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INVITATION TO COMMENT

SPR13-33

Title
Probate Guardianship: Eligibility of a Ward for Special Immigrant Juvenile Status Under Federal Immigration Law

Proposed Rules, Forms, Standards, or Statutes
Adopt form GC-224

Proposed by
Probate and Mental Health Advisory Committee
Hon. Mitchell L. Beckloff, Chair

Action Requested
Review and submit comments by June 19, 2013

Proposed Effective Date
January 1, 2014

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Executive Summary and Origin

In response to a referral from the Family and Juvenile Law Advisory Committee and a 2012 decision of the Court of Appeal, Second Appellate District, the Probate and Mental Health Advisory Committee proposes the adoption of a new mandatory Judicial Council form. The *Order Regarding Eligibility for Special Immigrant Juvenile Status—Probate Guardianship* (GC-224), when signed by a judicial officer presiding in a California probate guardianship case, would make findings that are necessary to support the application of an immigrant ward for special immigration juvenile status (SIJS) under federal law. That status would entitle the ward to permanent lawful residence in the United States and eligibility to apply for citizenship in the future.

Background

The federal Immigration and Nationality Act defines a "special immigrant" to include an immigrant who is present in the United States "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."[1] The federal law further provides that if such an immigrant's reunification with one or both parents is "not viable" due to abuse, neglect, abandonment, or a similar basis found under state law, and it would not be in his or her best interest to be returned to his or her, or his or her parents', previous country of nationality or last

[1] Immigration and Nationality Act, § 101(a)(27)(J); 8 U.S.C. § 1101(a)(27)(J).

habitual residence, the immigrant may be granted special immigrant juvenile status by the federal government. This status means that he or she is eligible for classification as a lawful permanent resident alien, entitled to live and work in the United States indefinitely and apply for citizenship in the future.[2]

In the case of an immigrant who is a dependent of a state juvenile court, the findings of (1) dependence upon that court, (2) non-viability of reunification with a parent, and (3) that it would not be in the best interest of the immigrant to be returned to his or her, (or his or her parents') country of nationality or last habitual residence, are to be made in the state's judicial proceedings (or in administrative proceedings authorized or recognized by the state juvenile court). These findings must be proven in the federal immigration reclassification proceeding by an order of the state juvenile court.[3]

Form JV-224

In response to the federal law, effective on January 1, 2007, the Judicial Council adopted a form designed for use in the juvenile court to establish the state judicial findings necessary to apply for SIJS, the *Order Regarding Eligibility for Special Immigrant Juvenile Status* (form JV-224). After changes were made in the federal law in 2009, the Family and Juvenile Law Advisory Committee proposed revisions of form JV-224 to conform to these changes and to provide greater clarity. These changes in the form were considered by the Judicial Council on October 29, 2010, and were adopted effective July 1, 2011.

During the progress of the proposal to revise form JV-224, public comment was requested on whether a version of the form appropriate for use in probate guardianships should be developed by the Probate and Mental Health Advisory Committee. Two commentators asserted that probate departments of the court have authority under the federal law to issue findings that would support special immigrant juvenile status for wards in probate guardianships, and requested referral to the probate advisory committee for development of a form order suitable for use in guardianship cases. The Family and Juvenile Law Advisory Committee responded to these requests by referring the matter to the Probate and Mental Health Advisory Committee.

B. F., et al, Minors v. Superior Court

At the time of the referral noted above, although some courts in probate guardianship cases had been making SIJS findings on behalf of their guardians' wards, it was not clear that a court in such a case had authority to make these findings. A probate department of the superior court in a guardianship case is not a juvenile court as that term is used in Welfare and Institutions Code section 245 (in referring to the superior court's exercise of jurisdiction under the Juvenile Court Law, chapter 2 of part 1 of division 2 of that code); and a ward is not a dependent child of a juvenile court, as that phrase is used in section 300 of that code and as generally understood in California practice.

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[2] 58 Fed.Reg. 42843, 42844 (Aug. 12, 1993).

[3] See 8 C.F.R. §§ 204.11(c)(3)–(6), (d)(2). A copy of Part 204.11 is attached.

Clarity on that issue has now been provided. In *B. F., et al., Minors v. Superior Court* (2012) 207 Cal.App.4th 621, the Court of Appeal, Second Appellate District, concluded that for purposes of the Immigration and Nationality Act and SIJS under that law and related regulations, a superior court in a probate guardianship case is a "juvenile court," in that the court in such a case has jurisdiction to make judicial determinations about the custody and care of a juvenile, and does so when it appoints a guardian (*id.* at pp. 627–629, 8 C.F.R. § 204.11(a)). The fact that a probate guardianship is not a juvenile dependency proceeding as defined and governed by the provisions of the Welfare and Institutions Code is of no moment. The superior court, whether exercising jurisdiction in a probate guardianship or in a juvenile dependency or delinquency proceeding is a single court (*id.* at pp. 628–629).[4]

The appointment of a general guardian of the ward's person is "placement of a juvenile under the custody of an individual appointed by a juvenile court" for purposes of the federal law. Such an appointment is also a judicial determination of the ward's entitlement to long-term foster care, which under the relevant federal SIJS regulation is a determination that family reunification is no longer a viable option (*B. F., et al., Minors v. Superior Court, supra,* at p. 626; 8 C.F.R. § 204.11(a)). The superior court sitting as a probate court in a guardianship case that has appointed a general guardian of the person of a minor therefore has the authority and duty to make findings in support of the SIJS of that minor in an appropriate case, within the meaning of the federal law and regulations (*id.*, at p. 630).

The Proposal

The Probate and Mental Health Advisory Committee proposes the adoption, effective January 1, 2014, of the *Order Regarding Eligibility for Special Immigrant Juvenile Status—Probate Guardianship* (GC-224), a court order in a guardianship case that would make findings in support of a ward's eligibility for special immigrant juvenile status under federal immigration law.

- This form is needed to implement the decision of the Court of Appeal in *B. F., et al., Minors v. Superior Court, supra,* 207 Cal.App.4th 621, and is also proposed in response to the referral from the Family and Juvenile Law Advisory Committee and public comments received on the 2010 revision of the juvenile court version of the form.

- Use of a distinct guardianship form instead of reliance on a modified version of the juvenile court form is appropriate in part because the first two sentences of item 1 of the latter form: "[t]he child was found to be within the jurisdiction of the juvenile court under Welfare and Institutions Code section 300 or 602"; and "[t]he child was declared dependent on the

[4] The appellate opinion also supports the statement made above, that superior courts in probate guardianships throughout California, including the respondent court in the case under review, had been making SIJS findings prior to the Court of Appeal's decision. The petitioners in the case asked the court to take judicial notice of 17 SIJS orders made by superior courts in guardianship cases throughout the state, a request unopposed by the respondent court. The request for judicial notice was denied because court orders in trial courts are not precedent, but the fact of their issuance prior to the decision of the Court of Appeal was not in dispute. See *B. F., et al., Minors, supra,* 204 Cal.App.4th at p. 627, fn. 2.

juvenile court of the county . . .", are not findings made by a court in a California probate guardianship case. Crossing these inapplicable findings out on a modified form could adversely affect the application for SIJS with the federal immigration authority because that authority might erroneously conclude from the cross-outs that necessary facts were not found. Federal immigration hearing officers might not understand the differences between California juvenile court and probate guardianship practice and the reasons why these inappropriate findings are crossed out.

These findings would be eliminated from the proposed guardianship form. The remaining sentences in item 1 are identical in both forms, and the contents of items 2, 3, and 4 of the proposed guardianship form are almost identical to items 2 and 3[5] of the juvenile court form. Items 1–4 of form GC-224 should be sufficient under the federal regulations for the required SIJS findings.

- The date the ward was placed under the custody of an agency or person appointed by the court and the date that reunification of the ward with his or her parent(s) is deemed not to be viable, required to be shown in items 1 and 2 of the proposed form, is the same date: the date a general guardian of the ward's person was appointed. (See *B. F., et al., Minors, supra,* 207 Cal.App.4th at pp. 626–627.)

- The title of the proposed new form is identical to the title of the juvenile court form, except that "—Probate Guardianship" is added. This is proposed to ensure that a search for the guardianship form by form name will access the right form.[6]

- In the *B. F., et al., Minors* case, the minors themselves requested the SIJS order as part of their petition for the appointment of their general guardian (*id.*, 204 Cal.App.4th at p.624). This was entirely proper. The minors were at least 12 years of age, and could petition for this relief (Prob. Code, § 1510(a)). An appointed guardian could also seek such an order on behalf of his or her ward.[7] Under the federal law, either the minor or anyone acting on his or her behalf may apply for SIJS (8 C.F.R. § 204.11(b)).

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[5] The finding that it would be in the best interest of the minor to remain in the United States is a separate item 4 in the guardianship order rather than a final sentence of item 3, as in the juvenile court form. This separation is most consistent with the federal regulation, which separately states the negative of the finding ("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 alien] or his or her parent or parents . . ." (8 C.F.R. § 204.11(c)(6)). Both the existing juvenile form and the proposed new guardianship form contain both the positive and negative expressions of this finding, although the regulation refers only to the negative expression. The proposed new form follows the practice of the existing form in this respect, however, out of concern that elimination of this finding might inadvertently lead to different results in immigration proceedings involving dependent children of juvenile courts and wards of probate guardians.

[6] The text "(Probate—Guardianships and Conservatorships)" at the bottom of the form is the form group into which the new form would be placed, abbreviated in the form group designator as "GC-" followed by the specific form number, "224." This text is not part of the title of the form, and would not be shown in the list of forms by name.

[7] The disposition order of the Court of Appeal in *B. F., et al., Minors, etc.,* referred to the request for SIJS as the request of the minors "by and through their legal guardians . . ." (204 Cal.App.4th at p. 630).

If an appointed or proposed guardian is unrepresented by counsel in a case in which his or her ward or proposed ward is an immigrant who may be eligible for SIJS, the court could appoint counsel for the minor under Probate Code section 1470(a) and, if the minor were under the age of 12, perhaps a guardian ad litem (Prob. Code, § 1003; form GC-100), for purposes of the application for the SIJS order.[8] Participation of counsel experienced in SIJS practice on behalf of a potentially eligible ward or proposed ward, directly or indirectly through his or her guardian, is recommended whenever that is possible.

- The proposed form contains an instruction at the bottom of the form that separate SIJS orders are to be prepared for each ward or proposed ward for whom SIJS is sought in a multiple-ward case. The court may appoint a guardian for more than one ward, on one petition or on multiple petitions in the same case (Prob. Code, § 2106). Although this is done most commonly in sibling or half-sibling situations, no blood relationship between the wards is required by the statute; the important unifying factor in a multiple-ward case is the identity of the proposed guardian, not the relationships of the wards to each other or to the persons responsible for them before the guardian's appointment. Separate orders are recommended because there may be separate immigration proceedings for each ward in a multiple-ward case, not all wards may have common parents and supporting facts, and not all wards may be eligible for SIJS relief.

  Separate SIJS orders in multiple-child cases are not currently recommended as an instruction in the juvenile court form (although they may be used in practice). Multiple allegedly dependent children in the same case are possible (see, e.g., *Carroll v. Superior Court* (2002) 101 Cal.App.4th 1423). However, the unifying factor in such a case is the person or persons who created or failed to correct the children's dependency in a shared-home situation, in most cases one or both of their parents. Because a multiple-child case in a juvenile dependency proceeding will be more likely to involve at least one common parent and common supporting facts than a multiple-ward case in a guardianship, the need for and utility of separate orders seems more clear in the latter than in the former.

Alternatives Considered

No alternatives other than a new Judicial Council form were considered because the creation of this form would implement new positive law establishing the right of persons involved in guardianship cases to apply for the order the form would provide; the new form was requested by commentators responding to the last revision of the existing juvenile court form; and these requests were referred, with approval, to this advisory committee by the committee responsible for those revisions. Early drafts of the form more closely followed the existing juvenile court form. Departures from that form were made for the reasons mentioned above, due to differences between probate guardianship and juvenile dependency practice.

[8] The cost of appointed counsel for the minor, to the extent that his or her estate and parents cannot afford it, would be borne by the county, not the court. See Probate Code section 1470(c)(2) and (3), and Cal. Rules of Court, Appendix E.

Implementation Requirements, Costs, and Operational Impacts

Adoption of this form will incur the standard reproduction, training, and distribution costs connected with the creation and dissemination of any new Judicial Council form. The advisory committee believes these costs will be minimal, are made necessary by the decision of the Court of Appeal described above, and should be offset in the long run by improvements in guardianship practice in case involving SIJS applications, as well as better outcomes in the related federal practice for eligible minors and their guardians.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal reasonably achieve the stated purpose?
- Would this proposal have an impact on public's access to the courts? If a positive impact, please describe. If a negative impact, what changes might lessen the impact?
- The committee developed a draft application for an SIJS order in a guardianship as an attachment to a guardianship appointment petition, but decided not to proceed with the project at this time. Would such an application, consisting of new optional Judicial Council forms and revisions of the appointment petitions to refer to them, be of interest in the next year or so?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposed form provide cost savings in connection with SIJS applications in probate departments? If so please quantify. If not, what changes might be made that would provide savings, or greater savings?
- What would the implementation requirements be for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems.
- Would 2 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- If this proposal would be cumbersome or difficult to implement in a court of your size, what changes would allow the proposal to be implemented more easily or simply in a court of your size?

Attachments and Links

Form GC-224, at page 7.
Title 8, U.S.C. § 1101(a)(27)(J), at page 8.
8 C.F.R. § 204.11 (Jan. 1, 2012), at pages 9 and 10.

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):*	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional):* E-MAIL ADDRESS *(Optional):* ATTORNEY FOR *(Name):*	**Draft** **Not Approved by the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
GUARDIANSHIP OF THE PERSON ☐ AND ESTATE OF *(Name):* ☐ MINOR ☐ MINORS *	
ORDER REGARDING ELIGIBILITY FOR SPECIAL IMMIGRANT JUVENILE STATUS—PROBATE GUARDIANSHIP	CASE NUMBER:

The court has reviewed the supporting material on file, heard the arguments of counsel, and found the following:

1. *(Name):* ☐ the minor ☐ one of the minors named above, was legally committed to, or placed under the custody of, a state agency or department, or an individual or entity appointed by this court, on *(specify date):* . He or she remains under this court's jurisdiction.
2. Reunification of the minor with one or both of his or her parents was deemed not to be viable on *(date):* . This finding was made by reason of the abuse, neglect, or abandonment of the minor or by reason of a similar basis under California law.
3. It is not in the best interest of the minor to be returned to his or her previous country of nationality or country or countries of last habitual residence *(specify country or countries):*

   or to his or her parents' previous country or countries of nationality or country or countries of last habitual residence *(specify country or countries):*

4. It is in the minor's best interest to remain in the United States.
5. ☐ Additional findings about the minor or his or her parents are ☐ provided on Attachment 5. ☐ stated below:

Date:

JUDICIAL OFFICER

☐ SIGNATURE FOLLOWS LAST ATTACHMENT

* ***(In a guardianship case involving more than one ward, prepare a separate order for each ward whose eligibility for special immigrant juvenile status is at issue.)***

Form Adopted for Mandatory Use
Judicial Council of California
GC-224 [New January 1, 2014]

ORDER REGARDING ELIGIBILITY FOR SPECIAL IMMIGRANT JUVENILE STATUS—PROBATE GUARDIANSHIP
(Probate—Guardianships and Conservatorships)

Immigration and Nationality Act,
§ 101(a)(27)(J), 8 U.S.C. § 1101 (a)(27)(J);
8 C.F.R. § 204.11
www.courts.ca.gov

Title 8 United States Code section 1101(a)(27)(J)

(a) As used in this chapter—

(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 C.F.R. § 204.11 (Jan. 1, 2012)

§ 204.11 Special immigrant status for certain aliens declared dependent on a juvenile court (special immigrant juvenile).

(a) *Definitions.*

Eligible for long-term foster care means that a determination has been made by the juvenile court that family reunification is no longer a viable option. A child who is eligible for long-term foster care will normally be expected to remain in foster care until reaching the age of majority, unless the child is adopted or placed in a guardianship situation. For the purposes of establishing and maintaining eligibility for classification as a special immigrant juvenile, a child who has been adopted or placed in guardianship situation after having been found dependent upon a juvenile court in the United States will continue to be considered to be eligible for long-term foster care.

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.

(b) *Petition for special immigrant juvenile.* An alien may not be classified as a special immigrant juvenile unless the alien is the beneficiary of an approved petition to classify an alien as a special immigrant under section 101(a)(27) of the Act. The petition must be filed on Form I–360, Petition for Amerasian, Widow(er) or Special Immigrant. The alien, or any person acting on the alien's behalf, may file the petition for special immigrant juvenile status. The person filing the petition is not required to be a citizen or lawful permanent resident of the United States.

(c) *Eligibility.* An alien is eligible for classification as a special immigrant under section 101(a)(27)(J) of the Act if the alien:

(1) Is under twenty-one years of age;

(2) Is unmarried;

(3) Has been declared dependent upon a juvenile court located in the United States in accordance with state law governing such declarations of dependency, while the alien was in the United States and under the jurisdiction of the court;

(4) Has been deemed eligible by the juvenile court for long-term foster care;

(5) Continues to be dependent upon the juvenile court and eligible for longterm foster care, such declaration, dependency or eligibility not having been vacated, terminated, or otherwise ended; and

(6) Has 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; or

(7) On November 29, 1990, met all the eligibility requirements for special immigrant juvenile status in paragraphs (c)(1) through (c)(6) of this section, and for whom a petition for classification as a special immigrant juvenile is filed on Form I–360 before June 1, 1994.

(d) *Initial documents which must be submitted in support of the petition.* (1) Documentary evidence of the alien's age, in the form of a birth certificate, passport, official foreign identity document issued by a foreign government, such as a Cartilla or a Cedula, or other document which in the discretion of the director establishes the beneficiary's age; and

(2) One or more documents which include:

(i) A juvenile court order, issued by a court of competent jurisdiction located in the United States, showing that the court has found the beneficiary to be dependent upon that court;

(ii) A juvenile court order, issued by a court of competent jurisdiction located in the United States, showing that the court has found the beneficiary eligible for long-term foster care; and

(iii) Evidence of a determination made in judicial or administrative proceedings by a court or agency recognized by the juvenile court and authorized by law to make such decisions, that it would not be in the beneficiary's best interest to be returned to the country of nationality or last habitual residence of the beneficiary or of his or her parent or parents.

(e) *Decision.* The petitioner will be notified of the director's decision, and, if the petition is denied, of the reasons for the denial. If the petition is denied, the petitioner will also be notified of the petitioner's right to appeal the decision to the Associate Commissioner, Examinations, in accordance with part 103 of this chapter.