court noted that Bianka's request for a custody order was uncontested and that "her mother has had no difficulty obtaining health care, education or anything else." (*Id.* at pp. 427-428.) From this, the Court of Appeal surmised that Bianka's parentage action "appears to have been brought only to obtain SIJ findings" and therefore "was not a bona fide custody proceeding under the UPA." (*Ibid.*) Having decided her parentage action was a pretext to obtain SIJS findings, the court concluded the "findings will not be useful to Bianka" because the federal government would view her petition for SIJS as not "bona fide" and deny it. (*Ibid.*) Thus the cost to Bianka of seeking SIJS findings was the inability to obtain them.

Going further, the Court of Appeal approved the Family Court's refusal to place Bianka in her mother's custody, despite Bianka's best interests, or to make the SIJS findings Bianka requested and supported with evidence, until it adjudicated her alleged father's paternity. (*Bianka M.*, *supra*, 245 Cal.App.4th at pp. 427-428.) This meant Bianka would "not only need to join [her alleged father] to the action but must also establish a basis for personal jurisdiction over him." (*Id.* at pp. 430-431.) Because the

Family Court lacked, and could not compulsorily obtain, personal jurisdiction over Bianka's alleged father, this condition effectively ended Bianka's chances of obtaining a custody order or SIJS findings (and therefore SIJS).

The Court of Appeal erred in two fundamental ways. First, by refusing SIJS findings on the assumption that the federal government would not accept them, the court disabled Bianka from even requesting, let alone obtaining SIJS. The Court of Appeal thereby supplanted the federal government as the sole and final arbiter of whether to grant or deny SIJS to a child. Moreover, by denying SIJS findings to children who "appear" to have brought a state court proceeding for the purpose of obtaining those findings, when that is what the law requires, the Court of Appeal sacrificed the ends of SIJS to the means of obtaining it. This decision upset the careful balance created by the federal SIJ statute between state courts' authority over matters affecting child welfare and the federal government's prerogative to control immigration. And it contradicted prior holdings by the Court of Appeal. If affirmed, the decision also would isolate California among a growing body of decisions from other states admonishing their courts to stick to a limited fact-finding role under the SIJ statute and leave immigration policy to the federal government.

Second, the Court of Appeal's insistence on litigating Bianka's alleged father's paternity, necessitating his voluntary submission to the

Family Court's jurisdiction, interposed an insurmountable obstacle to a custody order that is both demonstrably in Bianka's best interests and prerequisite to SIJS findings. Here, too, the Court of Appeal's decision departed from those of other panels which found no legal basis for conditioning SIJS findings on establishing an alleged father's paternity. If allowed to stand, the court's decision would deny SIJS to an entire class of eligible children, like Bianka, who were abandoned by a parent residing abroad.

For these reasons, this Court should reverse the Court of Appeal and remand with directions to order the trial court to make the SIJS findings and related custody order Bianka requested.

Statement of the Case

A. SIJS Carefully Allocates Federal and State Responsibility in a Framework Designed to Protect Children Who Suffered Abandonment, Abuse or Neglect.

"Congress created [SIJS] classification to protect abused, neglected, and abandoned unaccompanied minors through a process that allows them to become permanent legal residents." (*In re Y.M.* (2012) 207 Cal.App.4th 892, 915, citation omitted.) "[T]he purpose of SIJ status [is] to 'protect the applicant from further abuse or maltreatment by preventing him or her from being returned to a place where he or she is likely to suffer further abuse or neglect.'" (*In re Israel O.* (2015) 233 Cal.App.4th 279, 291 ("*Israel O.*"),

quoting *Marcelina M.-G. v. Israel S.* (N.Y.App.Div. 2013) 973 N.Y.S.2d 714, 723-724.)

Discretion to grant or deny SIJS to a child is reserved exclusively to the federal government through USCIS. (*Eddie E. v. Superior Court* (2015) 234 Cal.App.4th 319, 326 [Fourth Dist., Div. Three] ("*Eddie E. II*") ["[T]he federal government has exclusive jurisdiction with respect to immigration . . ., including the final determination whether an alien child will be granted permanent status as [an] SIJ."], citations omitted.) State courts, however, "play an important and indispensable role in the SIJ application process." (*Leslie H. v. Superior Court* (2014) 224 Cal.App.4th 340, 348 ("*Leslie H.*"), quoting *In re Mario S.* (N.Y. Fam. Ct. 2012) 38 Misc.3d 444, 451 [954 N.Y.S.2d 843] ("*Mario S.*").) They "are charged with making a preliminary determination of the child's dependency and his or her best interests, which is a prerequisite to an application to adjust status as a special immigrant juvenile." (*Leslie H.*, *supra*, 224 Cal.App.4th at p. 348, citation omitted.) In conjunction with this preliminary determination, state courts make three SIJS findings that enable a child to petition USCIS for SIJS. (*Id.* at p. 348, citations omitted.)

The SIJS findings needed to petition the federal government for SIJS are that (1) the child is "dependent" upon a juvenile[1] court or "committed

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[1] A "juvenile court" is any U.S. court "having jurisdiction under state law to make judicial determinations about the custody and care of

to, or placed under the custody of" the State or other court-appointed individual or entity; (2) the child cannot be reunified with one or both parents "due to abuse, neglect, abandonment, or a similar basis found under State law," and (3) it is not in the child's "best interest" to be "returned" to her country of origin. (*Leslie H.*, *supra*, 224 Cal.App.4th at p. 349, citing 8 U.S.C. § 1101(a)(27)(J); see also Code Civ. Proc., § 155, subd. (b)(1).)

A state court's decision to make SIJS findings in no way guarantees that the federal government will grant a child's request for SIJS. (*See Marcelina*, *supra*, 112 A.D.3d at p. 113 [SIJS findings "do not bestow any immigration status on SIJS applicants."].) Conversely, a state court's *refusal* to make SIJS findings guarantees that the federal government will *not* grant a child's request for SIJS. (*Ibid.*)

Section 155 reflects the California Legislature's determination that "it is in the best interest of the child for a superior court to issue the SIJS factual findings if requested and supported by evidence." (Sen. Rules Comm., Off. of Sen. Floor Analyses, Rep. on Assem. Bill No. 1603 (2015-2016 Reg. Sess.) Jun. 16, 2016 ("Senate Floor Analysis"), p. 6.) A court "has the authority ***and duty*** to make [SIJS] findings" pursuant to section 155 where these conditions are met. (*B.F. v. Superior Court* (2012) 207

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juveniles" (8 C.F.R. § 204.11(a)), and "includes, but is not limited to, the juvenile, probate, and family court divisions of the superior court." (Code Civ. Proc. § 155, subd. (a)(1).)

Cal.App.4th 621, 630 ("*B.F.*"), emphasis added; see also Code Civ. Proc., § 155, subd. (b)(1).)

B. Bianka is a Special Immigrant Juvenile.

Bianka was abandoned by her father in Honduras before she was born. (See Dkt. No. 3, Petitioner's Appendix of Exhibits, Vol. 1 ("1 AE") 2-3; 1 AE 9.)[2] Her alleged father refused to provide Bianka with any support. (*Id.*, Vol. 2 ("2 AE") 2-337:4, 2 AE 342:3-19.) He said he would rather Bianka die than provide her with money for milk. (2 AE 336:14-16.) He mocked Bianka's poverty and hunger by giving her mother Gladys fish heads when she begged him for food, and taunted her with the whole fish he was saving for himself. (2 AE 342:6-16.)

Bianka's childhood was punctuated by violence. While out riding her bicycle, Bianka saw a group of men being held up at gun point, then heard gunshots as she passed them. (1 AE 9, ¶ 5.) Armed men burst into Bianka's school during class and robbed her teacher at gunpoint in front of Bianka and her fellow elementary school students. (*Ibid.*) Bianka's experiences are emblematic of endemic violence in Honduras and demonstrate the importance of SIJS. (See, e.g., United Nations High Commissioner for Refugees, Children on the Run (Mar. 2016) p. 10 ["Forty-four percent of these displaced children [from Honduras] were

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[2] "Dkt. No." refers to sequential entries in the Court of Appeal docket for *Bianka M.*, *supra*, 245 Cal.App.4th 406.

threatened with or were victims of violence by organized armed criminal actors" and "[t]wenty-four percent of the children reported abuse in the home."].)

Unable to provide for Bianka in Honduras – and receiving no support from Bianka's alleged father – Bianka's mother Gladys traveled to the United States to find work. (1 AE 3, ¶ 6.) Bianka remained in Honduras with her older sister. (*Id.* ¶¶ 6-7.) After arriving in California, Gladys called Bianka every week and sent her clothing, shoes, school supplies, and money. (1 AE 9, ¶ 4.) Despite the remittances from Gladys, however, Bianka's older sister struggled to provide for Bianka because she had her own children to care for. (1 AE 10, ¶ 8.) Eventually she no longer could do both. (*Ibid.*) Faced with the prospect of homelessness in a country plagued by violence, Bianka fled to the United States. (1 AE 9, ¶ 6.) After being detained by federal immigration authorities, Bianka was reunited with her mother. (*Ibid.*) Bianka feels safe now, living in a stable family environment with her mother and two siblings and attending Carver Middle School. (1 AE 10, ¶ 7.)

C. Bianka Did Everything the Law Required of Her to Obtain a Custody Order and SIJS Findings.

In 2014, Bianka initiated a parentage action in Los Angeles County Superior Court (the "Family Court"). (1 AE 11.) She filed a request for order ("RFO") placing her under her mother's sole legal and physical

custody and making SIJS findings. (1 AE 105.) A custody order has intrinsic value to Bianka in ensuring a stable home situation that protects her health, safety and welfare. It is also a prerequisite to a SIJS finding that a child has been "[l]egally committed to, or placed under the custody of... an individual or entity appointed by the court." (Code Civ. Proc., § 155, subd. (b)(1)(A)(ii).) As such, a request for SIJS findings "may be filed in any proceeding under the Family Code in which a party is requesting sole physical custody of the child who is the subject of the requested findings" and may be made "[a]t the same time as, or any time after, a [RFO] requesting sole physical custody of the child." (See California Rules of Court, rule 5.130(b)(2)(B).) Bianka's mother wants custody of Bianka and did not oppose the RFO. (1 AE 4, ¶¶ 10, 12-13.)

Although section 155 allows Bianka to request SIJS findings in any division of the Superior Court, in practice, one-parent SIJS cases like hers can only proceed in family court. A family court action is the only kind of proceeding Bianka can initiate on her own and in which her mother can serve as "an individual ... appointed by the court" to take custody of Bianka, supporting the first SIJS finding. (Code Civ. Proc., § 155, subd. (b)(1)(A)(ii).) Probate proceedings will not work because Bianka resides with her mother, who is ineligible for appointment as her guardian. (Prob. Code, §§ 1514, subd. (b)(1)-(2) & 1600, subd. (a).) Dependency proceedings are also unavailable to Bianka because her mother provides her

with a loving and safe home. (Welf. & Inst. Code, § 300.) Juvenile delinquency proceedings would require Bianka to engage in some misconduct (*id.*, § 601), an unreasonable requirement since Bianka has no intention (and no history) of misbehaving. Further, only the State can initiate dependency or juvenile delinquency proceedings – Bianka has no right to do so herself. (Welf. & Inst. Code, §§ 325, 650.) Nevertheless, "the prerequisites for SIJS findings are the same across superior court divisions." (Senate Floor Analysis, p. 6.)

The Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") provides a California court "the exclusive jurisdictional basis for making a child custody determination." (Fam. Code, § 3421, subd. (b).) In general, the UCCJEA permits the court to make an initial child custody determination if, as in Bianka's case, California "is the home state of the child on the date of the commencement of the proceeding" (*id.*, subd. (a)(1)), and the order is in the child's best interest. (*Id.*, §§ 3011, 3021, subd. (f), 3022; accord *In re Marriage of Burgess* (1996) 13 Cal.4th 25, 31.) The court's primary concern in making a custody determination is the child's health, safety, and welfare. (Fam. Code, § 3020, subd. (a).)

"Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child custody determination." (Fam. Code, § 3421, subd. (c).) Bianka need only provide notice of the

proceeding to any alleged, natural, or presumed parent[3] and an opportunity to be heard, in accordance with California law. (Fam. Code, § 7635.) Notice to a parent residing in Honduras, like Bianka's alleged father, may be accomplished "by personal delivery of a copy of the summons and of the complaint" (Civ. Code, §§ 413.10, 415.10), at least 10 days before the proceeding. (Fam. Code, §§ 3408, subd. (a), 7635, subd. (b), 7666, subd. (a).)[4] Assuming these criteria are met, the court may "during the pendency of a proceeding or at any time thereafter, make an order for the custody of a child during minority that seems necessary or proper." (*Id.*, § 3022.)

Bianka satisfied each of the prerequisites to obtain the custody order she sought. Her home state is California. (See 1 AE 13; see also 1 AE 7.) She provided notice of the proceeding to both her mother – the proposed custodial parent – (1 AE 121), and her alleged father, who was personally served on May 28, 2015. (1 AE 125.) Bianka also served her alleged father with the same documents – the parentage petition, summons, RFO and all supporting documents – by mail on June 2, 2015. (1 AE 126.)[5]

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[3] The distinctions between these categories are discussed in more detail below. (See Legal Discussion § II.B.)

[4] Honduras is not a signatory to the Hague Service Convention, as the Court of Appeal acknowledged. (*Bianka M.*, 245 Cal.App.4th at p. 436.) As a result, service may be executed by means authorized under California law.

[5] In addition, Bianka's attorney called her alleged father on April 27, 2015 and notified him of the date, time, and location of the July 14, 2015 hearing on Bianka's RFO. (1 AE 116, ¶ 2.)

And Bianka made "a sufficient factual showing" that an award of sole custody to her mother is in her best interest. (2 AE 362:9-15.)

Bianka also satisfied every requirement under section 155 to obtain SIJS findings. The Family Court had jurisdiction to make those findings (all divisions of the Superior Court do). (Code Civ. Proc., § 155, subd. (a).) Bianka supported each SIJS finding with uncontroverted evidence, including (among other things) her own declaration (1 AE 109), which section 155 makes expressly sufficient to sustain the findings (Code Civ. Proc., § 155, subd. (b)(1)).

The custody order Bianka requested – and the Family Court should have made – would "[l]egally commit[] [her] to, or place[] [her] under the custody of … an individual or entity appointed by the court," satisfying the first SIJS findings. (Code Civ. Proc., § 155, subd. (b)(1)(A)(ii).)

The uncontroverted evidence that Bianka's alleged father abandoned her before birth (1 AE 2-3, ¶ 4), never had a relationship with her (1 AE 9, ¶ 3), and does not want a relationship now (1 AE 100, ¶ 2; 1 AE 116, ¶ 2), demonstrated that reunification was "not … viable because of abuse, neglect, [or] abandonment," satisfying the second SIJS finding. (Code Civ. Proc., § 155, subd. (b)(1)(B).)

The Family Court's own finding that "both the overall level of violence in her city and the lack of available relatives to care for her, is untenable, and supports a finding that **it would not be in the best interest[]**

of [Bianka] to be returned" to Honduras (2 AE 311, original emphasis) supports the third SIJS finding that "it is not in the best interest of [Bianka] to be returned to" Honduras. (Code Civ. Proc., § 155, subd. (b)(1)(C).)

In light of the foregoing facts, the Family Court should have granted Bianka's RFO. Instead, the court denied the RFO on the grounds that due process and the apparent lack of a "justiciable controversy" prevented it from making the requested custody order or SIJS findings without first adjudicating Bianka's alleged father's paternity. (2 AE 305.) Bianka petitioned for writ review.

D. The Court of Appeal Affirmed the Family Court's Order, Foreclosing Bianka's Ability to Obtain SIJS.

The Court of Appeal issued a published decision denying the writ petition. (*Bianka M.*, *supra*, 245 Cal.App.4th at p. 406.) Based on the apparent lack of controversy over custody, the court surmised that "Bianka's primary goal in bringing her parentage action was to obtain an order containing SIJ[S] findings." (*Id.* at p. 433.) It concluded that her maternity action was therefore "not a bona fide custody proceeding under the UPA" for purposes of SIJS. (*Id.* at pp. 427-428.)

The Court of Appeal also held "it was within the [Family Court's] discretion" to compel Bianka to join her alleged father to the proceeding and adjudicate his paternity "to attempt to give [him] a meaningful

opportunity to refute [her] allegations" – by which it meant SIJS findings – "before making the orders [she] requested." (*Id.* at p. 430.)

The Court of Appeal's decision to permit the Family Court to withhold SIJS findings based on its own conclusion that Bianka's maternity action was not "bona fide" effectively ended Bianka's hopes of receiving SIJS. The Court of Appeal misapprehended the role of the State's courts in the SIJS framework. Their task is to make a factual determination that the federal government uses to identify children eligible for SIJS. It is not to make the federal government's decision to grant or deny SIJS to those children; that is the government's sole prerogative. The Court of Appeal usurped that prerogative by allowing California courts to withhold SIJS findings based on their own conjecture about a child's motives and the assumption that these motives would prompt the federal government to deny the child's request for SIJS. The court also confused the relative priorities the Legislature has assigned to a child's interests and those of her parents; the former are a California courts' paramount concern in custody matters. (Fam. Code, § 3020, subd. (a).) Yet *Bianka M.* subordinated them to the hypothetical interests of an alleged father who has disclaimed any intent to assert them.

As for its decision mandating a paternity determination, the Court of Appeal acknowledged that this would require "Bianka . . .not only . . .to join [her alleged father] to the [maternity] action but . . . also [to] establish a

basis for personal jurisdiction over him." (*Bianka M.*, *supra*, 245 Cal.App.4th at p. 430.) Personal jurisdiction, however, cannot be obtained by service or joinder alone – it "depends on three factors: (a) jurisdiction of the state; (b) due process, *i.e.*, notice and opportunity for hearing; and (c) compliance with statutory jurisdictional requirements of process." (*Howard v. Data Storage Associates, Inc.* (1981) 125 Cal.App.3d 689, 696.) Bianka cannot control or satisfy the first of these: her alleged father lives in Honduras and has no contacts with California. (See, e.g., 1 AE 125 [proof of personal service on Bianka's alleged father in Honduras].) Because the Family Court cannot obtain personal jurisdiction over him, it cannot adjudicate his paternity. (*Cty. of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215, 1227 ["even though a statutory scheme may empower the trial court to determine paternity ... in a family law matter, such power only extends 'to parties over whom it has personal jurisdiction.'"].)

Although it "appreciate[d] that [the] process may prove difficult for Bianka and other similarly situated children seeking SIJ status," the Court of Appeal offered no viable solution to the dilemma its holding created. (*Bianka M.*, *supra*, 245 Cal.App. 4th at pp. 430-431.) To the contrary, the court advised Bianka to go through the motions of a procedure it acknowledged would likely prove pointless. She was to amend her pleadings to name her alleged father as a party to the action and serve him again with another summons and copy of the petition. (*Id.* at p. 416.)

Then, if he "fail[ed] to respond—the most likely outcome if, as Bianka alleges, he has no interest in her welfare—Bianka may then attempt to proceed by way of default and obtain the relief she seeks." (*Ibid.*)

But without personal jurisdiction over her alleged father, a default judgment adjudicating his paternity is void. (*Gorham*, *supra*, 186 Cal.App.4th at p. 1234.) This is true whether or not Bianka's alleged father failed to bring a motion to quash after being served. (*Strathvale Holdings v. E.B.H* (2005) 126 Cal.App.4th 1241, 1250.) To this the Court of Appeal responded that "[i]f obtaining personal jurisdiction over [her alleged father] is problematic, Bianka may attempt to obtain the relief she seeks by entering into a stipulated judgment of paternity with her father." (*Bianka M.*, *supra*, 245 Cal.App. 4th at p. 416.)

Although it is theoretically possible that a person who abandoned Bianka would willingly enter into a stipulated judgment agreeing that he is her father, the Court of Appeal's suggestion that this is the procedure Congress intended children to follow to obtain SIJS is fanciful. It fails to provide a reliable path to SIJS and the stable custody arrangements that are needed to protect children from further mistreatment. It places the burden on an already-traumatized child to not only interact with a person who endangers their "health, safety, and welfare," but also to plead for that person's help. And it would allow an abandoning, abusive, or neglectful parent to continue to victimize the child (and the other parent) by simply