

Special Immigrant Juvenile Status (SIJS) in the North Carolina State Courts

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Speaker

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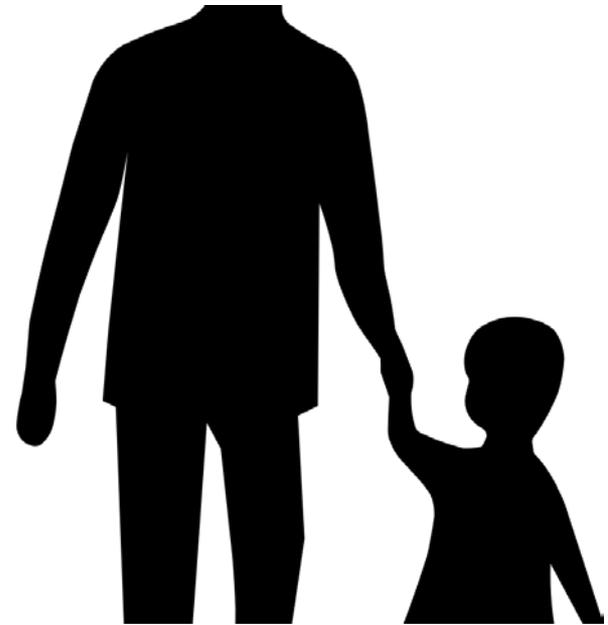
Program Content

International, Federal, and State Statutory and Case Law on the Subjects of Special Immigrant Juvenile Status (SIJS) and International Service of Process



Target Audience:

Attorneys and Judicial Officials practicing or presiding in Family Court, Juvenile Delinquency Court, Juvenile Abuse/Neglect/Dependency (“DSS”) Court, Adoption Proceedings, and Guardianship (Estate) Matters.



Course Objectives:



To enable practitioners to screen cases, and for judicial personnel to evaluate the substantive merits of cases, to follow correct procedures regarding service (including outside the U.S.), hearings, and evidence, and make correct legal decisions in cases of Special Immigrant Juveniles.

Agenda

1. NC State Law: Personal & Subject Matter Jurisdiction, Substantive Law, Venue, other Civil Procedure Issues
2. International Service of Process
3. Other Considerations
4. Hypotheticals for Discussion
5. Questions and Answers

Role of the state court order

A court order from a state court empowered to make determinations on the care and custody of minor children is *one required element* with which the young person makes the required showings (described on the previous slide) and requests status as a Special Immigrant Juvenile from the immigration agency (USCIS).

SIJS: The State Court Order in a Nutshell

- The order should show that some form of child custody has been taken from at least one parent and given to someone else.
- The order should be signed by a judge, filed with the court, and currently in effect.
- The order should make the following conclusions:
 1. Reunification with one or both of the Child's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under state law; and
 2. It is not in the best interest of the Minor Child to be returned to his/her previous country.
- The order should lay out the facts to support these conclusions.
- The order does **NOT** confer immigration benefits in itself.



NC STATE LAW

- **Public Policy**
- **Courts/Proceedings where Child Custody determinations may be made**
- **Subject Matter Jurisdiction (UCCJEA)**
- **Venue**
- **Personal Jurisdiction & Service of Process**
- **Definitions of Terms relevant to SIJS Findings**

North Carolina Public Policy

- Every child needs & deserves a Guardian or Custodian who has full legal authority to act in their best interests, during each and every day of their childhood.

§ 35A-1201(6) North Carolina recognizes that:

Minors, because they are legally incompetent to transact business or give consent for most purposes, need responsible, accountable adults... Parents are the natural guardians of the person of their minor children, but unemancipated minors, when they do not have natural guardians, need some other responsible, accountable adult to be responsible for their personal welfare and for personal decision-making on their behalf.

What is Child Custody?

- Child custody is a “bundle” of rights and responsibilities relating to the care, custody, and control of a minor child.
- Prior to any court involvement or other binding legal action, biology controls and the parents share equal custody rights (regardless of whether a child is legitimated or any formal paternity determination)
- Child custody may be shared by multiple individuals/entities, and some, all, or none of whom may be the biological parents.
- Child custody consists of both legal custody (decisionmaking authority) and physical custody (physical care, visits, delegated care)
- Mere physical custody or possession (caretaking) of a child does not constitute the kind of legal custody required for SIJS.

What kinds of custodians exist under NC Law?

- A biological parent or an adoptive parent (Ch 48)
- A general guardian or guardian of the person (Ch 35A or 7B)
- A custodian appointed by a court (Ch 50 or, rarely Ch 7B)

What categories are not custodians?

- *Caretakers*
- *Individuals appointed by ORR as voluntary ‘sponsors’*
- *Individuals with (revocable) powers of attorney over the child*

Summary of Courts/Proceedings

(making child custody determinations)

Who is seeking “care and custody”? Proceeding

- Parent vs. parent
- Third party (anyone) vs. parents
- CPS/DSS

- DJJ (i.e. “the state”)

- DSS, OR certain individuals with standing to file Rights
- Anyone (when parents are deceased)
- Anyone wishing to adopt (including step-parents)

Appropriate Action/Special

- Ch. 50 “Family Court”
- Ch. 50 “Family Court”
- Ch. 7B Juvenile Abuse-Neglect-Dependency Court

- Ch. 7B Juvenile Delinquency Court

- Ch. 7B Termination of Parental

- Ch. 35A Guardianships

- Ch. 48 Adoptions

Chapter 50 Child Custody Actions

- Often this is one parent versus another, showing that only one should have the right to legal custody
- 50-13.1 allows non-parents to petition for custody of a minor child, *so long as* they have standing with respect to the particular child, and can show unfitness of the parents*
- 50-13.2(a) codifies that a best interest standard applies (“the court *shall* consider *all relevant factors...* and *shall make findings accordingly...* which support **the determination of what is in the best interest of the child.**”)



Chapter 50 Child Custody Actions

- GS § 50-13.8 provides for custody of individuals past 18 where they are physically or mentally incapable of self-support.
- GS § 50-13.5 provides for the detailed procedure, including grounds for *ex parte* or temporary orders prior to service of process
 - (d)(2) states that the court may enter orders prior to service of process in appropriate cases.
 - A temporary or *ex parte* order for custody solidifying status quo may normally be ordered.
 - To changes the living arrangements *ex parte*, the child must be exposed to:
 - a substantial risk of bodily injury/sexual abuse
 - a substantial risk of abduction/removal from the State (to evade the jurisdiction of North Carolina courts).

Juvenile Court Actions:

7B Article 1-10, Juvenile Abuse/Neglect/Dependency Actions ("DSS Court")

- Only a County Department of Social Services ("DSS") may initiate a juvenile petition regarding a child who meets the statutory criteria of Abuse, Neglect, or Dependency
- DSS involvement is based on a confidential Child Protective Services ("CPS") report.
- Court may award custody or guardianship to non-parents.
- If a one-parent home, SIJ may still be appropriate.*
- The Court's File is confidential - Make sure any SIJS order is released by a court order (including the SIJS order itself)

7B Article 11, Termination of Parental Rights (“TPR”)

- Standing: GS § 7B-1103 the action may be brought by DSS, a GAL for the child, a guardian, one parent against another, a long-term custodian or caretaker, or anyone who has filed a petition to adopt the child.
- The TPR is a more severe deprivation of rights than a mere custody determination, and involves significantly more procedural hurdles, including appointed counsel for respondent parents
- Having found TPR to be in the child’s best interests, the court should make changes in custody in favor of the petitioner/movant: **§ 7B-1112. Effects of termination order** “...upon entering an order terminating the parental rights of one or both parents, the court may place the juvenile in the custody of the petitioner or movant, or some other suitable person... as may appear to be in the best interests of the juvenile.”

7B Article 15-27, Juvenile Undisciplined/Delinquent Actions

- These actions qualify under the federal statute, where the court makes an award of custody of the minor.
- Note that certain crimes may eliminate the possibility of obtaining legal immigration status - USCIS will carefully examine and evaluate these before granting status

Guardianship Proceedings

N.C. Gen. Stat. Ch. 35, Art., 6

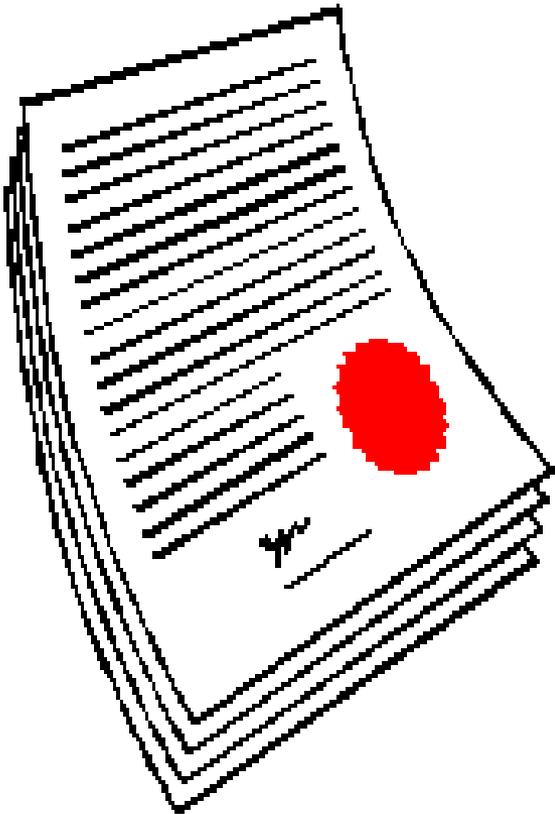
- These informal “special proceeding” are handled by the Clerk’s office.
- In all instances the Clerk must determine the facts in order to determine the best interests of the minor child, and “ the clerk shall in every instance base the appointment of a guardian or guardians on the minor's best interest.” G.S. § 35A-1224
- This is an option available for orphans, i.e. where the minor has no “natural guardian.”
- The clerk may appoint a *general guardian* who will have all the custodial rights of a parent (not the same constitutional protections).*

Adoption Proceeding

N.C. Gen. Stat. Ch. 48

- There are many procedural barriers, and if the parents contest there would need to be a TPR filed.
- These informal “special proceeding” are handled by the Clerk’s office, not judges, and follow their unique procedure (if facts are contested, may be transferred to District Court and heard by a judge).
- Most “powerful” of all awards of custody - virtually irreversible, bestows constitutional rights on adoptive parents, terminates rights of biological parents
- Adoptions rely on social work reports, and are only to be granted after the clerk makes factual determinations regarding the best interests of the minor child, *see e.g.* § 48-2-603(a) and § 48-2-606(a).

Recap: What role does a NC state court order play in the SIJS process?



Any qualifying court’s order placing the Minor Child in the custody of “an individual or entity” will be taken into consideration by USCIS in that agency’s determination as to whether the Minor Child qualifies for Special Immigrant Juvenile Status.

Findings of Fact in Civil and Juvenile Matters

N.C. Gen. Stat. § 1A-1 (Rules of Civil Procedure)

Applies to All Ch. 50 actions & Juvenile Actions*

Rule 52. Findings by the court.

(a) Findings. -

(1) In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.

Findings of Fact in Special Proceedings or Estates?

Adoption:

§ 48-2-603(a). Hearing on, or disposition of, petition to adopt a minor.

...the court shall grant the petition upon finding by a preponderance of the evidence that the adoption will serve the best interest of the adoptee

§ 48-2-606. Decree of adoption.

(a) A decree of adoption must state **at least**:

...

(7) That the adoption is in the best interest of the adoptee.

Guardianship:

§ 35A-1223. Hearing before clerk on appointment of guardian.

The clerk shall receive evidence necessary to determine... the minor's assets, liabilities, and needs, and who the guardian or guardians shall be. The hearing may be informal and the clerk may consider whatever testimony, written reports, affidavits, documents, or other evidence the clerk finds necessary to determine the minor's best interest.

Finding Facts: The Declaratory Judgment Act

Declaratory Judgments: Speaking broadly, any NC court may interpret any question of law or matter in dispute between the parties already before it. Therefore, those courts have an additional mechanism with which to answer the questions required about the child's best interests and viability of reunification with parent(s).

Per N.C. Gen. Stat. Ch. 1, Art. 26: Any division and any court of record within the General Court of Justice may, in an action pending before it solely for a declaratory judgment or for other matters wherein it has jurisdiction over the parties, may make a determination of facts and law applicable to settling a controversy between the parties.

Declaratory Judgment Act

N.C. Gen. Stat. § 1-254 Courts given power of construction of all instruments. Any person... *whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder.*

N.C. Gen. Stat. § 1-264 Liberal construction and administration. This Article is declared to be remedial, its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and it is to be liberally construed and administered.

NC Definitions of Abuse, Neglect, and Abandonment & other similar bases; Viability of Reunification

- Common Law: There are no binding statutory definitions for these terms provided for courts (other than Juvenile A-N-D & TPR's).
- Must make determinations based on common law principles.
- Courts must normally use the **plain meaning** or dictionary definition. (See, e.g., In re D.A.M., A12-0427, 2012 WL 6097225 (Minn. Ct. of App. Dec. 10, 2012)).
- Finding caselaw: discussions where the presumption of parental fitness was rebutted by showing acts inconsistent with parental status, which include (but are not limited to) abuse and neglect.
- These kinds of determinations are of the same general sort as the special findings for SIJS.
- Statutory definitions provided by Juvenile Code should be *persuasive* only in other proceedings.

Statutory Guidance:

Child Welfare Proceedings (A-N-D and TPR) statutes were drafted to meet state's due-process burdens, representing a high standard

- **N.C. Gen. Stat. § 7B-101** defines “**Abused Juvenile,**” “**Neglected Juvenile,**” and “**Dependent Juvenile.**”
- **N.C. Gen. Stat. § 7B-1111** Contains definitions for Abandonment and other grounds sufficient for a termination of parental rights



**Subject-Matter Jurisdiction:
Uniform Child Custody Jurisdiction
and Enforcement Act (“UCCJEA”):
N.C. Gen. Stat. § 50A-101 et seq.**

Applicable to all child custody proceedings of any sort, governs subject-matter jurisdiction

Why is jurisdiction in NC?

- Jurisdiction does not arise unless and until North Carolina meets the definition of a “Home State,” which under **NCGS § 50A-102 and -201** generally occurs after six months of residence by the child in NC.
- The court may have temporary emergency jurisdiction under § **50A-204** when the child is present in North Carolina and has been abandoned or threatened with abuse or mistreatment (which may ripen into non-temporary jurisdiction with passage of time).

Foreign countries treated like other states

The UCCJEA (incorporated into N.C.G.S. at Chapter 50) treats foreign countries as though they were other states for purposes of these definitions.

§ 50A-105 International application of Article:

(a) A court of this State shall treat a foreign country as if it were a state of the United States...



Verification of Pleadings, Petitions, and Applications

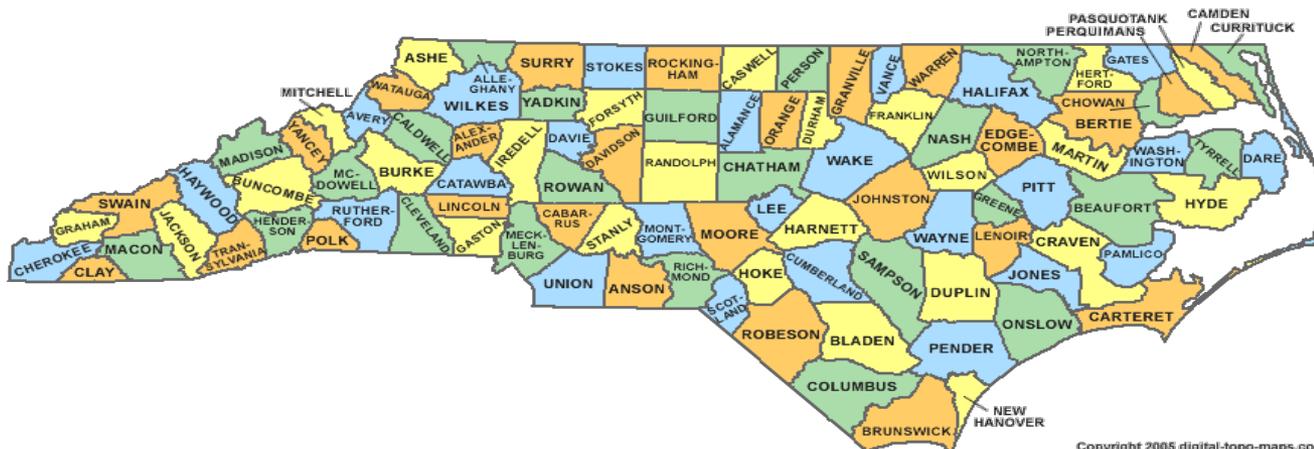
- All pleadings relating to child custody have to be sworn-to and include an affidavit regarding compliance with the UCCJEA. (Can Affidavit as to Status of Minor Child, form AOC-CV-609 available at nccourts.org)
- For all the types of proceedings referenced herein, the pleading needs to be verified as required by law.

N.C. Gen. Stat. § 1-148 Verification before what

officer: Any officer competent to take the acknowledgment of deeds, and any judge or clerk of the General Court of Justice, notary public, in or out of the State, or magistrate, is competent to take affidavits for the verification of pleadings, in any court or county in the State, and for general purposes.

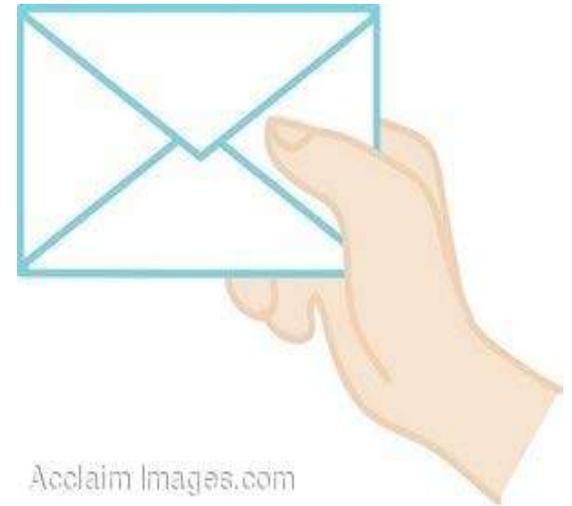
Child Custody Venue

- Specific Statute - § 50-13.5(f): Any County in which any parent or the child resides, or where the child “is physically present”
- General Rule: Objections to venue will be waived if not raised initially by the Defendant. *See* G.S. § 1-83. **Change of venue.** If the county designated... is not the proper one, the action may, however, be tried therein, unless the defendant, before the time of answering expires, demands in writing that the trial be conducted in the proper county...



PERSONAL JURISDICTION - INTERNATIONAL SERVICE OF PROCESS

- N.C. Rules of Civil Procedure for International Service of Process or Service of Process by Publication:
 - N.C. Gen. Stat. § 1A-1
Rules of Civil Procedure
 - Rule 4(j1) publication
 - Rule 4(j3) international
 - Also note requirements for proof of service in § 1-75.10 before a ‘default’
 - **Rule 4(j6) acceptance of service goes a long way...** And providing this document is not exclusive of attempts to serve personally and server executing an affidavit of service of process



The UCCJEA also addresses Service of Process & Personal Jurisdiction

Notice (Service) to persons outside State: § 50A-108 (a) “Notice required for the exercise of jurisdiction when a person is outside this State may be given in a manner prescribed by the law of this State for service of process or by the law of the state in which the service is made. *Notice must be given in a manner reasonably calculated to give actual notice but may be by publication if other means are not effective.*”

§ 50A-201(c) Physical presence of, or *personal jurisdiction over, a party or a child is not necessary* or *sufficient to make a child-custody determination.*

PERSONAL JURISDICTION - INTERNATIONAL SERVICE OF PROCESS

- Why Serve if a parent is abroad?
 - If there is a parent abroad, you need to establish personal jurisdiction via service (and comply with due process) in order to *permanently* alter those constitutionally-protected rights
 - But UCCJEA and 50-13.5 contemplate *valid* orders (at least temporary) without service, presumably because children exist, grow, and live their childhood independent of whether their parents' rights are intact.
- Effects of Non-compliance with Service Treaties: Potentially would not be enforceable in the other country.
- Effects of Non-compliance with NC Rules regarding service: Potentially could be voided through litigation in NC

PERSONAL JURISDICTION: International Service of Process

It may be easier than you think!

- Step 1: Visit the Department of State Website and look up the country
- Step 2: If they *are* a signatory to a treaty, further analysis will be required
- Step 3: If they *are not* a signatory, or there is a loophole in the treaty, or if you decide that compliance isn't helpful, then *just proceed under the NC Rules*.



The screenshot shows the TRAVEL.STATE.GOV website, U.S. DEPARTMENT OF STATE · BUREAU OF CONSULAR AFFAIRS. The main heading is 'LEGAL CONSIDERATIONS'. Below it are three tabs: 'U.S. Citizenship Laws & Policies', 'International Judicial Assistance' (which is selected), and 'International Treaties & Agreements'. A navigation bar includes 'Service of Process', 'Obtaining Evidence', 'Enforcement of Judgements', and 'Authentication of Documents'. A breadcrumb trail reads 'Travel > Legal Considerations > International Judicial Assistance > Country Information'. There are 'Print' and 'Email' icons. The main heading is 'Country Information'. Below it is the text 'Find Judicial Assistance Information For:' followed by a search input field containing 'Enter a country or area' and a 'GO' button. At the bottom is a world map with the United States highlighted in blue.

Hague Service Convention

- Governs service in many countries
- US is a full party to the convention.
- There are nuances, *including that it does not apply where no valid address is known.*
- Requires translating documents, filling out some cover sheets, and sending to a “central authority” which ensures proper service.
- May take several months.
- There is an excellent article available at NCCourts website.



Inter-American Service Convention and Additional Protocol

- Governs service in certain Western Hemisphere Countries
- The US only considers parties those states who adopted the original Convention AND the Additional Protocol
- Northern Triangle Countries: Guatemala **is** a signatory; Honduras is **not** a signatory; and El Salvador **appears to be** a signatory (but DOS has given conflicting opinions).
- Uses similar forms, has similar requirements, and utilizes the same “Central Authority” to effectuate service as the Hague.
- However, the clerk’s office is required to issue and certify these forms, unlike the Hague.

Custody Case Process

1. File Complaint
2. If and only if a true emergency, request an *ex parte* order.
3. Schedule temporary hearing (possibly just ‘permanent’)
4. Send for Service, optimally via Private Process Server if abroad
5. *Hearing (Temporary); Set Date for Permanent*
6. Service Perfected and Filed with Court
7. Ensure the Court has memoranda including laws & resources
8. Get an official court interpreter via NC AOC (free)
9. Final Custody Hearing, may have live testimony or other evidence supporting all best interests issues, including SIJS Findings, resulting in Custody Order

If legal or factual questions persist re SIJS findings, Court may request briefing or Court/party may request to continue/reopen evidence

Common Problems

- State Court Judge doesn't want to make any 'special' findings or talk about 'federal law'
- Judge is concerned about human trafficking.
- Judge disbelieves the client's story and believes the parties are in collusion.
- Judge won't make 'reunification' findings outside Juvenile court.
- Judge won't make findings about return to foreign country.
- Clerk 'doesn't do' findings of fact
- Location of parent to be served is 'unknown'.
- Judge doesn't believe service/notice was sufficient.

ETHICAL CONSIDERATIONS

- Ethical Issues Concerning Dual-Representation
- Mandatory Reporting of Abuse/Neglect/Dependency
- Reporting parties to ICE
- Preparing Waiver of Right to Answer, Pleadings, or Consents to unrepresented opposing party

The Challenges of Dual Representation

- Who are our clients?
- How do we explain confidentiality?
- How do we protect each clients' privacy interests?
- How do we anticipate and manage conflicts?

NC State Bar Ethics Opinion

RPC 175 January 13, 1995 (*see also consistent prior opinion RPC 120 July 17, 1992*) indicates that a lawyer may violate client confidence to comply with the then-effective reporting statute (recodified and updated, but very similar, at GS § 7B-301).

- Failure to report may be punishable criminally, but will *not* normally result in discipline.
- N.B. Immunity from liability for reporters: G.S. § 7B-309

7B-301. Duty to report abuse, neglect, dependency...

(a) Any person or institution who has cause to suspect that any juvenile is abused, neglected, or dependent... shall report the case of that juvenile to the director of the department of social services...

NC State Bar Ethics Opinion

- **2009 FEO 5 January 22, 2009** indicates that attorneys may not report opposing parties to Immigration and Customs Enforcement (“ICE”, an agency of the federal Department of Homeland Security)

NC State Bar Ethics Opinion

- **CPR 296 July 15, 1981** (*see also* **CPR 121 July 15, 1977**): indicates that attorneys may prepare an *acceptance of service document* for an opposing party, but **not** a *waiver of the right to answer* or an *answer* or other responsive pleading

Hypotheticals for Discussion

Hypotheticals for Discussion:

Example A - Eduardo

Eduardo, age 15, comes from El Salvador. His father died when he was 5, and he was raised by his mother, Alina. Ever since Eduardo was about 6 years old, Alina had a live-in boyfriend named Fausto. Both Alina and Fausto hit Eduardo on a regular basis. Fausto would lash Eduardo with a belt when Eduardo did something as simple as spilling water. Fausto also drank heavily and used drugs, and he became extremely violent on these occasions, at times throwing chairs at Eduardo. Also, once when Eduardo was about 8 years old, Fausto picked him up and hurled him across the room while yelling curses at him. Eduardo's mother Alina did nothing to prevent Fausto from harming Eduardo; in fact, she also cursed at Eduardo, told him he was "good for nothing", and hit him regularly with her hands or with household items such as shoes. Finally, when Eduardo was 14, he could no longer stand the domestic violence and he fled to the United States, hoping to live with his uncle Reynaldo, with whom he had had a relationship through phone conversations since he was very young. Eduardo now lives with Reynaldo in NC.

Hypotheticals for Discussion:

Example B - Julisa

Julisa is sixteen and was born in Guatemala. Her family is from the Quiche indigenous group. Her father left Julisa, her mother, and her four siblings when she was two years old. Julisa's mother later remarried. Julisa left school after the sixth grade to work and help her family. She worked at a butcher shop arriving at 4:30 a.m. Monday through Saturday. She chopped meat, cleaned, and served at the shop. Last year, her stepfather was told to leave his small farm by a group of young men. Julisa thinks the men were part of a gang that picks on the "indios." Her stepfather said he had no way to feed his family if he didn't have his land. The gang came back and shot her stepfather. He died a few days later. Julisa's mother told Julisa she had to go to the US to find work and to help her family. Julisa was apprehended at the border and was released to her Aunt Juana. Julisa's biological father's whereabouts are completely unknown.

Hypotheticals for Discussion:

Example C - Hector

Hector is 17 years old. He came from Honduras, and is currently living with his mother, Theresa, in NC. Hector's mother was never married to his father, Juan, and she was unable to convince him to put his name on the birth certificate as Hector's father. Juan left Hector's mother when Hector was a few months old, and has never had any contact with Hector. When Hector was nine years old, his mother came to the US and left him in the care of her own mother, his maternal grandmother. When Hector was 14, he began to be targeted by organized criminal gangs and was told he would be killed if he didn't begin working for them. Feeling unsafe and hoping to find a source of protection, Hector asked his grandmother about his father's whereabouts, and learned that the father lived in the next town over. Hector went to visit his father, Juan. Juan would not let Hector come to live with him unless he stopped attending school and went to work to help support the household, so he remained with his Grandmother, though he was threatened several times at school. When Hector was 15, his grandmother died. Having no other relatives who were willing to house and care for him, Hector left Honduras and made his way to the US, hoping to reunite with his mother. Hector was apprehended in Texas and released to his mother Theresa.

OPEN FLOOR:

**ADDITIONAL QUESTIONS AND
ANSWERS**

Additional Resources

- Derrick's website www.LODJH.com has a section on legal resources that includes permanent links to today's materials and will be updated with future additions on this subject, URL: <http://www.derrickhensley.com/info.html>
- Consider listening to a podcast done in Fall 2014 by Joanna, Derrick, and Prof. Lenni Benson of New York Law School (link on website)
- Additional SIJS Resource are available at a Dropbox.com folder from another CLE (held at Elon University School of Law in 2014) with various SIJS materials (link on website)
- Links to many of the materials referenced herein, an example custody case file, and other materials will be provided.

Contact Information for Speakers

Questions? Call or e-mail me anytime!

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