S233757

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
FOR THE SECOND APPELLATE DISTRICT, DIVISION THREE
CASE NO. B267454

BRIEF OF *AMICUS CURIAE* AT THE REQUEST OF THE CALIFORNIA SUPREME COURT

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AMICUS CURIAE BRIEF

INTEREST OF AMICUS CURIAE

This *amicus* brief has been prepared and is being filed pursuant to this Court's order of November 16, 2016, requesting an amicus brief in place of a respondent's brief in *Bianka M. v. Superior Court* (2016) 245 Cal.App.4th 406, 416, review granted and opinion superseded sub nom. *M., Bianka v. S.C.* (2016) 370 P.3d 1052. The brief was drafted by L. Rachel Lerman, a partner at the law firm of Barnes & Thornburg LLP, and the attorney to whom the order was directed. Assistance was provided by Barnes & Thornburg associate Joseph Wahl.

While the *amicus* brief is being submitted in place of a respondent's brief as directed by the order, we are not advocates for any party. Instead, in keeping with the engagement letter that we drafted and this Court signed, we have taken a neutral approach. We have carefully reviewed the briefs filed to date, the lower court opinions, and relevant state and federal authorities. While we agree with some of the Court of Appeal's rulings, we disagree with others. We also agree with Petitioner in some, but not all, respects. Our conclusions are summarized in the Introduction to this brief, below.

Dated: February 14, 2017

BARNES & THORNBURG LLP

By 

L. Rachel Lerman

One of the Attorneys for *Amicus Curiae*

ISSUES PRESENTED

1. Whether a Superior Court may deny a child's request for Special Immigrant Juvenile ("SIJ") classification findings on the ground that the request was not made during a bona fide child welfare proceeding.

2. Whether a Superior Court may deny a child's request for SIJ classification findings on the ground that parentage of the child's alleged, noncustodial father has not been adjudicated, when the alleged father fails to respond after receiving all of the due process the law requires.

a. Whether joinder of, and/or personal jurisdiction over, the child's alleged father are necessary preconditions to making the SIJ status finding that her father abandoned her.

b. Whether it is appropriate for a Superior Court to ask a child seeking SIJ status findings to seek a stipulation of parentage from the alleged father she claims abandoned her.

INTRODUCTION

This case requires this Court to rule on issues of first impression concerning the role of California juvenile courts in making the findings that an undocumented minor must obtain before she can apply to the federal government (specifically, the United States Customs and Immigration Service, or "USCIS") for SIJ classification under the federal Immigration and Nationality Act ("INA").

Originally enacted in 1990, the SIJ statute has been amended several times over the years. Most recently, in 2008, the statute was amended to clarify that it applies to children for

whom "reunification with one or both ... parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law." (8 U.S.C. § 1101 (a)(27)(J).)[1]

Under the current version of the statute, children like Bianka M. ("Bianka"), who are able to reunite with a single parent living in the United States, may apply to the federal government for SIJ classification if they obtain findings from a state juvenile court that: (1) the child is "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"; (2) "reunification with 1 or both" parents is "not viable due to abuse, neglect, abandonment, or a similar basis found under State law"; and (3) "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." (*Id.*)

Bianka left Honduras by herself at the age of 10, and traveled to California to rejoin her mother, Gladys, who left Honduras herself in 2005. As Bianka and her mother testified, Bianka cannot go back to Honduras to live with her biological father, Jorge, because he abandoned Gladys (the mother of his

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[1] Originally, the statute required that a child seeking SIJ classification be "deemed eligible for long-term foster care." The language "deemed eligible for long-term foster care" was defined through regulation to mean that a court made a determination that family reunification is not a viable option. (See 8 CFR § 204.11(a)(1993).)

four children) while she was pregnant with Bianka, and declared he would rather see Bianka dead than be obliged to support her. Jorge never married Gladys, so he is classified by California law as Bianka's "alleged" father, giving him limited due process rights. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 449; Dkt. No. 3, Petitioner's Appendix of Exhibits ("AE") 303.)

Specifically, as an alleged father, Jorge is entitled to notice and an opportunity to be heard with respect to Bianka's petition to be placed in Gladys' sole custody. (*Id.*) Should he wish to be heard, he may seek to obtain "presumed" father status under California law. (See Fam. Code, § 7611 [outside of marriage, a presumed father is one who takes the child into his home and holds her out as his own].) Unless Jorge seeks and obtains presumed father status, his due process and parental rights extend no further.

Both of the lower courts were concerned that a parent might use the SIJ statute to kidnap a child from the custody of a parent living in another country. Noting these concerns, the Superior Court ruled that it could not grant Bianka's request for an order placing her in her mother's sole custody, or make a finding that Jorge abandoned her, without first determining Jorge's paternity in a proceeding to which Jorge was joined as a party.

The Court of Appeal granted writ review and affirmed the Superior Court based on its conclusions that (1) Bianka's custody petition was not bona fide, but based solely on her desire to obtain the findings needed to apply for SIJ status; and (2) "a

request for sole legal and physical custody in a parentage action necessarily requires a court to consider the parentage of both parents," so the Superior Court did not abuse its discretion in requiring Bianka to join Jorge, who received inadequate notice in this case. The Court of Appeal recognized that it could be difficult for Bianka to establish personal jurisdiction over Jorge, and suggested that Bianka might obtain a stipulation of parentage from him.

As discussed in Bianka's opening brief on the merits and in this brief, *infra*, the Court of Appeal's first conclusion is mistaken. Federal authorities, and now California Code of Procedure Section 155, which the Legislature clarified after the Court of Appeal's decision in this case was filed, provide that the question of whether an application for SIJ classification is made pursuant to a bona fide state court proceeding is one for the federal authorities, not the state courts, to address and decide.

The Court of Appeal's second conclusion is correct in part and mistaken in part. First, it appears that the notice Jorge received in this case was inadequate, as the Court ruled. California's custody and parentage statutes do not specify whether Jorge is entitled to notice that Bianka seeks a finding he abandoned her, but California dependency law strongly suggests that he is. California Rules of Court further suggest that Jorge is entitled to receive notice in Spanish, if he cannot read or understand English. Once notice has been corrected, however, there is no need for Bianka to join Jorge or demonstrate that he is subject to personal jurisdiction, as the Court further ruled.

The due process protections already in place under California law ensure that California custody proceedings are not used to deprive a presumptive parent of custody or parental rights. Indeed, the Uniform Child Custody Jurisdiction and Enforcement Act (the "UCCJEA"), codified in the California Family Code at §§ 3400 et seq., was drafted in part to protect against kidnapping of a child by one of her parents.

The UCCJEA requires that "all persons entitled to notice under the law of this state as in child custody proceedings between residents of this state" receive notice and an opportunity to be heard. (Fam. Code, § 3425.) The Uniform Parentage Act, codified in the California Family Code at §§ 7600 et seq., provides that "notice of [a parentage] proceeding shall be given to every person identified as the biological father or a possible biological father[.]" (Fam. Code, § 7666.) Upon receiving notice, an alleged father may exercise his right to be heard and seek to obtain presumed father status.

In keeping with these statutes, the California courts of appeal have consistently held, until now, that "[t]he requirements of due process of law are met in a child custody proceeding when, in a court having subject matter jurisdiction over the dispute [under the UCCJEA], the out-of-state parent is given notice and an opportunity to be heard." (*In re Marriage of Torres* (2002) 62 Cal.App.4th 1367, 1378 ("*Torres*"), citing *In re Marriage of Leonard* (1981) 122 Cal.App.3d 443, 459 ("*Leonard*"); see also *In re A.S.*, (2009) 180 Cal.App.4th 351, 362 [holding that a court "does not err by terminating a biological father's parental rights

when he has had the opportunity to show presumed father status and has not done so."].)

Once Jorge receives proper notice, it is up to him to respond in a timely fashion. If he does not, California law entitles him to nothing more. The same is true if he comes forward but cannot establish presumed father status.

In either of these circumstances, amicus submits that the Superior Court may and should proceed to adjudicate Bianka's custody case and make the SIJ classification findings set forth in 8 U.S.C. § 1101 (a)(27)(J).

STATUTORY BACKGROUND

A. The SIJ Provision

Congress enacted the SIJ provision of the INA in 1990 to protect undocumented minor immigrants who were eligible for long-term foster care. Congress has amended the statute several times over the years, most recently in 2008. While the SIJ statute is federal law, and was enacted based on federal authority over immigration matters, it relies on state juvenile courts to determine several underlying issues of fact.[2]

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[2] The SIJ statute originated as a narrow solution to a child welfare problem noted by California advocates. (See S. Daugherty, *Special Immigrant Juvenile Status* (2015) 80 Brook. L. Rev. 1087, 1092.) The statute provided children eligible for long-term foster care with the opportunity for a green card, federal benefits, and legitimate employment. (*Id.*) It incidentally benefited the State because federal benefits "decreased reliance on wholly state-funded services provided to undocumented immigrants." (J. Baum et al., *Most in Need But Least Served:*

The 1990 version of the statute extended to undocumented immigrant children who were eligible for long-term foster care because their parents were unavailable to provide for them. (8 U.S.C. § 1101 (a)(27)(J) (1990).)

In 1997, Congress amended the law to specify that an immigrant child applicant be deemed eligible for long-term foster care *due to abuse, neglect, or abandonment* (Pub. L. 105-119, 111 Stat. 2460 (1997)), a concept that was implied but not expressly stated in the original version of the statute.

In 2005, Congress added a provision relevant to SIJ classification proceedings in conjunction with the 2005 Reauthorization of the Violence Against Women Act ("VAWA 2005"). (Dep't of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 826, 119 Stat. 2960, 3065-66, Rule 12.4(a), (c), (e), pp. 116-117.) The new provision protects abused children by barring government officials from making personal contact, or compelling immigrant minor applicants to make personal contact, with the parent who allegedly abused or abandoned them. (8 U.S.C. § 1357(h) [providing that a child seeking SIJ classification "shall not be compelled to contact the alleged abuser"]; see M. Fitzpatrick and L. Orloff, *Abused, Abandoned, or Neglected: Legal*

Legal and Practical Barriers to Special Immigrant Juvenile Status for Federally Detained Minors (2012) 50 Fam Ct. Rev. 621, 623, cited in Daugherty, *supra.*)

Options for Recent Immigrant Women and Girls (2016) 4 Penn St. J.L. & Int'l Aff. 614, 628.)[3]

In 2008, Congress amended the SIJ statute again, this time pursuant to the William Wilberforce Trafficking Victims Protection Reauthorization Act ("TVPRA") of 2008. (Pub. L. 110-457, § 235, 122 Stat. 5044.) Under the 2008 version of the statute, which is the law today, state courts 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." (8 U.S.C. § 1101 (a)(27)(J).)

B. California Parentage and Custody Statutes

1. The Uniform Child Custody Jurisdiction and Enforcement Act

The UCCJEA is a revised form of the UCCJA, which was amended and renamed in 1997. (*In re A.C.* (2005) 130 Cal.App.4th 854, 860 [noting that cases interpreting the UCCJA are instructive in deciding cases under the UCCJEA except where there is a conflict between the two statutory schemes]; see also Jurisdiction and Litigation Choices, Cal. Prac. Guide Family L. Ch. 7-A ["The UCCJA and UCCJEA are similar but not

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[3] See 146 Cong. Rec. H9046 (2000), at 126, H.R. Rep. No. 109-233 (2000) (explaining that "Congress created special protections for victims of domestic violence against disclosure of information to their abusers and the use of information provided by abusers ... to ensure that immigration enforcement agents and government officials covered by this section do not initiate contact with abusers, call abusers as witnesses or relying on information furnished by or derived from abusers to apprehend, detain and attempt to remove victims[.]").

identical. Notably, the UCCJEA eliminates inconsistencies with the preemptive [Federal Parental Kidnapping Prevention Act] ...; strengthens the jurisdictional standards, thus removing the incentive under prior law to move children out of state for the purpose of relitigating custody/visitation disputes; and establishes uniform methods for enforcing custody and visitation orders."].) The UCCJEA has been adopted by nearly every state in the nation and is codified in the California Family Code at §§ 3400 et seq.

The purpose of the UCCJEA is "to avoid jurisdictional competition between states or countries, promote interstate cooperation, avoid relitigation of another state's or country's custody decisions and facilitate enforcement of another state's or country's custody decrees." (*Schneer v. Llaurado* (2015) 242 Cal.App.4th 1276, 1287 (citation omitted); see also *In re Marriage of Nurie* (2009) 176 Cal.App.4th 478, 496-497 ("*Nurie*") [UCCJEA also serves to deter parental kidnapping].)

The UCCJEA is the "'exclusive method of determining subject matter jurisdiction in custody disputes involving other jurisdictions[,]'" including foreign jurisdictions. (*In re Karla C.* (2010) 186 Cal.App.4th 1236, 1268 (quoting *In re Marriage of Sareen* (2007) 153 Cal.App.4th 371, 376).

A California court has subject matter jurisdiction when, as here, California is the "home state" of the child at the start of the proceeding. (*Ibid.*, citing Fam. Code, § 3421, subd. (a)(1).)

The UCCJEA applies to any "child custody proceeding," which the Act defines to include proceedings "for ... the

termination of parental rights" and for "protection from domestic violence." (Fam. Code, § 3402, subd. (d); see also *In re Marriage of Fernandez-Abin* (2011) 191 Cal.App.4th 1015, 1037-1038.)

2. The Uniform Parentage Act

The Uniform Parentage Act governs determinations of parentage. (*Jason P. v. Danielle S.* (2014) 226 Cal.App.4th 167, 174, citing *K.M. v. E.G.* (2005) 37 Cal.4th 130, 138; see *id.* [the Act "provides a comprehensive scheme for judicial determination of paternity, and was intended to rationalize procedure, to eliminate constitutional infirmities in then existing state law, and to improve state systems of support enforcement"], citation and quotations omitted.)

Under the Uniform Parentage Act, a woman may establish parentage "by proof of her having given birth to the child, or under this part." (Fam. Code, § 7610, subd. (a).) A man who is married to the mother at the time of birth is presumed to be the child's father. (Fam. Code, § 7611.) A man who is not married to the child's mother is not presumed to be the child's father unless he marries or attempts to marry her after the birth and/or "receives the child into his or her home and openly holds out the child as his or her natural child." (*Id.*, subd. (d).)

The Section 7611 paternity presumptions reflect "the state's interest in the welfare of the child and the integrity of the family," rather than the interests of the alleged or biological father. (*In re Jesusa V.* (2004) 32 Cal.4th 588, 611, citation and quotations omitted.) "'The statutory purpose [of section 7611] is to distinguish between those fathers who have entered into some

familial relationship with the mother and child and those who have not.'" (*Jason P., supra,* 226 Cal.App.4th at pp. 177, quoting *In re T.R.* (2005) 132 Cal.App.4th 1202, 1209.) "'The paternity presumptions are driven by state interest in preserving the integrity of the family and legitimate concern for the welfare of the child. The state has an 'interest in preserving and protecting the developed parent-child ... relationships which give young children social and emotional strength and stability.'" (*Id.*, quoting *In re Nicholas H.* (2002) 28 Cal.4th 56, 65.)

STATEMENT OF THE CASE

A. Bianka's Petition to Be Placed in Her Mother's Sole Custody and Her Request for SIJ Classification Findings

Bianka, who is now 13 years old, traveled from Honduras to the United States alone and without documentation in 2013. (*Bianka M. v. Superior Court* (2016) 245 Cal.App.4th 406, 416, review granted and opinion superseded sub nom. *M., Bianka v. S.C.* (216) 370 P.3d 1052 ("*Bianka M.*").) After a brief federal detention, she was reunited with her mother, Gladys, in California. (*Ibid.*) Gladys is a citizen of Honduras who left that country for the United States in 2005. (*Ibid.*; AE 3.) Gladys left Bianka in the care of an older daughter; she contacted her daughters regularly by phone and sent money to support Bianka. (Bianka M., supra, 245 Cal.App.4th at p. 416; AE 3, 9.) Bianka left Honduras when her sister was no longer able to care for her. (AE 9-10.)

According to Gladys, Bianka was fathered by Jorge, a resident of Honduras. (AE 331.) Gladys testified that she and Jorge never married, but were in a relationship for about fifteen years and had four children together, including Bianka. (AE 303.) Gladys also testified that Jorge beat her while she was pregnant with Bianka, that he left her during the pregnancy, that he never contacted Bianka or provided for her, and that he said he would rather see Bianka dead than have to support her. (AE 332-342.)

On December 12, 2014, Bianka filed a petition in the California Superior Court for the County of Los Angeles under the Uniform Parentage Act, seeking an order placing her in Gladys' sole custody to ensure Bianka a stable home. (AE 11, 105.)

She also asked the Superior Court to make the three findings needed to seek SIJ classification from the federal government, namely: (1) that she is in her mother's custody, (2) that her reunification with "1 or both" parents in Honduras "is not viable due to [her alleged father's] abuse, neglect, abandonment," and (3) that it would not be in her "best interest to be returned" to Honduras. (8 U.S.C. § 1101(a)(27)(J); *Bianka M.*, *supra*, 245 Cal.App.4th at p. 417.)

Jorge was not named or otherwise identified in this petition and there is no evidence in the record indicating that Jorge was served at the time of filing. (*Bianka M.*, *supra*, 245 Cal.App.4th at p. 418.) Bianka did, however, serve Jorge with her request for