APPENDIX A

SUPREME COURT OF KENTUCKY

No. 2018-SC-000592-DGE

COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES,
Appellant.
v.
N.B.D.,
Appellee,

RENDERED: JUNE 13, 2019
7/9/2019
CORRECTED: JULY 17, 2019

On Review from Court of Appeals
Case Number 2018-CA-000494
Campbell Circuit Court Nos. 17-J-00422
and 17-J-00422-001

OPINION OF THE COURT BY
JUSTICE D. LAMBERT

REVERSING

The Cabinet for Health and Family Services (hereinafter Cabinet) seeks reversal of the Court of Appeals, which held that the Campbell Family Court erred in declining to conduct a Special Immigrant Juvenile (hereinafter SIJ) hearing at the disposition

phase of a dependency, neglect and abuse case regarding N.M.D.J. (hereafter N.), an unaccompanied Guatemalan child. After thorough review, we reverse the Court of Appeals.

I. Facts

N. was born in Guatemala in 2001 and will turn eighteen in July 2019. She is now the mother of two infant children, having one child born in 2017 in Arizona and one child born in 2018 in Kentucky. Only N.'s case is before us. It is believed that her biological parents remain in Guatemala. They did not participate directly in the dependency case filed below but were appointed counsel. N. was also appointed counsel but neither her counsel, nor the counsel for the parents have participated in the appellate process. N.B.D. is the mother of N.'s boyfriend (M.). M. is likewise a minor and the father of N.'s two children.

N.B.D., an adult resident of Newport, Kentucky, filed a dependency petition in the Campbell County Family Court (the petition was signed June 20, 2017, but not filed until August 16, 2017) alleging the following:

> N. is an unaccompanied minor from Guatemala who is in removal proceedings with DHS[1]. She was released to her cousin's custody. The cousin lives out of state. N. had a child on January 24, 2017. Her cousin made her pay for everything for her and the child. My son, M., is the father of the child. N. could not pay to live with her cousin and she came here to live with me and my son. She is afraid

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[1] Department of Homeland Security.

> to return to Guatemala. She and M. were on vacation in Mexico when they were kidnapped. The kidnappers held them in a house. There was a lot of blood in the house. I paid $3000 for their release. When they released them, they put covers on their heads and took them to the U.S. border and told them not to return to Guatemala. They had both M. and N.'s (Petition ends abruptly at this point).

As N.B.D. requested, temporary custody of N. was placed with her at the first court appearance. The Court also ordered the Cabinet to become involved to offer services to N. After a couple of pretrial appearances, an adjudication hearing was set for December 20, 2017. At the end of the adjudication hearing, the court found that the child was dependent as there was no legal custodian present and set the disposition hearing for January 31, 2018. Meanwhile, N. gave birth to her second child on January 4, 2018. Two days prior to the disposition hearing, N.B.D.'s counsel filed a motion to continue the case, incorrectly alleging that the newborn was premature and that the child remained in the hospital. Counsel also stated that two experts had been retained to testify about the dangers to N. if she returned to Guatemala; and that additional time was needed by counsel to permit the experts to interview N. and "form an opinion." The Cabinet objected to a continuance and the Court overruled the motion, conducted the dispositional hearing, and adopted the recommendations of the Cabinet to continue custody of N. with N.B.D.

In addition to completing the standard form order and docket sheet, Judge Woeste entered a separate

five-page order addressing his findings in more detail, including the fact that U.S. immigration authorities had detained both N. and M. in Arizona, and had temporarily placed them with a cousin in Arizona pending the immigration proceedings. He noted that N. and M. subsequently ran from that federal immigration placement to the home of N.B.D. The Court also noted that N. had testified that she had come from Guatemala with M. and while they were traveling through Mexico, they were kidnapped by a gang.

The Court then addressed the motion for a continuance, the request for the SIJ special findings, and the limits of its own jurisdiction to make SIJ findings. The Court overruled the motion for a continuance because it was the Court's opinion that the testimony of experts regarding N.'s home country would not be relevant as the child was to stay in Kentucky in the custody of N.B.D., and therefore it was without the jurisdictional authority to undertake SIJ findings because such findings were not relevant to the core dependency, neglect, and abuse issues before the court.

II. Special Immigrant Juvenile Status under 8 U.S.C. Section 1101 (a)(27)(J) and the Role of State Courts

In *de Rubio v. Rubio Herrera*, 541 S.W.3d 564 (Mo. Ct. App. 2017), the Missouri Court of Appeals addressed the jurisdiction of Missouri courts to make SIJ findings in a dissolution case where the parents were both citizens of El Salvador and the custody of the child was granted solely to the mother. The mother wanted the court to enter an order that it would not be in the child's best interest to return to his home country with the father. *Id.* at 568-69. The *de Rubio* Court discussed the statute, saying:

> The federal Immigration and Nationality Act provides a path for undocumented immigrant children who have been abused, neglected, or abandoned to gain lawful permanent residency in the United States by obtaining Special Immigrant Juvenile status. *In re Guardianship of Guaman*, 879 N.W.2d 668, 671-72 (Minn. App. 2016) (citing 8 U.S.C. § 1101(a)(27)(J); 8 CFR § 204.11). A child who obtains such status may become a naturalized United States citizen after five years. *Eddie E. v. Superior Court*, 234 Cal. App. 4th 319, 326, 183 Cal.Rptr.3d 773 (Cal. App. 2015).
>
> This process was established in 1990, when Congress amended the Act to include the definition of "Special Immigrant Juvenile" ("SIJ") in 8 U.S.C. § 1101(a)(27)(J). *Recinos v. Escobar*, 473 Mass. 734, 46 N.E.3d 60, 63 (2016). The 1990 definition required (1) a finding by a state court that the child is "dependent on a juvenile court" and eligible for long-term foster care, and (2) a finding that it is "not in the child's best interests to return to his or her country of origin." *Id.* at 64. In 1997, Congress modified the definition to include a child who had been "legally committed to, or placed under the custody of, an agency or department of a State" and required that eligibility for long-term foster care be "due to abuse, neglect, or abandonment." *Id.*

Id. at 569-70 (footnotes omitted).

On appeal, the mother argued the circuit court erred by not making the findings required for SIJ status. *Id.* at 571. The Court found no error based on the

fact that Missouri does not have a statute or legal precedent **requiring** a court to issue special findings of fact to qualify a juvenile for SIJ status. *Id.* at 571-72. Nor does the federal statute itself require a state to make those findings. *Id.* at 571. The Court acknowledged that a court **is permitted** to make those findings, but the obligation to do so arises solely from a court's duty to act in the child's best interest. *Id.* at 573. Ultimately, the court held:

> Our reading of the SIJ statute is in accordance with the analysis in [*Canales v. Torres Orellana*, 800 S.E.2d 208 (Va. Ct. App. 2017)], which is consistent with the idea that **federal law cannot mandate a state court to make findings but may rely on state courts in the proper circumstances to make such findings that are in a child's best interest** and required of the court while in the position of in loco parentis.

Id. (emphasis added).

The case cited by the *de Rubio* opinion, *Canales v. Torres Orellana*, 800 S.E.2d 208 (Va. Ct. App. 2017), came to the same well-reasoned conclusion. In *Canales*, mother and father were both Honduran. *Id.* at 212. When the child was two, the mother immigrated to the United States and left the child in the care of the child's grandmother in Honduras. *Id.* Nine years after immigrating, when the child was in the United States, the mother petitioned the juvenile court to grant her sole custody and make specific factual findings that the child had been "abused" and "abandoned" by the child's father, as those are the terms used in the SIJ statute. *Id.* 212-13. The father at all times lived in Honduras and his whereabouts

were unknown. *Id.* The juvenile court granted sole custody to the mother but declined to make the specific SIJ findings. *Id.* The mother then appealed to the Circuit Court. *Id.* The Circuit Court also granted the mother sole custody, but declined to make the specific SIJ findings, believing it "did not have jurisdiction to make findings as to [SIJ] petitions[,] as such authority is not set forth in the Code of Virginia." *Id.*

The Virginia Court of Appeals agreed with the circuit court, holding:

> the SIJ statute does not request, much less order, state courts to make specific, separate SIJ findings; rather, it allows the appropriate *federal* entities to consider a state court's findings of fact, as recorded in a judgment order rendered under state law, when determining whether an immigrant meets the SIJ criteria. In other words, the SIJ definition only lists certain factors which, *if* established in state court proceedings, permit a juvenile immigrant to petition the United States Citizenship and Immigration Services ("USCIS") of the Department of Homeland Security for SIJ status—8 U.S.C. § 1101(a)(27)(J) does not *require* that the state court make such findings or convey jurisdiction upon them to do so.

Id. at 217.

In this case, N.B.D. requested the extra finding by the trial court to start the process of qualifying the child for Special Immigrant Juvenile status under 8 U.S.C Section 1101(a)(27)(J).

Under the Immigration and Naturalization Act, a "special immigrant" juvenile is defined as follows:

(27) The term "special immigrant" means—

[. . .]

(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 chapter;

8 U.S.C. § 1101(a)(27)(J).

Nothing contained in the Immigration and Nationality Act directs a state court to take any additional steps beyond carrying out their duties under state law. In fact, the United States Citizenship and Immigration Services ("USCIS") Policy Manual states as follows:

> USCIS must review the juvenile court order to conclude that the request for SIJ classification is bona fide, which means that the juvenile court order was sought to obtain relief from abuse, neglect, abandonment, or a similar basis under state law, and not primarily or solely to obtain an immigration benefit. The court ordered dependency or custodial placement of the child is the relief being sought from the juvenile court.

USCIS Policy Manual, Vol. 6, Part J, ch. 2 (D)(5), 2017 WL 443003 (footnote omitted).

The Policy Manual also recognizes that the federal law does not specifically direct the states to undertake a SIJ classification hearing. "There is nothing in the USCIS guidance that should be construed as instructing juvenile courts on how to apply their own state law." USCIS Policy Manual, Vol. 6, Part J, ch.2 (D)(4), 2017 WL 443003. Rather the Manual directs state courts only to follow state laws as to when to exercise

their authority, and to use their own evidentiary rules and due process guidelines in deciding whether to undertake a SIJ review. USCIS Policy Manual, Vol 6, Part J, ch. 3(A)(2), 2017 WL 443004.

III. Jurisdiction of Kentucky Courts in Dependency, Neglect and Abuse Cases

Here, N. met the first of the dependency and placement requirements, but the Court found that it did not have the authority under state statutes to make the requested additional SIJ findings. The Family Court has jurisdiction via KRS[2] 23A.100(2)(c) and KRS 620[3] to handle dependency, neglect and abuse

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[2] Kentucky Revised Statutes.

[3] 620.023 Evidence to be considered in determining the best interest of a child. (1) Evidence of the following circumstances if relevant shall be considered by the court in all proceedings conducted pursuant to KRS Chapter 620 in which the court is required to render decisions in the best interest of the child: (a) Mental illness as defined in KRS 202A.011 or an intellectual disability as defined in KRS 202B.010 of the parent, as attested to by a qualified mental health professional, which renders the parent unable to care for the immediate and ongoing needs of the child; (b) Acts of abuse or neglect as defined in KRS 600.020 toward any child; (c) Alcohol and other drug abuse, as defined in KRS 222.005, that results in an incapacity by the parent or caretaker to provide essential care and protection for the child; (d) A finding of domestic violence and abuse as defined in KRS 403.720, whether or not committed in the presence of the child; (e) Any other crime committed by a parent which results in the death or permanent physical or mental disability of a member of that parent's family or household; and (f) The existence of any guardianship or conservatorship of the parent pursuant to a determination of disability or partial disability as made under KRS 387.500 to 387.770 and 387.990. (2) In determining the best interest of the child, the court may consider the effectiveness of

actions and to make findings as to the best interest of the child. Clearly, N., as an unaccompanied minor child, whose parents are believed to be residents of Guatemala, is a dependent child and is entitled to the protection and care of the Commonwealth of Kentucky via KRS Chapter 23A.100. The ultimate question presented here is whether the Family Court must make additional findings relevant to the child's SIJ classification, upon request, in every such case. We hold that the courts of Kentucky are not required to make additional findings related to SIJ classification unless the court first determines that the evidence to be gleaned from such a supplemental hearing is relevant to the child's best interests. We agree with the family courts' assessment of the jurisdictional statutes and agree that our General Assembly has not specifically directed Kentucky's courts to make SIJ findings.[4] Some state courts have held that their jurisdiction was sufficient without the legislature enacting more specific statutes addressing SIJ classification findings.[5]

We agree with the findings of Judge Woeste that "[s]uch a hearing is unnecessary where the Court has

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rehabilitative efforts made by the parent or caretaker intended to address circumstances in this section.

[4] Some state legislatures have amended their statutes to direct courts to make SIJ determinations. *See,* e.g., Fla. Stat. Ann. Section 39.5075(4) (West 2005), Md. Code Ann. Fam. Law, Section 1-201(a) and (b)(1), and N.Y. Fam. Ct. Act Section 661(a).

[5] *See,* e.g., *Matter of Guardianship of Luis*, 114 N.E.3d 855 (Ind. Ct. App. 2018); *Guardianship of Penate*, 76 N.E.3d 960 (Mass. 2017); *Florida Dep't of Children and Families*, 215 So. 3d 1219 (Fla. 2017); *In re Guardianship of Guaman*, 879 N.W.2d 668 (Minn. Ct. App. 2016); *H.S.P. v. J.K.*, 121 A.3d 849 (N.J. 2015); and *In the interest of J.J.X.C.*, 734 S.E.2d 120 (Ga. Ct. App. 2012).

found that the child is dependent and that the present custodial arrangements are appropriate to serve the best interests of the child." However, we hold that under proper circumstances, where such a placement of the child back into the country where he or she was abused, neglected or abandoned is being considered by the state court, the courts of Kentucky are empowered under KRS 620.023 and other statutes which grant authority to determine custody or placement of a child, to make additional findings to determine whether it would be in the child's best interest to return to his or her native country. In this case, where N.B.D. acknowledges in her initial petition that N. was "in removal proceedings with DHS" and the child's testimony confirms that she and M. ran from the Arizona home where they had been placed by immigration authorities, there are also grave concerns about the use of the juvenile process by N.B.D. to circumvent federal immigration law. The Supremacy Clause of the U.S. Constitution prohibits states from resolving immigration hearings.[6] Rather, the proper place for such expert evidence in this case is not in any state court, but in federal immigration court.

For the foregoing reasons, we reverse the Court of Appeals.

All sitting. Buckingham, Keller, Lambert, and Wright, JJ., all concur. VanMeter, JJ., concurs in result only. Minton, C.J. dissent by separate opinion in which Hughes, J., joins.

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[6] U.S. Const, art. VI, cl. 2.

MINTON, C.J., DISSENTING:

I agree with the majority's recognition that Kentucky courts have jurisdiction to make Special Immigrant Juvenile Status ("SIJS") findings. But I must respectfully dissent from the majority's holding that our trial courts are not required to engage in SIJS factfinding. I fear the majority signals a reluctance on the part of our state courts in Kentucky to engage fully in the collaborative process established by federal law to protect the welfare of undocumented immigrant children. And this holding, in my view, subverts the overarching duty of our courts to guard the best interests of all children who come before us.

The United States Supreme Court "has long made clear that federal law is as much the law of the several States as are the laws passed by their legislatures. Federal and state law 'together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent'".[7]

The jurisdictions identified by the majority that require their state courts to engage in SIJS factfinding whenever an undocumented immigrant child is before them in a dependency, neglect, and abuse ("DNA") action, even in the absence of a state statutory mandate

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[7] *Haywood v. Drown*, 556 U.S. 729, 734-35 (2009) (quoting *Claflin v. Houseman*, 93 U.S. 130, 136-37 (1876)).

to do so, recognize the collaborative responsibility of their state courts to engage in SIJS factfinding.[8]

Federal law leaves to state courts the responsibility of deciding family law matters: "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States."[9] Recognizing the proficiency of state courts' handling of family law issues, while at the same time recognizing the proficiency of federal authorities' handling of immigrant issues, the federal government, in furtherance of the idea of cooperative federalism, has entrusted to state courts the

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[8] *See, e.g.*, *H.S.P. v. J.K.*, 121 A.3d 849, 852 (N.J. 2015) ("[Family courts] play[ ] a critical role in a minor immigrant's attempt to obtain SIJ status[.] . . . The [family court's] role in the SIJ process is . . . to apply its expertise in family and child welfare matters to the issues raised in 8 C.F.R. § 204.11 [.] . . . This approach will provide USCIS with sufficient information to enable it to determine whether SIJ status should be granted or denied[.]"); *In re Guardianship of Guaman*, 879 N.W.2d 668, 671 (Minn. App. 2016) ("Congress charged state courts with making SIJ findings because it 'recogniz[ed] that juvenile courts have particularized training and expertise in the area of child welfare and abuse, which places them in the best position to make determinations on the best interests of the child and potential or family reunification.'") (quoting *In re Hei Ting C.*, 109 A.D.3d 100 (N.Y. 2013)); *Guardianship of Penate*, 76 N.E.3d 960, 966 (Mass. 2017) ("Congress delegated [SIJS factfinding] to State courts because it recognized "the distinct expertise State courts possess in the area of child welfare and abuse,' which makes them best equipped to shoulder The responsibility to perform a best interest analysis and to make factual determinations about child welfare for purposes of SIJ eligibility.'") (quoting *Recinos v. Escobar*, 46 N.E.3d 60, 65 (Mass. 2016)).

[9] *Ex parte Burrus*, 136 U.S. 586, 593-94 (1890).

duty to make certain preliminary findings that bear on an undocumented immigrant child's ability to seek custody in the care of an individual or entity in the United States.

As the majority recognizes, the federal government has charged, but not mandated, state courts with making certain findings pertaining to an undocumented immigrant child's SIJS. "Only once a state juvenile court has issued [the requisite] factual predicate order may the child, or someone acting on his or her behalf, petition the [USCIS] for SIJS."[10] "The process for obtaining SIJ status is 'a unique hybrid procedure that directs the collaboration of state and federal systems.'"[11] As the Court of Appeals noted in the case at hand, without the requisite SIJS findings by a Kentucky court, undocumented immigrant children in Kentucky will be unable to proceed with an application for SIJS and may possibly face deportation. It is not an exaggeration to say that that child's "immigration status hangs in the balance."[12]

The requisite factual predicate to obtain SIJS is contained in 8 U.S.C. § 1101(a)(27)(J) and 8 C.F.R. 204.11. The statute, 8 U.S.C. § 1101(a)(27)(J), states the following, in relevant part:

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[10] *In re Enis A.C.M.*, 152 A.D.3d 690, 692 (N.Y. App. Div. 2017) (quoting *Matter of Marisol N.H.*, 115 A.D.3d 185, 188-89 (N.Y. App. 2014)).

[11] *Recinos v. Escobar*, 46 N.E.3d 60, 64 (Mass. 2016) (quoting *H.S.P. v. J.K.*, 121 A.3d 849 (N.J. 2015); *Matter of Marisol N.H.*, 115 A.D.3d 185, 188 (N.Y. 2014)).

[12] *In re J.J.X.C.*, 734 S.E.2d 120, 124 (Ga. Ct. App. 2012).

> The term "special immigrant" means an immigrant who is present in the United States—
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> (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; [and]
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> (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[.]

8 C.F.R. § 204.11 states the following, in relevant part:

> An alien is eligible for classification as a special immigrant. . . if the alien: . . .
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> (1) [i]s under twenty-one . . . ;
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> (2) [i]s unmarried;
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> (3) [h]as been declared dependent upon a juvenile court. . . in accordance with state law governing such declarations of dependency . . . ;
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> (4) [h]as been deemed eligible by the juvenile court for long-term foster care;

> (5) continues to be dependent upon the juvenile court and eligible for long-term foster care . . . ; and
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> (6) [h]as been the subject of judicial proceedings or administrative proceedings authorized or recognized by the juvenile court in which it has been determined that it would not be in the alien's best interest to be returned to the country of nationality or last habitual residence of the beneficiary or his or her parent or parents[.]"

"[']Juvenile court['] means a court located in the United States having jurisdiction under State law to make judicial determinations about the custody and care of juveniles[.]"[13] In Kentucky, those courts are the circuit family courts or the juvenile session of the district court in circuits where there is no family court division of circuit court.

Under KRS 620.023(1), in a DNA action, "the court is required to render decisions in the best interest of the child[.]" The "best interest of the child" standard is the hallmark of Kentucky family law decision making, and Kentucky's courts have a responsibility to dispose of a case according to the "best interest of the child."

When an undocumented immigrant child appears before a Kentucky court of competent jurisdiction in a DNA action, there are essentially three potential scenarios that could occur: 1) the court engages in SIJS factfinding, determining that it is not in the child's best interests to be returned to the custody of his or

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[13] 8 U.S.C. § 204.11(a).

her parents or native homeland; 2) the court engages in SIJS factfinding, determining that it is in the child's best interests to be returned to the custody of his or her parents or native homeland; or 3) the court does not engage in SIJS factfinding at all, disposing of the case as it sees fit.

In the first suggested scenario, the trial court engages in SIJS fact finding, determining that it is not in the child's best interests to be returned to the custody of his or her parents or native homeland. The trial court's only real option is to place the child in the custody of an individual or entity within the United States. And, because the trial court has engaged in explicit SIJS factfinding, it has ensured that the child can petition the federal government for SIJS without which the child would be subject to deportation. Deportation is—under this scenario—the exact situation that the trial court explicitly found would not be in the child's best interests. The trial court has fulfilled its duty to dispose of the child's case according to that child's best interest.

In the second scenario, the trial court engages in SIJS factfinding, determining that it is in the child's best interest to be returned to the custody of his or her parents or native homeland. Although the trial court has determined that deportation is in the child's best interest, only the federal government has the power to ensure that deportation occurs. In this manner, the trial court has nevertheless fulfilled its responsibility to dispose of the case according to the child's best interest because it has supplied the federal government with the information it needs to deport the child, the exact situation that the trial court has determined would be in the child's best interest.

A variation of the final scenario is the one presented to this Court in the case at hand. Here, as the majority notes, the trial court "found that the child is dependent and that the present custodial arrangements are appropriate to serve the best interests of the child," the "present custodial arrangements" being the placement of the child in the custody of the child's boyfriend's mother here in Kentucky. Because the trial court concluded in this way, the trial court found engaging in SIJS factfinding to be "unnecessary."

But without the requisite SIJS factfinding that the trial court refused to engage in, this child cannot petition the federal government for SIJS to prevent deportation. This result is contrary to the trial court's conclusion that "the present custodial arrangement[ ]," i.e. custody in the hands of an individual in the U.S., is in the child's best interest. It is impossible for the trial court to assuredly say that it fulfilled its duty to dispose of the case in furtherance of the child's best interest because the family court not only allowed but created the risk of a different outcome for this child—deportation. And that outcome is directly contrary to the trial court's finding that placement of the child in the care of an individual or entity within the U.S. is in the child's best interest.

To ensure compliance with the judiciary's duty to dispose of juvenile cases according to the child's best interest and to ensure that Kentucky does not shirk its duty in cooperative federalism, I would require Kentucky's courts always to engage in SIJS factfinding when an undocumented immigrant child is before the court in an action involving a custodial arrangement. I would affirm the Court of Appeals and remand this

case to the trial court with instructions to engage in SIJS factfinding.

Hughes, J. joins.

SUPREME COURT OF KENTUCKY

No. 2018-SC-000592-DGE

COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES,
Appellant.
v.
N.B.D.,
Appellee,

JULY 17, 2019

On Review from the Court of Appeals
Case Number 2018-CA-000494-MR
Campbell Circuit Court Nos. 17-J-00422
and 17-J-00422-001

ORDER CORRECTING

The Opinion of the Court by Justice Lambert rendered June 13, 2019 is corrected and the attached opinion is hereby substituted in lieu of the original opinion. Said correction does not affect the holding of the original opinion rendered by the Court.

ENTERED: July 17, 2019

s/_____
Chief Justice

APPENDIX B

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

No. 2018-CA-000494-ME

N.B.D.,
Appellant,
v.
CABINET FOR HEALTH AND FAMILY SERVICES;
N.M.D.J., A MINOR CHILD; R.D.; AND F.J.,
Appellees.

RENDERED: NOVEMBER 2, 2018; 10:00 A.M.
TO BE PUBLISHED
OPINION OF OCTOBER 5, 2018, WITHDRAWN

Appeal from Campbell Circuit Court
Honorable Richard A. Woeste, Judge
Action Nos. 17-J-00422 & 17-J-0422-001

OPINION REVERSING AND REMANDING

BEFORE: CLAYTON, CHIEF JUDGE; JOHNSON AND KRAMER, JUDGES.

CLAYTON, CHIEF JUDGE: Under the Immigration and Nationality Act, 8 United States Code (U.S.C.) § 1101(a)(27)(J) (2014), an undocumented juvenile immigrant may apply for permanent residency by obtaining special immigrant ("SIJ") status. As a

predicate to acquiring this status, the immigrant must present findings from a state juvenile court that he or she satisfies certain statutory criteria. This appeal is taken from a Campbell Family Court order declining on jurisdictional grounds to make such findings regarding N.M.D.J. ("Child"), a minor who was born in Guatemala and now resides in Kentucky.

A person who qualifies for SIJ status is defined as

> [A]n 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[.]

8 U.S.C. § 1101(a)(27)(J).

Thus, "[b]efore an immigrant child can apply for SIJ status, she must receive the following predicate

findings from a 'juvenile court': (1) she is dependent on the juvenile court; (2) her reunification with one or both parents is not viable due to abuse, neglect, or abandonment; and (3) it is not in her best interests to return to her country of origin." *Recinos v. Escobar*, 46 N.E.3d 60, 62 (Mass. 2016) (footnote omitted). "Once these special findings are made, an application and supporting documents may be submitted to the United States Citizenship and Immigration Services (USCIS) agency. An application for SIJ status must be submitted before the immigrant's twenty-first birthday." *Id.* (Citing 8 Code of Federal Regulations (C.F.R.) § 204.11 (2009)) (footnote omitted). "Congress created the SIJ classification to permit immigrant children who have been abused, neglected, or abandoned by one or both of their parents to apply for lawful permanent residence while remaining in the United States." *Id.*

Child was born in Guatemala in 2001. In September 2016, Child and her boyfriend ("Boyfriend") traveled to Mexico from Guatemala to vacation and visit relatives. Child was pregnant at the time. While in Mexico, the couple was kidnapped by a gang. They paid $3,000 to be released. The gang took them to the United States border and told them not to return to Guatemala. The couple came across the border and were detained in Arizona by immigration authorities. Child was placed in the custody of a cousin in Arizona pending further immigration proceedings. She gave birth on January 24, 2017. According to Child, her cousin tried to make her pay for everything for herself and the baby. She and Boyfriend, who is the father of the baby, left Arizona and went to northern Kentucky to live with N.B.D., Boyfriend's mother ("Appellant").

On August 16, 2017, Appellant filed a juvenile dependency, neglect or abuse petition in Campbell Family Court. On September 6, 2017, the Child was placed in the temporary custody of Appellant and the family court ordered the Cabinet to become involved in the case. On January 14, 2018, Child gave birth to another baby. Appellant filed a motion to continue the dispositional hearing in order to procure the testimony of experts about gang and drug cartel violence in Guatemala and Mexico, and for a pediatric psychiatrist to perform an evaluation of Child's trauma resulting from the kidnapping in Mexico. The family court denied the motion, stating that those issues were not relevant to the disposition. The Cabinet recommended Child be left in Appellant's custody and also reported allegations of domestic abuse of Child by Boyfriend. The family court adopted the Cabinet's recommendation and awarded continued custody to the Appellant. The court also referred Child to the Women's Crisis Center and ordered Boyfriend to undergo an anger management assessment. The family court refused on jurisdictional grounds the request of Appellant's counsel to make additional findings to satisfy the requirements of 8 U.S.C. § 1101(a)(27)(J) which might enable Child to acquire SIJ status. Its order stated in pertinent part as follows:

> This Court's jurisdiction is set forth in KRS 23A.100. Pursuant to that statute, this Court has jurisdiction to preside over dependency, neglect and abuse actions under KRS 620. KRS 620.140 provides dispositional alternatives after a child is found to be dependent. There are no provisions in either statute which would require this Court to hold a

separate hearing and engage in 8 U.S.C. 1101 factfinding process to decide whether or not reunification with the child's parents in Guatemala is viable due to possible abuse, neglect or abandonment. In addition, there is nothing in the above mentioned law that requires a finding that the child's best interests would not be served by returning the child to the previous country or nationality . . . [.] Such a hearing is unnecessary where the Court has found that the child is dependent and that the present custodial arrangements are appropriate to serve the best interests of the child.

This Court doesn't have personal jurisdiction over the parents of the child. The parents have never made an appearance in the case. Summons for the parents were issued but were unserved. The Court can proceed in such circumstances simply because the child is found within the county. KRS 610.010(2). However, the court's exercise of jurisdiction is subject to the assertion of jurisdiction of other courts or jurisdictions as set forth in KRS 610.010(7).

Counsel for the custodian had made mention in previous court hearings that there is [a] mandate under federal law that this Court make such a finding. No specific directive of such could be found in the applicable federal statutes. Moreover, this Court has serious concerns about engaging in a factfinding process that spans from Campbell County, Kentucky into Arizona, through Mexico and into Guatemala. The testimony in the prior

> adjudication hearing was that the child and her boyfriend left Guatemala on their own accord. Such a factfinding process is better left to the federal government who have personnel and resources in all the aforementioned places. Furthermore, requiring a state court to make findings necessary for federal immigration cases would seem to violate anti-commandeering doctrine under the Tenth Amendment to the United States Constitution.

The family court concluded, "There is no requirement that this Court enter into an additional SIJ factfinding process under the applicable jurisdictional statute nor the statutes relating to dependency, neglect and abuse." This appeal followed.

There is no Kentucky statute which expressly requires a family court to make findings under the SIJ statute. Several states, including California, Florida, Maryland and Nebraska, have passed legislation directing their courts to make the requisite findings. *See, e.g.*, Cal. Civ. Proc. Code § 155 (a) and (b) (2016); Fla. Stat. Ann. § 39.5075 (2005); Md. Code Ann., Fam. Law § 1-201(b)(10)(2014); Neb. Rev. Stat. § 43-1238(b) (2018).

Kentucky law defines subject-matter jurisdiction as "the court's power to hear and rule on a particular type of controversy." *Nordike v. Nordike*, 231 S.W.3d 733, 737 (Ky. 2007). The jurisdiction of Kentucky's family courts is defined in KRS 23A.100. Section (1) of that statute lists areas of general jurisdiction which the family courts retain as a division of the circuit courts; section (2) lists areas of additional jurisdiction including, as the family court noted, dependency,

neglect and abuse proceedings as delineated in KRS Chapter 620. In KRS 23A.110, the legislature explained that "[t]he additional jurisdiction of a family court . . . shall be liberally construed and applied to promote its underlying purposes, which are as follows: . . . To assure an adequate remedy for children adjudged to be dependent, abused, or neglected[.]" KRS 23A.110(4). Without the requisite findings by the family court, Child will be unable to proceed with an application for SIJ status and may possibly face deportation. It is not an exaggeration to say that Child's "immigration status hangs in the balance." *In re J.J.X.C.*, 734 S.E.2d 120, 124 (Ga. Ct. App. 2012). As other state appellate courts have agreed, the failure to make findings relevant to SIJ status "effectively terminates the application for legal permanent residence, clearly affecting a substantial right" of the child. *See, e.g.*, *In re Interest of Luis G.*, 764 N.W.2d 648, 654 (Neb. Ct. App. 2009); *E.C.D. v. P.D.R.D.*, 114 So. 3d 33, 36 (Ala. Civ. App. 2012). In our view, the SIJ fact-finding process falls squarely within the family court's jurisdiction as furthering its purpose to provide an adequate remedy for Child, who has been adjudged to be dependent and whose substantial rights are affected by such findings or lack thereof.

The family court is most emphatically not being directed to "address immigration issues" or Child's "immigration status," as argued by the dissent. In the unpublished opinion relied upon by the dissent, *Collins v. Santiago*, No. 2007-CA-00391-MR, 2007 WL 3037762 (Ky. App. Oct. 19, 2007), a panel of this Court affirmed the trial court's refusal to consider a father's alleged status as an illegal alien in determining the custody of his two minor children. Similarly, the

family court in this case is not being asked to address or consider Child's immigration status; it is directed to make findings that are solely within its unique competence and jurisdiction as a family court. Indeed, it is hard to know what other judicial or administrative tribunal could be better equipped make such a finding.

The Cabinet argues, in reliance on an opinion of the Virginia Court of Appeals, that there is simply no specific directive in the federal statute that compels state courts to make these findings. The Virginia Court reasoned as follows:

> As a preliminary matter, because the SIJ statute is within the definitions portion of Title 8, it is clear that 8 U.S.C. § 1101(a)(27)(J) only *defines* a special immigrant for the purpose of interpreting and enforcing the entirety of Title 8, and nothing more. There is no language in any federal statute *mandating* that state juvenile courts make the SIJ findings. Further, the SIJ statute does not request, much less order, state courts to make specific, separate SIJ findings; rather, it allows the appropriate *federal* entities to consider a state court's findings of fact, as recorded in a judgment order rendered under state law, when determining whether an immigrant meets the SIJ criteria. In other words, the SIJ definition only lists certain factors which, *if* established in state court proceedings, permit a juvenile immigrant to petition the United States Citizenship and Immigration Services ("USCIS") of the Department of Homeland Security for SIJ status—8 U.S.C. § 1101(a)(27)(J) does not *require* that

> the state court make such findings or convey jurisdiction upon them to do so.

Canales v. Torres Orellana, 800 S.E.2d 208, 217 (Va. Ct. App. 2017).

> Although an SIJ applicant is required to provide federal officials with an order or orders from a state court in support of his or her eligibility for SIJ status, the statutory scheme and relevant federal guidance make clear that such orders should have been generated by state courts applying state law in the normal course of their responsibilities under the laws of the respective states. Nothing in the INA [Immigration and Nationality Act] directs a state court to do anything more than carry out its adjudicatory responsibilities under state law.

Id. at 218 (footnote omitted).

This approach has been adopted by the Missouri Court of Appeals, which has specified, "[I]f a state court **in the regular course of business** happens to make findings that fit within these parameters, then the juvenile can take those findings to the federal authorities and apply for SIJ status." *de Rubio v. Rubio Herrera*, 541 S.W.3d 564, 573 (Mo. Ct. App. 2017), *reh'g and/or transfer denied* (Jan. 30, 2018), *transfer denied* (Apr. 3, 2018) (emphasis added). This reliance on happenstance is problematic. If the family court "in the regular course of business" happened to make a finding that it was or was not in Child's best interest to return to Guatemala, it would presumably be acting within its jurisdiction, whereas the Virginia and Missouri approach would mean that Child's mere request

for such a finding would deprive the family court of jurisdiction.

Other state courts have described the process for obtaining SIJ status as "a unique hybrid procedure that directs the collaboration of state and federal systems." *H.S.P. v. J.K.*, 121 A.3d 849, 857 (N.J. 2015) (internal citations and quotation marks omitted). This approach is based on the recognition, as we have stated, that state courts have matchless expertise in juvenile welfare matters. "The SIJ statute affirms the institutional competence of state courts as the appropriate forum for child welfare determinations regarding abuse, neglect, or abandonment, and a child's best interests." *In re J.J.X.C.*, 734 S.E.2d at 124 (internal citation omitted).

On the other hand, the role of state courts in the SIJ process is carefully limited. The Supreme Court of New Jersey has described the role of its family court, the Family Part, in SIJ proceedings as critical but "closely circumscribed:"

> The Family Part's sole task is to apply New Jersey law in order to make the child welfare findings required by 8 C.F.R. § 204.11. The Family Part does not have jurisdiction to grant or deny applications for immigration relief. That responsibility remains squarely in the hands of the federal government. Nor does it have the jurisdiction to interpret federal immigration statutes. The Family Part's role in the SIJ process is solely to apply its expertise in family and child welfare matters to the issues raised in 8 C.F.R. § 204.11, regardless of its view as to the position likely to be taken

> by the federal agency or whether the minor has met the requirements for SIJ status.

H.S.P., 121 A.3d at 852.

Similarly, the Appellate Division of the Supreme Court of New York stated that

> [t]he state court's role in the SIJ process is not to determine worthy candidates for citizenship, but simply to identify abused, neglected, or abandoned alien children under its jurisdiction who cannot reunify with a parent or be safely returned in. their best interests to their home country. By issuing a special findings order, Family Court is not rendering an immigration determination; such order is merely a step in the process to assist USCIS and its parent agency, the Department of Homeland Security, in making the ultimate immigration determination[.]

Matter of Guardianship of Keilyn GG., 74 N.Y.S.3d 378, 381 (N.Y. App. Div. 2018) (internal citations and quotation marks omitted).

In keeping with its independence from the federal immigration process, the family court is fully authorized as the finder of fact to conclude under Kentucky law that a petitioner has failed to present evidence to support the SIJ factors or that the evidence presented was not credible. *See, e.g.*, *In re J.J.X.C.*, 734 S.E.2d at 124; Kentucky Rules of Civil Procedure (CR) 52.01. We do not ask the family court to render an "advisory opinion," as the dissent contends. The family court is not being asked to "opine" at all; it is being asked to make findings. The determination of Child's immigration status is a question solely for the federal authorities.

Indeed, we are not motivated by a misguided sense of sympathy, as the dissent suggests, to direct the family court to make findings which it deems favorable to Child's prospects for attaining permanent residency. The family court is merely being asked to make findings, based on the evidence presented by the parties, regarding Child's best interest, an area within its capability and jurisdiction.

The Cabinet argues that making the SIJ findings could violate the anti-commandeering doctrine of the Tenth Amendment of the United States Constitution. "[T]the Tenth Amendment makes explicit that '[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people[.]'" *New York v. United States*, 505 U.S. 144, 155, 112 S. Ct. 2408, 2417, 120 L. Ed. 2d 120 (1992). The federal government may not, therefore, commandeer "the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program[.]" *Id.*, 505 U.S. at 176, 112 S. Ct. at 2420. For example, in a case involving the disposal of radioactive waste, the United States Supreme Court concluded that "while Congress has substantial power under the Constitution to encourage the States to provide for the disposal of the radioactive waste generated within their borders, the Constitution does not confer upon Congress the ability simply to compel the States to do so." *Id*., 505 U.S. at 149, 112 S. Ct. at 2414. Similarly, in a case involving the enforcement of a federal gun control law, the nation's highest court deemed unconstitutional the obligation imposed on Chief Law Enforcement Officers to "make a reasonable effort to ascertain within 5 business days whether receipt or

possession [of a handgun] would be in violation of the [federal] law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General[.]" *Printz v. United States*, 521 U.S. 898, 903, 117 S. Ct. 2365, 2369, 138 L. Ed. 2d 914 (1997).

Unlike the laws invalidated in *Printz* and *New York*, which mandated that states comply with detailed regulatory schemes, the SIJ statute does not impose any specific burden on state courts. *See* Gregory Zhong Tian Chen, *Elian or Alien? The Contradictions of Protecting Undocumented Children Under the Special Immigrant Juvenile Statute*, 27 *Hastings Const. L.Q.* 597, 659 (2000). 8 United States Code (U.S.C.) § 1101(a)(27)(J) does not impose a duty on state courts to comply with a federal scheme. In making findings in this case, the family court will be exercising its unique competence as a family court, not in response to a federal directive, but in furtherance of the interests of Child whom it has already adjudged dependent.

Finally, we address the Appellant's argument that the family court erred in not transferring the case to Boone Circuit Court because she and Child reside in Boone County. "In civil actions, when the judge of the court in which the case was filed determines that the court lacks venue to try the case due to an improper venue, the judge, upon motion of a party, shall transfer the case to the court with the proper venue." KRS 452.105. The Appellant does not provide any citation to the record indicating that she filed a motion to transfer the case to a different forum. Furthermore, the Appellant initiated the action by filing her petition in Campbell Circuit Court. "[W]hile the concept of venue is important, it does not reach the fundamental

level of jurisdiction, a concept whereby the authority of the court to act is at issue." *Fritsch v. Caudill*, 146 S.W.3d 926, 927 (Ky. 2004). "[V]enue is not the equivalent of jurisdiction and can be waived if not timely raised." *Gibson v. Fuel Transp., Inc.*, 410 S.W.3d 56, 62 (Ky. 2013). In the absence of a showing that the family court was given an opportunity to rule on the issue, the issue of venue is waived.

For the foregoing reasons, the order of the Campbell Family Court is reversed and the matter is remanded for the court to make findings pursuant to 8 U.S.C. § 1101(a)(27)(J) and 8 C.F.R. § 204.11.

KRAMER, JUDGE, CONCURS.

JOHNSON, JUDGE, DISSENTS AND FILES A SEPARATE OPINION.

JOHNSON, JUDGE DISSENTING: I respectfully dissent from the majority opinion. This is a case of first impression. While N.D.B. attempts to rely upon *Y.M.R.G. v Cabinet for Health and Family Services*, No. 2017-CA-000898-ME, that appeal was finalized by a dismissal from this court. There is no written legal opinion, published or unpublished, which addresses the authority or jurisdiction of the family court to enter into a special-findings hearing for the purpose of allowing N.D.B. to apply for SIJ status pursuant to the Immigration Naturalization Act.

In December 2017, a hearing was held by the Campbell Family Court wherein the family court found that Child was dependent. The family court then held a hearing to determine final disposition of Child. Relying upon the recommendation of the Cabinet for Health and Family Services the family court made the necessary findings under KRS 620.140 and

granted custody of the child to N.D.B. However, at the dispositional hearing, N.D.B. asked the family court to hold an additional hearing for the purpose of entering a predicate order finding that it was not in the best interests of the child to return to her native county of Guatemala. N.D.B. then stated that the document would be filed with the immigration court for the purpose of child obtaining SIJ status.

The family court declined based upon its ruling that pursuant to KRS 620.140 it was in the best interests of the child that she remain in the custody of N.D.B. who can care for her needs. The family court determined that it was irrelevant to its ruling concerning the disposition of Child for it to hold an additional hearing for the sole purpose of determining if it was in the best interests of Child to return to Guatemala. The family court therefore, declined to enter into a special fact-finding proceeding to make additional findings to satisfy the requirements of 8 U.S.C. 1101(a)(27)(J) which would enable Child to seek SIJ status. The family court was correct in not extending its hearing to make the special finding of facts requested by N.D.B., because the family court is without jurisdiction or authority to hold a hearing for the sole purpose of furthering Child's acquisition of SIJ status.

A family court's jurisdiction is defined by KRS 23A.100 which grants them exclusive jurisdiction over the dissolution of marriage, child custody, visitation, maintenance and support, distribution of property, adoption and termination of parental rights. However, family courts also have the general jurisdiction of a circuit court. While the jurisdiction of our circuit courts is broad, it is not unlimited. As the family court noted, there is nothing in our state statutes that direct

the family court to hold such a hearing for the purposes of determining disposition as set forth in KRS 620.140. The family court went on to state that if the General Assembly wants our family courts to address immigration issues, they can enact such a statute. However, a determination as to whether or not an immigrant child before our family court should return to their home country is not within the authority of the family courts at this time.

To hold a hearing for the sole purpose of making a determination so that an immigrant child can apply for SIJ status is beyond the authority of our family courts. We addressed the issue in an unpublished opinion, *Collins v Santiago*, 2007-CA-000391-MR, 2007 WL 3037762 (Ky. App. October 19, 2007). In *Santiago*, the father was an illegal immigrant and mother was a legal resident of the United States. In the custody hearing, the family court granted the parties joint custody of the couple's two children. Mother then raised the father's immigration status and asked the family court to reconsider the joint custody order based on the father's status. Our Court declined, stating "While the jurisdiction of Kentucky's family courts are very broad, it does not encompass immigration issues. It is not the role of the Circuit Court to address Santiago's immigration **status** except in his capacity to care and provide for his children." *Id.* (emphasis added). As in this case, it is not the role of the family court to address Child's immigration status unless it affects whether her needs are being met.

In this case *sub judice*, the family court declined to hold a hearing for the sole purpose of making special findings which Child might use to seek SIJ status. I agree with the family court. As the family court noted

in its order when denying the motion for a special hearing:

> The Cabinet had filed a disposition report prior to the disposition date recommending that the child be in the custody of the current custodian, [N.D.B.], in Newport KY. Given the nature of the case and the fact that the Cabinet had made such a recommendation the Court did not feel that conditions in the child's nation of origin were relevant because the recommendation of the Cabinet was that the child was to stay in the United States with [N.D.B].

As noted in *Santiago*, our family courts do not have jurisdiction to address immigration status unless it is necessary for a determination of the disposition of Child under Kentucky statutes. Here, because the family court had already made both adjudication and dispositional findings, there is no authority for the family court to go further. The family court correctly noted that there are no provisions in either state or federal statutes which would require a family court to hold a separate hearing for the single purpose of assisting Child obtain the unique SIJ status.

Even the majority noted, for the family court to engage in such a hearing would require "a unique hybrid procedure that directs the collaboration of state and federal systems." Yet, as the majority also notes "there is no Kentucky statute which expressly requires a family court to make findings under the SIJ [federal] statute." I do not see where there is a legal basis to expand the authority of our family courts beyond that granted by the General Assembly. I disagree with the majority that the family court has a duty, authority,

or jurisdiction to conduct a hearing which has no relevance to the adjudication or the disposition of Child except for the **sole** purpose of obtaining a unique immigration status.

While the majority might like for the family court to so act, Kentucky law is explicitly clear that we cannot can engage in advisory opinions. That, in essence, is what the majority is asking the family court to do. Our Kentucky Supreme Court has emphatically stated, "[Our] Court has repeatedly reaffirmed the proposition that it has no jurisdiction to decide issues which do not derive from an actual case or controversy. Power to render advisory opinions conflicts with Kentucky Constitution Section 110 and thus cannot be exercised by the Court." *Com. v. Hughes*, 873 S.W.2d 828, 829-30 (Ky. 1994) (citations and internal quotation marks omitted).

Like the majority, I am sympathetic to the plight of Child who may face adverse conditions if she is returned to her home country. However, sympathy alone is not a sufficient basis for establishing new law or expanding the current law. I believe that the family court acted within its authority in granting custody to N.D.B. But I also believe that the family court was correct when it declined, based upon relevance to the disposition of Child, to hold a hearing for the sole purpose of immigration law. Therefore, I would affirm the family court's order.

APPENDIX C

COMMONWEALTH OF KENTUCKY
CAMPBELL FAMILY COURT

No. 17-J-422-001

IN THE INTEREST OF:
NELIDA MARIBEL DIAZ JUAREZ, a minor

Feb. 1, 2018

ORDER

This case was brought on for a hearing on January 31, 2018. Theresa Cunningham was present, representing the person exercising custody and control, Nalberta Bravo Diaz (Nalberta Bravo). Also present was the child, Nelida Maribel Juarez (Nelida Juarez). She was represented by Kirk Pfefferman, who is her Guardian ad Litem. The case was handled simultaneously with 17-J-515-001, Dayana Janeth Aguilar Diaz. Dayana Diaz was born on January 24, 2017. Nelida Juarez is the mother of the infant, Dayana Diaz.

Campbell County was represented by Olivia Toller. Mary Salyer was representing the father of Nelida Juarez, Ruben Diaz who is in Guatemala; and, Martin Haas was representing the mother of Nelida Juarez, Fiberta Juarez, who is also in Guatemala.

On December 20, 2017, the Court found that the child was dependent as the child was an unaccompanied minor in the United States and did not have a

legal custodian present to provide supervision and shelter. The child had come from Guatemala with Marvin Bravo, the son of Nalberta Bravo. Nelida Juarez testified at the adjudication that she and Marvin traveled to Mexico from Guatemala and while in Mexico were kidnapped by a gang. The gang subsequently released them and told them not to go back to Guatemala. Whereupon, they came across the U.S. border. The parties were detained in Arizona by Immigration authorities. Custody of Nelida Juarez was given to a relative in Arizona pending the immigration proceedings. She subsequently ran from there to Northern Kentucky along with Marvin Bravo. Nelida Juarez and Marvin Bravo are living with Nalberta Bravo. Pursuant to Cabinet recommendation, Nalberta Bravo was given temporary custody of the Nelida Juarez both at the temporary removal hearing and at the adjudication hearing.

A disposition was set for January 31, 2018. Several days prior to the disposition, Ms. Cunningham filed a Motion for Continuance as she wanted to have expert testimony regarding the dangers of the child going back to Guatemala. The County Attorney filed a Response opposing such. The request for a continuance was heard at the disposition on January 31, 2018. The Court denied Ms. Cunningham's motion for a continuance on the basis that the subject of the expert testimony was not relevant for disposition of the child.

Ms. Cunningham admitted in Court that she wanted an extra finding to qualify the child for special immigrant status under 8 U.S.C. § 1101(a)(27)(J) (SIJ). That statute requires a juvenile to have a state court order which finds the juvenile is an immigrant.

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 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 chapter . . ."

Consequently, the expert testimony was to support the proposition that conditions in Guatemala are such that it is not in the child's best interests to be returned to the her parents home because of the dangerous conditions there.

The Cabinet had filed a disposition report prior to the disposition date recommending that the child be in the custody of the current custodian, Nalberta Bravo, in Newport KY. Given the nature of the case and the fact that the Cabinet had made such a recommendation the Court did not feel that conditions in the child's nation of origin were relevant because the recommendation of the Cabinet was that the child was to stay in the United States with Nalberta Bravo Diaz. However, the Court felt that there were some concerns with such custodial arrangement as the child had reported possible domestic violence to a school counselor. The case was set review in order to address those issues on February 28, 2018 at 9:15 a.m., Custody was maintained with the current custodian.

The Court's jurisdiction is set forth in KRS 23 A.100. Pursuant to that statute, the Court has jurisdiction to preside over dependency, neglect and abuse actions under KRS 620. KRS 620.140 provides dispositional alternatives after a child is found to be dependent. There are no provisions in either statute which would require this Court to hold a separate hearing and engage in 8 U.S.C. 1101 factfinding process to decide whether or not re-unification with the child's parents in Guatemala is viable due to possible abuse, neglect or abandonment. In addition, there is nothing in the above mentioned law that requires a finding that the child's best interests would not be served by returning the child to the previous country

or nationality under. Such a hearing is unnecessary where the Court has found that the child is dependent and that the present custodial arrangements are appropriate to serve the best interests of the child.

This Court doesn't have personal jurisdiction over the parents of this child. The parents have never made an appearance in the case. Summons for the parents were issued but were unserved. The Court can proceed in such circumstances simply because the child is found within the county. K.R.S. 616.010(2). However, the courts exercise of jurisdiction is subject to the assertion of jurisdiction of other courts or jurisdictions as set forth in K.R.S. 610.010(7).

Counsel for the custodian had made mention in previous court hearings that there is mandate under federal law that this Court make such a finding. No specific directive of such could be found in the applicable federal statutes. Moreover, this Court has serious concerns about engaging in a factfinding process that spans from Campbell County, Kentucky into Arizona, through Mexico and into Guatemala. The testimony in the prior adjudication hearing was that the child and her boyfriend left Guatemala on their own accord. Such a factfinding process is better left to the federal government who have personnel and resources in all the aforementioned places. Furthermore, requiring a state court to make findings necessary for federal immigration cases would seem to violate anti-commandeering doctrine under the Tenth Amendment to the United States Constitution. *New York vs. U.S.* 505 U.S. 144, 182 (1992); *Printz vs. U.S.*, 521 U.S. 898, 935 (1997).

The Court is aware of the unpublished case IN RE: Z, 2017-CA-000898 (Ky. App. June 21, 2017)

where the Appellate Court remanded the action back to the family court to make findings in accordance with 8 U.S.C. § 1101(a)(27)(J). However, the facts in that case appear to be distinguishable from this case. Evidently, deportation was imminent in that case—to the extent the Court invoked extraordinary relief under CR 76.33. Further, it appears that there was no jurisdictional argument posed in that case. While that case cited various other jurisdictions where this sort of fact finding is permitted, it did not cite a Virginia case which declined to make the special juvenile findings on jurisdictional grounds. See Canales v. Torres Orellana, 800 S.E.2d 208 (Va. App. 2017). Since In Re Z is an unreported case and cannot be cited or used as binding precedent under CR 76.28(4)(c) this court is not bound to follow it.

In conclusion, this Court denied the continuance requested by Ms. Cunningham as the expert opinions that she sought to enter were irrelevant to the disposition of this case. The Cabinet's dispositional recommendation was that the child was to stay in Kentucky with the present custodian. There is no requirement that this Court enter into an additional SIJ factfinding process under the applicable jurisdictional statute nor the statutes relating to dependency, neglect and abuse. Accordingly, the Court went forward with its disposition hearing and adopted the recommendations as requested by the Cabinet's dispositional report.

SO ORDERED this the 1 day of Feb, 2018.

s/
JUDGE RICHARD A. WOESTE
CAMPBELL CIRCUIT COURT, DIV. III

APPENDIX D

CABINET FOR HEALTH AND FAMILY SERVICES
Department of Community Based Services

FILED
CAMPBELL FAMILY COURT
JUL 3 2019
TAUNYA JACK, CLERK
BY s/_____ D.C.

Matthew G Bevin
Governor

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Newport, KY 41071
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Adam M. Meier
Secretary

The Honorable Judge Woeste
3rd Division
Campbell Family Court
330 York Street
Newport, KY 41071

Court Date: 07/03/19

Case Number(s): Nelida 17-J-422-01
Dayana 17-J-515-01
Dylan 18-J-45-01

REVIEW:

Children:

Dylan Aguilar-Diaz
DOB: 01/04/18

Dayana Aguilar-Diaz
DOB: 01/24/17

Parents:

Committed Youth Mother: Nelida Diaz-Juarez
DOB: 07/16/01
Address: All God's Children

Father: Marvin Aguilar-Bravo
DOB: 09/12/00
Address: 235 West 10th St. Newport, KY (last known)

I. Present Situation

This case is set for a review by the court during last court hearing.

II. Case History

This case was opened in May 2018 because Dylan was found as dependent due to both of his parents being minors.

III. Current Status of Case

Both of the children are currently in All God's Children with their mother, Nelida. Dylan and Dayana's needs are being met by Nelida. The children are continuing to do well in placement and are attending daycare while Nelida is at school. The children are in currently in the custody of CHFS.

Nelida has completed counseling services at the Women's Crisis Center. She was receiving Home/Hospital services through Newport High School. She is currently doing well at All's God Children and lives in an independent living apartment home close to the facility. Nelida is on track to graduate high school. Nelida will also be 18 in July 2019. Nelida has expressed interest in extending her commitment past her 18th birthday and has also expressed interest in wanting to participate in independent living, but

remain in Nicholasville until her graduation from high school in Nicholasville.

Marvin is currently residing in OH with his father and is working for a construction company. Marvin states that he is working every day, but does have an off day on Tuesday. He states that his main means of transportation is a cab that he has been calling. SSW has contacted the PIER and Marvin has attended 4 anger management classes out of 12 and has been actively participating in them. It is reported that he is very actively and arrives on time, and is doing well in the groups. It was stated that Marvin understands what he did and is aware of the situation. SSW inquired about follow-up recommendations after completion of the class and it was stated that Marvin continue with a self-help group, once weekly to maintain appropriate coping skills with his personal feelings.

RECOMMENDATIONS

The Cabinet for Health and Family Services respectfully submits the following recommendations:

Custody of Children:

The children and Nelida shall remain in the custody of the Cabinet.

Nelida Diaz-Juarez:

1. Cooperate with the Cabinet.

2. Cooperate with All God's Children.

3. Continue to meet all of children's basic needs including physical, mental, emotional, and medical.

4. Cooperate with all recommendations from the independent living recommendations.

Marvin Aguilar-Bravo:

1. Continue participating in classes through the PIER and follow recommendations after finished with the classes.

2. Participate and complete parenting classes.

3. Ensure that no further acts of violence occur.

4. Cooperate with the Cabinet.

5. Contact with the children will be at the discretion of the Cabinet.

Respectfully Submitted,

s/_____

Casey Bushelman, SSWII

APPROVED BY: s/_____

FSOS, Tracey Barrett

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DJJ/CHFS RECOMMENDATION IN ITS REPORT DATED 7-3-19 IS HEREBY INCORPORATED AS A COURT ORDER

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Judge Signature: s/_____