**PRACTICE ADVISORY**[1]
**July 14, 2017**

# STRATEGIES FOR OBTAINING SIJ PREDICATE ORDERS IN VIRGINIA POST-*CANALES V. TORRES*

This practice advisory analyzes the Virginia Court of Appeals' decision in *Canales v. Torres-Orellana*, Record No. 1073-16-4, and provides general practice strategies to help advocates continue to obtain predicate orders in Virginia's Juvenile & Domestic Relations District Courts and Circuit Courts subsequent to this decision, while the Legal Aid Justice Center appeals the decision to the Virginia Supreme Court.[2] Unless and until it is overturned on appeal, the *Canales* decision has the potential to complicate SIJ practice in Virginia, to the possible detriment of immigrant youth seeking protection.

In *Canales*, the Virginia Court of Appeals ruled on the authority of the Juvenile & Domestic Relations (J&DR) and Circuit Courts to make special immigrant juvenile (SIJ) findings. The first two holdings of the case—that J&DR and Circuit Courts are not authorized to make SIJ findings as an independent matter, and that while J&DR and Circuit Courts are *not required* to make SIJ findings, they *are permitted* to make the SIJ findings through the application of Virginia law in the normal course of business—were affirmations of the status quo in most courts in Virginia.

Unfortunately, substantial confusion has arisen from the third holding, that a Virginia court "has no authority to answer" the specific question of whether "it would not be in the alien's best interest to be returned" to his country of origin, where such a finding would add to or alter "the responsibilities of Virginia courts in adjudicating custody or other matters."[3]

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[2] Unfortunately, while awaiting a favorable Virginia Supreme Court decision, *Canales* is binding on the lower courts. *See* VA. CODE ANN. § 17.1-410.

[3] *Canales v. Torres Orellana*, No. 1073-16-4, 2017 Va. App. LEXIS 153, at *22 (Va. Ct. App. June 20, 2017) (citing 8 U.S.C. 1101(a)(27)(J)(ii)).

Subsequent to the Court of Appeals decision in *Canales*, the Virginia Supreme Court's Office of the Executive Secretary (OES) issued a memorandum in its capacity as law clerk to the Virginia trial judges. This memorandum has not yet been publicly released, but various advocates have reported that J&DR judges mentioned its existence during proceedings on the record. The memorandum apparently characterizes the *Canales* holding as completely limiting any consideration of SIJ findings. Although a memorandum of this nature obviously lacks binding force of law, it represents another hurdle that advocates will have to surpass in obtaining SIJ predicate findings of fact in a post-*Canales* landscape, and advocates will have to argue that it lacks persuasive authority and judges should not look to it for guidance.

This practice advisory is intended to assist advocates in addressing any increase in judicial scrutiny resulting from an unduly narrow interpretation of the *Canales* holding. The authors summarize the holdings in the case, offer post-*Canales* legal arguments for advocates, address other critical practice strategies, and include an appendix of sample custody petitions and orders consistent with the court's holdings.

## *Canales*: At a Glance

**Virginia Courts Have No Authority to Hear Independent SIJ Petitions.** The Court of Appeals held that "[n]othing in Code § 16.1-241, the jurisdictional statute for the J&DR courts, authorizes a J&DR court to conduct a proceeding whose sole purpose is to render SIJ findings." The Court further analyzed whether the "federal statutory scheme" imposed any further "obligation on state courts to make SIJ findings *independent of their normal processes"* and determined that the statutory scheme is definitional and did not create new, independent state jurisdiction.[4] Accordingly, the Court held that SIJ findings must be ancillary to the primary purpose of the juvenile court order which is "to obtain relief from abuse, neglect, abandonment, or a similar basis under state law, and not primarily or solely to obtain an immigration benefit."[5]

This holding affirms a commonly held tenet of practice in Virginia, that the General Assembly has not created an independent jurisdictional basis that permits the Court to make SIJ findings absent child custody, delinquency, adoption or other state statutory grounds for jurisdiction. Subsequent to the issuance of *Canales*, most advocates report that trial court judges are relying on this holding to dismiss separately filed SIJS motions, especially where those motions are assigned a different docket number by the clerk. As discussed next, however, this does not mean that trial courts are no longer making the necessary SIJS factual findings; but they are making these findings as part and parcel of a custody order, as opposed to a separate order granting a separate motion.

**Virginia Courts *May* Make SIJS Findings.** The Court also affirmed principles of judicial authority within the confines of the previously stated jurisdictional limitations, that lower courts *may* make SIJ findings, but that they are not mandated to do so. Because Virginia courts

[4] *Canales*, 2017 Va. App. LEXIS 153, at *11-12 (emphasis added).

[5] *Id.* at *15-16 (citing 6 USCIS Policy Manual, Part J § (2)(D)(5) (2017)).

often do make decisions and determinations regarding abuse, neglect, and abandonment,[6] the Court unequivocally affirmed the lower courts' authority to make some of the SIJ findings by stating that:

> "[T]here may be circumstances when a Virginia court, by rendering a custody determination *in the normal course*, will deliver a judgment and resulting order that may satisfy the SIJ requirements. So long as a Virginia court's judgment and subsequent order are the product of a proceeding that was authorized by the General Assembly to conduct and *result from the court's application of Virginia law in the normal course*, the Virginia court has not exceeded its authority as granted by the General Assembly."[7]

This language is of critical importance, because it contradicts and belies any contention (including that of the OES memorandum mentioned above) that the ultimate result of *Canales* means that Virginia courts can no longer enter factual findings that would satisfy the SIJ requirements. Were it the case that the Court of Appeals meant to wholly bar trial courts from entering SIJ predicate findings of fact, this language would make no sense.

Turning to the specific SIJ factual findings contained in the definitional provisions of 8 U.S.C. § 1101(a)(27)(J) and USCIS guidance expanding on those requirements, the Court of Appeals agreed that "once a JDR court has decided the issue of custody, it has also made a finding of fact that could potentially be used during SIJ proceedings to show that the immigrant child is dependent upon a state juvenile court or is *dependent upon a state juvenile court* or is *appointed to the custody* of another."[8]

Similarly, the Court of Appeals agreed that several state statutory grounds could support the additional factual finding in 8 U.S.C. § 1101(a)(27)(J)(i) that the child was subject to abuse, neglect or abandonment, as that issue "may, and all too often does, arise in the course of a Virginia court's determination of child custody."[9] To make these findings, the Court of Appeals explained, "a Virginia court would turn to the best interests of the child factors found in Code § 20-124.3."[10] The Court then specifically listed the statutorily mandatory factors that the state court is authorized to consider and specific applications of the "best interests" test in which a court may make findings that incidentally support federal SIJ determinations.[11]

The two foregoing holdings affirm and formalize long-standing principles of SIJ practice in Virginia J&DR Courts around the Commonwealth, and make clear that the Court of Appeals' purpose in the *Canales* opinion was not to hammer a final nail into the coffin of SIJS in Virginia,

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[6] *Id.* at *18.

[7] *Id.* at *20 (emphasis added).

[8] *Id.* at *17; *cf.* 8 U.S.C. § 1101(a)(27)(J)(i).

[9] *Id.* at *18.

[10] *Id.*

[11] *Id.*

but rather to clarify that petitioners seeking factual findings ancillary to custody cases have to make reference to Virginia Code, not U.S. Code, in justifying the need for the court to enter those findings.

**Virginia Courts May Not Determine Whether A Child Cannot Return to Home Country Where Such a Finding Adds To or Alters the Responsibilities of Virginia Courts.** The portion of the Court of Appeals opinion resulting in the most confusion among practitioners and lower-court judges lies in the subsection regarding whether the juvenile is one "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."[12]

The Court of Appeals interpreted the term "administrative or judicial proceedings" to refer to "federal administrative or judicial proceedings" and rejected Canales's argument that "this subsection is part of the SIJ findings of fact and therefore is a determination made by state courts."[13] Holding that "a Virginia court has no authority to answer this specific question" (contained in 8 U.S.C. § 1101(a)(27)(J)(ii)), the Court stated in an expansive footnote that "any language that does not explicitly indicate that proceedings are to be adjudicated in a state forum should presumptively refer to federal proceedings."[14] In the same footnote, however, the Court offered an important conclusion that frames this holding:

> [I]t is clear that the only 'best interests' analysis involving a state court is the one it would undertake through the application of state law pursuant to subsection (i) of the SIJ statute and whether or not the determination made by a state court satisfies subsection (ii) is beyond our purview; that question is reserved for the federal officials charged with the administration of the SIJ program.[15]

The Court of Appeals also implies that there is no specific authority to reach the question of whether it is in the child's best interest to return to the child or parent's home country, *if* issuing that finding would "add or alter the responsibilities of Virginia courts in adjudicating custody or other matters."[16] Therefore, the Court's holding reiterates that courts are permitted, but not required, to issue SIJ findings that fall within the normal statutory jurisdiction of the court, but "whether [a state court] judgment and supporting factual findings satisfy the definition of a special immigrant as contemplated by 8 U.S.C. § 1101(a)(27)(J) is solely a matter for determination by officials of the Department of Homeland Security."[17]

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[12] *Id.* at *21; *cf.* 8 U.S.C. § 1101(a)(27)(J)(ii).

[13] *Id.*

[14] *Id.* at *18 n.22.

[15] *Id.*

[16] *Id.* at *22.

[17] *Id.*

**Evidentiary Standard.** *Canales* did not evaluate or alter what proof or evidence is required to issue SIJ findings of fact. The underlying findings of fact in the lower court were treated deferentially and were not disturbed on appeal.[18]

## Strategies Post-*Canales*

As previously stated, the first two holdings in *Canales* are consistent with well-settled SIJ practice in Virginia. Given the problematic third holding, however, and given the OES memo that purportedly characterizes the *Canales* opinion as eliminating Virginia trial court judges' authority to enter SIJ predicate factual findings, much of the advocate's work in the courtroom may be to emphasize the way in which the Court of Appeals specifically and unequivocally acknowledged trial courts' authority to make SIJ findings.

**Emphasize J&DR Courts' Broad Discretionary Powers.** The *Canales* opinion does not (and could not) strip J&DR judges of their broad discretion, set forth in the Virginia Code, to consider all issues relevant to the welfare of the child to further the purposes of the law. The law is intended to be liberally construed, granting judges "all necessary and incidental powers and authority, whether legal or equitable in their nature" to "further the welfare of the child and the family."[19]

The J&DR court has broad discretion "in determining what promotes the children's best interests."[20] A court is empowered to make "decisions necessary to guard and to foster a child's best interests."[21] The court must consider the best interests of the child as paramount in any custody decision.[22] It must first consider all facts pertaining to custody and visitation arrangements before contemplating "*other considerations* arising in the matter."[23]

The Virginia Code's reference to "other considerations arising in the matter" necessarily provides for courts to consider issues beyond the factors listed in Code of Va. § 20-124.3. Virginia courts have analyzed and made findings concerning factors including relocation, the home environment, moral climate, living arrangements, and parental "devotion," among others not explicitly listed in that section of the statute.[24] In addition, courts consider any "material

[18] *Id.* at *23-24.

[19] VA. CODE ANN. § 16.1-227.

[20] *Brown v. Brown*, 30 Va. App. 532, 538 (1999).

[21] *Farley v. Farley*, 9 Va. App. 326, 328 (1990).

[22] VA. CODE ANN. § 20-124.3(B).

[23] VA. CODE ANN. § 20-124.3(A) (emphasis added).

[24] *See, e.g.*, *Bottoms v. Bottoms*, 249 Va. 410, 419 (1995) (finding that "the nature of the home environment," a potential custodian's living arrangements, and the "moral climate" were important considerations in determining custody); *Goodhand v. Kildoo*, 37 Va. App. 591, 602 (2002) (analyzing a parent's "devotion" to the child); *Scinaldi v. Scinaldi*, 2 Va. App. 571, 576 (1986) (considering a father's relationship with another woman and past court order preventing him from allowing her to sleep over when his children were visiting).

change in circumstances" for the purposes of modifying custody orders.[25] Ultimately, the court may consider all evidence and issues pertinent to determining a child's best interests.[26]

SIJ findings of fact are material to the minor's welfare and wellbeing, and often concern the minor's only alternative living arrangement. The court is empowered to reach the issues presented by the SIJ findings requested by a petitioner because they directly address the welfare and best interests of the child and impact the petitioner's ability to effectuate the custody order. It follows that reaching the issues presented by the SIJ findings are therefore necessary to guarding and fostering the minor's best interests, and to effectuate custody.[27] Failure to reach the issues presented by the SIJ findings undermines any possibility of the minor remaining with the petitioner in Virginia, regardless of whether the court grants the petitioner custody of the minor.

In short, emphasize that *Canales* reaffirmed that courts *may have jurisdiction* to issue some findings that may satisfy SIJ petitions. To support requests for SIJ findings, cite heavily to the Virginia Code and Virginia caselaw, not U.S. Code or the Immigration and Nationality Act (INA), to root the issuing of SIJ findings in the best interests of the child standard.

**Emphasize Best Interest Factors (Code of Va. § 20-124.3)**. The Court of Appeals agreed that lower courts can—and in some cases, must[28]—make findings on whether the minor has been abused, neglected, or abandoned by a parent. Similarly, courts routinely make findings in the context of custody proceedings regarding whether reunification with a parent is viable and whether it is in a child's best interests to return to a home in a different state or country, because these issues are central and material to a complete analysis of a custody case under the factors enumerated in Code of Va. § 20-124.3. The issues are commonly considered by courts in custody determinations and merely involve analysis of issues already required in a best interest of the child analysis by that section of Virginia Code.[29]

Review the best interests statute and relevant case law and be prepared to offer evidence on the specific factors, in addition to noting the Court of Appeals' own statements that several factors could support findings of fact that the federal agency may find support SIJ eligibility.[30]

**On Issues of Abuse, Abandonment, and Neglect.** Considering whether a minor has been abused, neglected or abandoned by a parent falls within Code of Va. § 20-124.3 (3), requiring the court to evaluate the "relationship existing" between the minor and the parent.

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[25] *See, e.g.*, *Surles v. Mayer*, 48 Va. App. 146, 171 (2006).

[26] *See Joynes v. Payne*, 36 Va. App. 401, 416 (2001) (affirming the chancellor's consideration and weighing of factors beyond those listed in VA. CODE ANN. § 20-124.3, including one parent's "forays" with another woman, in determining the child's best interests).

[27] *Farley v. Farley*, 9 Va. App. 326, 328 (1990).

[28] *Canales*, 2017 WL 2644214, at *18.

[29] *See Johnson v. Johnson*, 493 S.E.2d 668, 672 (Va. Ct. App. 1997) (holding that in determining relocation modification, "the trial court must make the child's best interests its primary concern"); *see also, Wheeler v. Wheeler*, 591 S.E.2d 698, 702 (Va. Ct. App. 2004) (considering whether relocation to Florida was in child's best interests).

[30] *See Canales v, Torres Orellana*, No. 1073-16-4, 2017 Va. App. LEXIS 153, at *18.

**Regarding Viability of Reunification**. In a custody proceeding, a court should consider the feasibility of contact with a parent and whether a relationship with that parent is appropriate. Code of Va. § 20-124.2(B). This consideration is important in evaluating the quality of the parental relationship and whether it needed to be protected through visitation or other means. Here, viability of reunification concerns the extent and feasibility of parental contact at the time of the decision.[31]

The meaning of "viable" is defined by Black's Law Dictionary as "capable of succeeding."[32] Under Code of Va. § 20-124.3(7), the Court is required to consider "the relative willingness and demonstrated ability of each parent to maintain a close and continuing relationship with the child, and the ability of each parent to cooperate in and resolve disputes regarding matters affecting the child" in a custody proceeding.[33] The SIJ finding that reunification with a parent is not viable simply requires consideration of the willingness and ability of the parent to maintain a "close and continuing" relationship with the minor under this factor.

A request to find that reunification with one parent is not viable can be analogized to asking for a finding concerning visitation, because it concerns if and how much the child may see the non-custodial parent. In *Eichelberger v. Eichelberger*, the Virginia Court of Appeals found that:

> Each case may require a court to exercise considerable judgment in placing conditions upon the frequency, duration, place, and extent of visitation, depending upon such factors as the age, relationship, emotional and physical condition of the child or parent; the parents' maturity and ability to responsibly care for a child; the location, availability and desires of the child and parents—to list but a few.[34]

Determining whether a minor's reunification with a parent is viable is a determination of that parent's "ability to responsibly care for a child" and is an issue within the power of the court to consider.[35]

***Not in best interests to return to home country***. After the *Canales* opinion, this factor is clearly the most problematic in terms of obtaining a custody order containing factual findings that USCIS will consider sufficient to grant an I-360 petition for Special Immigrant Juvenile Status. But all hope is not lost, and advocates have reported that many trial court judges are still willing to issue the factual findings in an appropriate case where supported by argument based on Virginia Code and Virginia caselaw. Here, advocates face a difficult strategic decision: whether to seek a factual finding that "it is in the best interests of the child to remain in

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[31] *Cloutier v. Queen*, 35 Va. App. 413, 425 (2001).

[32] *Viable*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[33] VA. CODE ANN. § 20-124.3(7).

[34] 2 Va. App. 409, 413 (1986).

[35] *Id.*

Virginia," where such language is clearly permitted by *Canales*, but ultimately may prove insufficient to satisfy USCIS; or, to seek a finding that "it is not in the best interests of the child to return to [country]," where such language will clearly satisfy USCIS, but may be more difficult to persuade the trial court judge that it is still permissible in light of *Canales*.

Either way, advocates should argue that the trial court can, and often must, take location into account when faced with a request to award custody to one parent, because the court must compare each parent's circumstances to determine "which home will provide the child with the greatest opportunity to fulfill his or her potential."[36] As stated above, it may also consider "the location, availability and desires of the child and parents."[37]

Code of Va. § 20-124.3 directs the court to consider the child's best interests for purposes of custody by applying a list of statutory factors. Advocates should argue that *on the particular facts of your case*, finding whether it is in the minor's best interests to return to his or her home country simply requires the court to engage in its usual duty under that statute to consider the minor's best interests for custody purposes and examine the factors enumerated in the "best interests" statute.[38] It does not require the court to reach new or novel issues,[39] or to evaluate in which country it is better to raise a child. Rather, the court's obligation is to examine the particular circumstances of the child's potential well-being should she or he be returned to home country, and determine whether it is in the child's best interests to return to those circumstances.

Further, determining whether it is in a minor's best interests to return to his or her home country is often analogous to a relocation decision when Virginia and the country of origin are the only two locations where the minor has potential caregivers. Unlike typical relocation cases, often the minor's primary caretaker is not seeking the relocation of the child.[40] However, the court's focus in relocation cases is not on the entity seeking authority for the move, but rather on the impact this new geographic location will have on the child's wellbeing.[41] Therefore, the court's consideration of where a minor should live is analogous to a relocation case because it involves deciding between two potential geographic homes based on the relative advantages of the two locations for the child.

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[36] *Turner v. Turner*, 3 Va. App. 31, 36 (1986).

[37] *Eichelberger*, 2 Va. App. at 413.

[38] *See* VA. CODE ANN. § 20-124.3.

[39] *Eichelberger*, 2 Va. App. at 413.

[40] *See Ramsey v. Harvey*, 75 Va. Cir. 220, 223 (2008) (holding that a relocation case is where the primary caretaker is petitioning for the authority to move the children to a different state).

[41] *See Rupert v. Callahan*, 89 Va. Cir. 312, 312 (2014) (denying the mother's petition to relocate her son to Tennessee because although evidence suggested the relocation would benefit the mother, the court is bound to consider whether the relocation would independently benefit the child); *see also Stockdale v. Stockdale*, 33 Va. App. 179, 186 (2000) (holding that the removal of the children to New Jersey would serve their best interests because of evidence regarding the increased quality of the schools and the generally positive environment the new community would provide).

**Emphasize the Necessary and Proper Clause of the Best Interest Standard (20-124.3(10))**. Under Code of Va. § 20-124.3, in determining the best interests of a child for the purposes of custody or visitation the court shall consider ten enumerated factors. Among these factors is a "catchall" provision, which provides that the court shall consider, "such *other factors* as the court deems necessary and proper to the determination."[42] It is clear from the statute that the legislature intended for the courts to consider factors not explicitly enumerated in Code of Va. § 20-124.3 (1)-(9) or foreseen in its child custody determinations, but nonetheless necessary and proper to custody determinations. In addressing these "other factors" specifically, the Supreme Court of Virginia held that "the controlling consideration in all child custody cases is always the child's welfare, and in determining the best interest of a child, the trial court must consider all facts . . ."[43]

Under Code of Va. § 20-124.3(10), Virginia courts have considered factors such as the home environment, moral climate, living arrangements, relationships with nonparents, and parental evasiveness with the court as necessary and proper to the determination of custody.[44] Therefore, it is well established in Virginia case law that factors, which may impact a minor's life either positively or negatively, are considered necessary and proper to the best interest analysis in the determination of custody.

The Supreme Court of Virginia held that under Code of Va. § 20-124.3(10), the court must consider all the facts that further the child's welfare and best interests.[45] In Virginia, abandonment by a parent and the viability of reunification with a parent are factors that must be considered in a court's best interest assessment.[46] For example, in *Smith v. Smith*, the City of Salem circuit court held,

> [H]aving considered each and every one of the factors contained in § 20–124.3 . . . including the moral climate in which the children are currently being raised, as well as the father's choice to abandon his wife and children at his initial departure, the Court finds that the best interests of the children will be served by placing their joint legal custody with both father and mother and by placing their physical custody with their mother.[47]

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[42] VA. CODE ANN. § 20-124.3(10) (emphasis added).

[43] *Brown v. Brown*, 218 Va. 196, 199 (1977).

[44] *See Bottoms*, 249 Va. at 417 (holding that that "other important considerations include the nature of the home environment and moral climate in which the child is to be raised."); *Kohut v. Osborne*, No. 2010-06-2, 2007 WL 445966, at *2 (Va. Ct. App. Feb. 13, 2007) (considering mother's evasiveness with the court as necessary and proper factor to the determination of custody); *O'Connor v. O'Connor*, No. 173024, 2003 WL 1563438 at *8 (Va. Cir. Ct., March 10, 2003) (considering the positive impact of the relationship between the child's mother and stepfather on the home environment as necessary and proper to the determination of custody); *Boardwine v. Bruce*, 88 Va. Cir. 218, 231 (2014) (considering the living arrangements of a non-custodial father necessary and proper to the determination of visitation).

[45] *See Brown*, 218 Va. at 199.

[46] 47 Va. Cir. 517 (Dec. 28, 1998).

[47] *Id.* at 2.

In addition, where a child should live and whether that environment offers security and stability are factors that are often necessary and proper to custody determinations.[48] The question of whether it is in a minor's best interests to return to his or her home country is analogous to the issue of relocation because under Virginia law, the best interest of the child standard not only controls the issues of custody and visitation, but also the removal of a child to another jurisdiction.[49] In fact, "Virginia law . . . requires the court to consider and weigh the *necessary* factors in order to determine . . . whether relocation is in the best interest of the child."[50]

Generally, in relocation cases, the custodial parent is seeking to move the child to a distant or foreign jurisdiction. In SIJ cases, the petitioner is usually not seeking to relocate or move the minor from Virginia. Instead, the minor may be in deportation proceedings or be at risk of being placed in proceedings, and may be forced to leave Virginia, the jurisdiction where custody is in question. In cases where relocation takes the child away from a secure and stable environment, the courts forbid the removal of the child from the state.[51] In Virginia, the minor often enjoys a secure and stable life with family or reliable adults. If deported, the minor may be returned to a dangerous community without an appropriate adult caretaker. Therefore, whether it's in a minor's best interest to return to his or her home country is necessary and proper to the determination of custody.

For these reasons, SIJ factual findings on abuse, abandonment, and neglect, whether reunification with a minor's parent is viable, and whether it is in the child's best interest to return to home country are necessary and proper to the determination of custody.

## Practice Strategies

Practice in different jurisdictions and before different judges within the same jurisdiction varies, so some or all of these strategies may or may not be appropriate in your particular case. These are general practice strategies that we suggest going forward as appropriate.

**Initial Filing**. Submit an attorney-drafted petition for custody and no separate SIJ motion. Include the factual basis for the petition for custody and the facts that give rise to the child's eligibility for SIJ. *See* Appendix for samples. Cite to state law and authority rather than the INA or Title 8 of U.S. Code, unless specific discussion of the child's pending removal proceedings proves necessary in the context of the case.

Post-*Canales*, many judges have dismissed separate SIJ motions. If you have a hearing on a case in which you have already submitted a motion for SIJ, be prepared to proceed with the custody case and propose the entry of a custody order which incorporates the SIJ findings.

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[48] *See Bottoms*, 249 Va. at 417.

[49] *See Goodhand v. Kildoo*, 37 Va. App. 591, 599 (2002). *See also Cloutier v. Queen*, 35 Va. App. 413, 430 (2001) (quoting *Simmons v. Simmons*, 1 Va. App. 358, 362 (1986)).

[50] *Goodhand*, 37 Va. App. at 602 (emphasis added).

[51] *See Scinaldi v. Scinaldi*, 2 Va. App. 571, 573 (1986). *See also Wheeler v. Wheeler*, 42 Va. App. 282, 288 (2004); *Carpenter v. Carpenter*, 220 Va. 299, 302 (1979).

If a docket clerk incorrectly dockets a previously filed SIJ motion under a separate docket number, make sure to file a formal Motion to Consolidate, bringing it back under the docket number of the custody petition. This should be done at the JDR level, but can also be done in Circuit Court if necessary.

**Proposed Order.** Submit a proposed custody order that incorporates the SIJ findings, instead of two separate orders. Some courts prefer to make all findings post-*Canales* on the DC-573, the Court's form order. If you are appearing in one of these courts, draft specific findings into your prayer for relief to provide model language. As with the petition, refer to state authority and not federal statutes.

Regarding the "best interests not to return" finding, advocates need to make a difficult strategic decision whether to request that the Court make a "not in the best interests to return to [country]" finding in the exercise of their broad authority to act in the best interest of the child, or whether to submit a proposed order with wording such as "it is in the child's best interests to remain in Virginia." The former is preferable as it will clearly be found acceptable by USCIS, whereas advocates have reported mixed results with the latter in front of USCIS. In the few weeks since the *Canales* opinion came down, which judges will agree to enter which factual findings is fast-changing, and at the time of publishing this Practice Advisory, not all judges remain willing to enter a factual finding phrased as "not in the best interests to return." In addition, which formulation of the "best interests not to return" factual finding USCIS will accept is also subject to possible change as that federal agency reacts to *Canales*.

**Additional Briefing**. If the judge indicates that they plan to refuse to make the requested factual findings, consider requesting additional time to brief their concerns if that is an option.

**Preparing for Appeal.** Cases appealed from J&DR to Circuit Court are reviewed de novo. Once at the Circuit Court level, engage a court reporter prior to the hearing to create a record of live testimony of the Court's reasoning. In Circuit Court, the petitioner is responsible for the court reporter's scheduling and expense. If you receive an order in Circuit Court that does not contain the findings that you requested, preserve the case for appeal to the Virginia Court of Appeals by noting your objection to the entrance of the order as required in Rule 5A:18 of the Rules of the Supreme Court of Virginia. Be sure to note your objections with specificity. Per the *Canales* opinion, "[o]rdinarily, endorsement of an order '[s]een and objected to' is not specific enough to meet the requirements of Rule 5A:18." Feel free to contact any of the authors of this practice advisory to discuss case selection and strategies for any possible appeal to the Virginia Court of Appeals, and which cases might or might not be good cases to appeal to the Court of Appeals.

Finally, as noted above, if a court assigns two separate case numbers, one for the custody order and one for an order issuing SIJ findings, submit a motion to consolidate the cases into one case at the J&DR and/or Circuit Court level.

**Please see the attached appendix for sample petitions, supplemental briefing and orders.**

# Appendix A.

# Templates: Initial Filing - Sample Attorney Drafted Petitions for Custody

V I R G I N I A:

IN THE JUVENILE AND DOMESTIC RELATIONS DISTRICT COURT IN
THE COUNTY OF XXXXX

IN RE: Xxxxx Xxxxx XXXX XXXX
A Minor Child Under 18 Years of Age HEARING DATE: _____

DOB: [date] DOCKET NO. JJ_____

PETITION FOR SOLE LEGAL AND PHYSICAL CUSTODY

COME NOW the Petitioner, Xxxxx Xxxx Xxxx, by Counsel and moves this Court for an entry of an Order granting her sole legal and physical custody, and in support thereof state to the Court as follows:

1. Xxxxx Xxxxx Xxxx Xxxx (hereinafter referred to as "the minor child") was born on [date] in [country] to Xxxxx Xxxxx Xxxx Xxxx (hereinafter referred to as "father") and Xxxxx Xxxxx Xxxx Xxxx (hereinafter referred to as "mother" or "Petitioner").

2. That the minor child is a child whose custody needs determination pursuant to Virginia Code § 16.1-241(A)(3), 1950 Edition, as amended. She has been residing within the jurisdiction and venue of this Court in Xxxxxx County since approximately [date]. She currently resides with the Petitioner, her mother, at [address].

3. That the Petitioner, of [address], in the County of Xxxxxx, and the jurisdiction and venue of this court, is the biological mother of the minor child and a person having a legitimate interest in this proceeding.

4. That the father of the minor child has not been involved in the life of the minor child since impregnating the petitioner, effectively abandoning the minor child, despite his physical

proximity to the child for at least the first several years of her life. His current whereabouts are unknown. See Exhibit 1, Affidavit of Petitioner.

6. That the Petitioner is willing to assume sole legal and physical custody of the minor child and provide a home for her, and she has the ability to provide a stable life for her.

7. That in the care of the Petitioner, the minor child has been thriving. She is a student at [school] in Xxxxxx County, Virginia. She is attending school and working hard to succeed academically to the best of her abilities.

8. That reunification with the minor child's father is not viable due to his abandonment and his unknown whereabouts.

10. That legal notice has been given to all proper and necessary parties; and that all provisions of the Juvenile and Domestic Relations District Court law have been duly complied with in assuming jurisdiction over the child; and that the child is within the jurisdiction of this Court; and all determinations have been made in accordance with the standards set forth in Virginia Code § 16.1-278.4, § 16.1-278-5, § 16.1-278.6 or 278.8 or 278.15 and §§ 20-124.1 through 20-124.6.

11. That it is in the best interests of the minor child to have the Petitioner granted sole legal and primary physical custody of the minor child.

WHEREFORE, the Petitioner prays that the Court award her the following relief:

a. Award her sole legal and primary physical custody of the minor child; and

b. Enter an Order of Publication to provide notice to the father of these proceedings; and

c. Award such other relief as the nature of this cause requires and the court deems necessary and proper and which will serve the purpose and intent of the Juvenile and Domestic Relations District Court Law.

A Proposed Order is attached.

Respectfully submitted,

_____

[Attorney], [Bar Number]
[Contact Info]
*Attorney for Petitioner*

VIRGINIA:

IN THE JUVENILE & DOMESTIC RELATIONS COURT

OF [INSERT NAME OF COURT]

| | | |
|---|---|---|
| In the Matter of: | § | No. _____ |
| **[MINOR CHILD'S NAME]** | § | |
| *A child under eighteen years of age* | § | PETITION FOR SOLE LEGAL AND PHYSICAL CUSTODY |
| **[PETITIONER(S) NAME]** | § | |
| *Petitioner, mother/father of minor child* | § | |

COMES NOW Petitioner, [NAME], by counsel, and states the following in support of this Petition for Sole Legal and Physical Custody under Virginia Code § 16.1-241 and § 20146.12.

**THE PARTIES**

1. [CHILD NAME] is the biological child of [MOTHER] and [FATHER]. [CHILD NAME] is a national and citizen of [COUNTRY] and resides within the Commonwealth of Virginia.
2. Petitioner is the Child's [MOTHER], who is a national and citizen of [COUNTRY] and resides in [CITY, STATE, COUNTRY IF APPLICABLE].
3. [FATHER] is a national and citizen of [COUNTRY] and resides in [CITY, STATE, COUNTRY IF APPLICABLE].
4. *[OPTIONAL PLEADING]* Petitioner is the Child's [RELATIONSHIP IF OTHER THAN

MOTHER/FATHER] and resides in [CITY], Virginia at [ADDRESS].

## JURISDICTION & VENUE

5. Because [CHILD NAME] resides at [ADDRESS] with [MOTHER/FATHER/OTHER] and has resided in this jurisdiction since [DATE], in excess of six months, jurisdiction and venue are proper. Va. Code § 16.1-243, § 20-146.12. The appropriate affidavit required under the UCCJEA (Form DC-620) is attached hereto and incorporated herein as Exhibit ___.

## SERVICE OF PROCESS

6. Upon information and belief, the [NON-PETITIONING PARENT(S)], [NAME(S)], currently reside[s] in [LOCATION]. The last known address of [PARENT] is [ADDRESS]. *See* Exhibit ___, Petitioner Affidavit Testimony.
7. Petitioner has exercised due diligence to locate the biological [FATHER/MOTHER], [NAME], in order to serve [HIM/HER] with notice of these proceedings in accordance with Va. Code § 8.01-296. *See* Exhibit ____, Evidence of Diligent Search.
8. Consistent with the standard set forth in Va. Code § 8.01-316 and § 8.01-317, diligence has been used without effect to ascertain the location of the party to be served, and therefore Petitioner asks this Court to enter an Order of Notice by Publication in this case. The appropriate affidavit is included with this filing (DC-435).

## FACTS IN SUPPORT OF PETITION

9. [CHILD NAME] requires a custody determination pursuant to Virginia Code § 16.1-241(A)(3). The Petitioner is the Child's [RELATIONSHIP] and has a legitimate interest in these proceedings.

10. The Child's [RELATIONSHIP] abandoned the Child at age [AGE] and has not been involved in the Child's life since that time. [INSERT OTHER FACTS AVERRING ABANDONMENT, ABUSE, NEGLECT OR SIMILAR BASIS] [PLEAD ALL CUSTODY FACTORS & ALL SIJS FACTORS]
11. [*OPTIONAL PLEADING IF ONE PARENT DECEASED, OTHER PARENT PETITIONING*] The Child's [RELATIONSHIP] died at the Child's age of [AGE] and has not been in the Child's life since [DATE]. Under Virginia law, when a biological parent dies there is a presumption that the remaining biological parent should be granted sole legal and physical custody. *See Judd v. VanHorn*, 195 Va. 988, (1954).

**ARGUMENTS & AUTHORITIES**

12. In determining child custody arrangements, the General Assembly "shall give primary consideration to the best interests of the child." Va. Code § 20-124.2(B). The determination of the best interests of the child requires the Court to consider a number of statutory factors that are enumerated in Va. Code § 20-124.3, as well as "[s]uch other factors as the court deems necessary and proper to the determination." Va. Code § 20124.3.
13. In this case, the applications of the statutory best interests factors weigh in favor of this Court's grant of the Child's sole legal and physical custody to Petitioner.
14. [INSERT ARGUMENTS SUPPORTING THIS BASED ON FACTS & BEST INTERESTS] [PAY SPECIAL ATTENTION TO FACTORS RELEVANT TO REUNIFICATION & HOME COUNTRY RETURN].

## PRAYER FOR RELIEF

WHEREFORE, after hearing all the evidence in this case and testimony *ore tenus,* the Petitioner prays that the Court award her sole legal and physical custody of the Child and any other relief within this Court's authority that the Court deems proper and necessary and make the factual findings contained in the proposed order included with this Petition.

Respectfully submitted,

_____

[Attorney Signature Block]

[INSERT TABLE OF CONTENTS FOR EXHIBITS]

# Appendix B.
# Templates:  Proposed Orders

V I R G I N I A:

IN THE JUVENILE AND DOMESTIC RELATIONS DISTRICT COURT IN THE COUNTY OF Xxxxxx

IN RE: Xxxxx Xxxxx XXXX XXXX
A Minor Child Under 18 Years of Age HEARING DATE: _____

DOB: [date] DOCKET NO. JJ_____

ORDER

This matter came before the Court upon the Petition for Sole Legal and Primary Physical Custody of the above named minor child filed by Xxxxx Xxxxx Xxxx Xxxx, by Counsel. Upon consideration of the pleadings and such other evidence as may be before this Court and the best interests of the child, the Court doth therefore FIND that

1. Xxxxx Xxxxx Xxxx Xxxx (hereinafter referred to as "the minor child") was born on [date] in [country] to Xxxxx Xxxxx Xxxx Xxxx (hereinafter referred to as "father") and the Petitioner. She is under the age of eighteen (18) years and is unmarried.

2. That the minor child is a child whose custody needs determination pursuant to Virginia Code § 16.1-241(A)(3), 1950 Edition, as amended. This court has jurisdiction to make an initial custody determination pursuant to Virginia Code § 20-146.12(A)(1), 1950 Edition as amended, because the child has been residing in Virginia continuously since approximately [date], a period of more than six months prior to the commencement of this proceeding.

3. That the minor child has resided with the Petitioner, her mother, at [address], in the County of Xxxxx, since approximately [date.]

4. The minor's father has never provided the minor child with any emotional or financial support and his whereabouts are unknown. Therefore, reunification with the minor child's father is not viable due to abandonment pursuant to Virginia Code §16.1-228(3) and § 20-81.

5. That is in the minor child's best interests to be placed in the custody of her mother, the Petitioner, in Virginia. That it would not be in the minor child's best interests to return to [country] because she has no reliable caretaker there and her father's whereabouts are unknown.

6. That legal notice has been given to all proper and necessary parties; and that all provisions of the Juvenile and Domestic Relations District Court law have been duly complied with in assuming jurisdiction over the child; and that the child is within the jurisdiction of this Court; and all determinations have been made in accordance with the standards set forth in Virginia Code § 16.1-278.4, § 16.1-278-5, § 16.1-278.6 or 278.8 or 278.15 and §§ 20-124.1 through 20-124.6.

7. The basis for the decision determining custody or visitation has been communicated to the parties orally or in writing. It is therefore

ADJUDGED, ORDERED and DECREED that the Petitioner, Xxxxx Xxxxx Xxxx Xxxx, shall be appointed as the sole legal and primary physical custodian of Xxxxx Xxxxx Xxxx Xxxx with full authority to act on behalf of and make decisions concerning the minor child. It is further

ORDERED that each party intending a change of address shall give 30 days' advance written notice of such change of address to the Court and other parties, pursuant to Virginia Code § 20-124.5. Unless otherwise provided in this Order, this notice shall contain the child's full name, the case number of this case, the party's new telephone number and new street address and if different, the party's new mailing address. Unless otherwise provided in this Order, the notice

shall be mailed by first class or delivered to this Court and to the other party. Further, the Clerk of this Court shall forward four attested copies of this Order to Counsel of Record.

ENTERED this_____day of _____ 2017.

The Court retains jurisdiction of this matter.

_____
JUDGE

I ASK FOR THIS:

_____
[Attorney] [Bar Number]
[Contact Info]
*Attorney for the Petitioner*

SEEN AND AGREED

_____
Guardian Ad Litem

VIRGINIA:

IN THE JUVENILE & DOMESTIC RELATIONS COURT

OF [INSERT NAME OF COURT]

| | | |
|---|---|---|
| In the Matter of: | § | No. _____ |
| **[MINOR CHILD'S NAME]** | § | |
| *A child under eighteen years of age* | § | ORDER REGARDING CUSTODY AND VISITATION |
| **[PETITIONER(S) NAME]** | § | |
| *Petitioner, mother/father of minor child* | § | |

CAME this day [Petitioner's name] for a hearing on the Petition for Sole Legal and Physical Custody of the minor child before this Court. Petitioner, [NAME], [RELATIONSHIP TO CHILD], appeared with counsel, [ATTORNEY NAME] along with the child's guardian *ad litem,* [NAME].

WHEREAS, after reviewing evidence submitted to the Court with the petition and hearing testimony *ore tenus,* and considering the recommendation of the guardian *ad litem*, the Court finds that this Order is an appropriate disposition of the issues of custody and visitation at this time, that is in accordance with the standards and requirements set forth in Sections 20-124.1 through 20-124.6 and Section 20-146.15 of the Code of Virginia, and that it is in the best interests of the minor child that it is hereby,

ORDERED, ADJUDGED AND DECREED as follows:

1. SOLE LEGAL CUSTODY: The child will be in the sole legal custody of Petitioner, [NAME].

2. PRIMARY PHYSICAL RESIDENCE AND CUSTODY: The principal residence and primary physical custody of the child shall be with Petitioner, [NAME].

3. VISITATION: Respondent [NAME] shall have visitation with the child at the discretion of Petitioner, [NAME].

4. This order is entered without prejudice to the rights of Respondent [NAME] to petition a court competent jurisdiction for custody and visitation of the minor child.

5. FACTUAL FINDINGS:

Pursuant to the best interests of the child enumerated in Virginia Code § 20-124.3 the Court makes the following factual findings in regard to the minor child:

A. The minor, [CHILD'S NAME] was born in [COUNTRY] on [DOB], and [he/she] is a citizen and national of [COUNTRY]. [He/She] is [AGE] years old and unmarried.

B. This Court has the jurisdiction under Virginia law to make determinations about the custody and care of juveniles under Virginia Code § 16.1-241. Specifically, the [COURT NAME] Juvenile and Domestic Relations District Court has the jurisdiction over [CHILD'S NAME] pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act and Virginia Code § 20-146.12 because the child has been residing in Virginia continuously since approximately [DATE], a period of more than six months prior to the commencement of this proceeding. The Child's home state is Virginia and the proper venue is [COUNTY].

C. The child has been residing at [ADDRESS] with the Petitioner, [HIS/HER MOTHER/FATHER/OTHER] in the [COUNTY/CITY] of [COUNTY/CITY] since approximately [DATE].

D. On [DATE], this Court heard the Petition for Custody filed in [COUNTY/CITY] Juvenile and Domestic Relations Court in case number [NUMBER], bringing [CHILD'S NAME] under this Court's jurisdiction.

E. [COUNTY/CITY] Juvenile and Domestic Relations Court appointed [GAL NAME] as the minor's *Guardian Ad Litem*.

F. [*OPTIONAL PLEADING - if Court needs to take continuing, exclusive, jurisdiction*] At the Pre-Trial Hearing on [DATE], this Court decided to take continuing, exclusive jurisdiction pursuant to Virginia Code § 20-146.13 since the child would be turning eighteen (18) prior to the Final Hearing.

G. Legal notice has been given to all proper and necessary parties; and that all provisions of the Juvenile and Domestic Relations District Court law have been duly complied with in assuming jurisdiction over the child; and that the child is within the jurisdiction of this Court; and all determinations have been made in accordance with Virginia Code § 16.1-278.4, § 16.1-278.5, § 16.1-278.6, or § 16.1-278.8 or § 16.1-278.15 and § 20-124.1 through § 20-124.6.

H. The Child's [RELATIONSHIP] abandoned the Child at age [AGE] and has not been involved in the Child's life since that time. [INSERT OTHER FACTS AVERRING ABANDONMENT, ABUSE, NEGLECT OR SIMILAR BASIS].

I. [*OPTIONAL PLEADING IF ONE PARENT DECEASED, OTHER PARENT PETITIONING*] The Child's [RELATIONSHIP] died at the Child's age of [AGE] and has not been in the Child's life since [DATE]. Under Virginia law, [REMAINING PARENT] is presumed to be the proper sole legal and physical custodian of [CHILD'S NAME].

J. That reunification with [PARENT(S)] is not viable due to [REASON] under Virginia Code § 20-81. (abandonment) [OR INSERT § 18.2-371.1 and §16.1-228 FOR ABUSE & NEGLECT]

K. It is in the Child's best interests to remain in Virginia in the legal and physical custody of Petitioner. [INSERT DETAILS RE: PARENT(s) LOCATION UNKNOWN]

L. It is not in the Child's best interests to return to [COUNTRY] or [PRIOR STATE] because there are no reliable family members who are able to care for or provide for [CHILD'S NAME].

6. NOTICE OF RELOCATION AND ACCESS TO THE CHILD'S RECORDS:

Pursuant to § 20-124.5 of the Code of Virginia 1950, as amended, all custody and visitation orders require that thirty (30) days; advance notice of relocation be provided to the Court and to the other party unless the Court, for good cause shown, orders otherwise. Pursuant to and except as otherwise provided in §20-124.6 of the Code of Virginia, neither parent, regardless of whether such parents have physical custody, shall be denied access to the academic or health records of the child.

It is further ORDERED the Court will dispense with the parties' endorsements of the Order and the Clerk will send certified copies of this Order to the parties.

ENTERED this_____day of _____ 2017.

The Court retains jurisdiction of this matter.

_____

Judge

I ASK FOR THIS:

_____

[FULL ATTORNEY BLOCK]
Attorneys for [NAME]

SEEN AND AGREED:

_____

[GAL NAME]
Guardian ad litem for [CHILD'S NAME]

# Appendix C.

# Templates: Supplemental Briefing in Support of Cases filed pre-*Canales*

VIRGINIA:

IN THE JUVENILE & DOMESTIC RELATIONS COURT
OF INSERT JURISDICTION

INSERT STYLE

**SUPPLEMENTAL BRIEFING REGARDING *CANALES V. TORRES-ORELLANA* IN SUPPORT OF PETITION FOR CUSTODY**

COMES NOW FULL PETITIONER NAME ("Petitioner"), by counsel, and submits this brief in support of Petitioner's petition for custody including findings of fact relevant to FULL CHILD NAME's eligibility for special immigrant juvenile status ("SIJS"). Considering the recent Virginia Court of Appeals' opinion in *Canales v. Torres-Orellana*, Petitioner submits additional briefing on the scope of the opinion and its impact on this Court's jurisdiction to make special immigrant juvenile factual findings in the context of the underlying petition for custody presently before this Court. *Canales v. Torres-Orellana,* No. 1073-16-4, 2017 WL 2644214 (Va. Ct. App. June 20, 2017).

## ANALYSIS OF OPINION

### I. *Canales Affirms Long-Standing Legal Principles on SIJS Determinations in Virginia.*

The Court of Appeals' central refrain throughout *Canales v. Torres-Orellana* is one invoking cautionary limitations on jurisdiction and protective of the role of the trial judge as fact-finder. Ultimately, the Court of Appeals decision affirms current special immigrant juvenile practice more than it undermines it, and simply clarifies the authority of state courts to determine factors relevant to special immigrant juvenile status as an ancillary matter in the context of existing jurisdiction and state court authority.

#### A. *Canales* affirms that there is no independent cause of action for SIJS in Virginia.

*Canales v. Torres-Orellana* affirms what has long been the position of juvenile judges and advocates alike, that "[t]he General Assembly has not authorized the courts of the Commonwealth to hear petitions for SIJ findings as an independent matter, and thus, no such power exists." *Canales,* No. 1073-16-4, 2017 WL 2644214, at *6.

**B. *Canales* affirms that trial judges *may* make SIJS findings in Virginia.**

Similarly, the Court affirmed long-standing and broadly-held judicial interpretation that the Court is not required to make special immigrant juvenile findings but that there "may be circumstances when a Virginia court, by rendering a custody determination in the normal course, will deliver a judgment and resulting order that may satisfy the SIJ requirements." *Id.* at *11. The limitation on this jurisdiction, notes the Court of Appeals, is that the Virginia court's judgment and subsequent order must be "the product of a proceeding that was authorized by the General Assembly to conduct" that results "from the court's application of Virginia law in the normal course." *Id.* In such a case, the Court of Appeals clearly holds that "the Virginia court has not exceeded its authority as granted by the General Assembly." *Id.*

Turning to the specific SIJ factual findings contained in the definitional provisions of 8 U.S.C. § 1101(a)(27)(J) and USCIS guidance expanding on those requirements, the Court of Appeals concedes that "once a JDR court has decided the issue of custody, it has also made a finding of fact that could potentially be used during SIJ proceedings to show two of the special immigrant juvenile factors: that the immigrant child is *dependent upon a state juvenile court* or is *appointed to the custody* of another." *Id.* at *9; *cf.* 8 U.S.C. § 1101(a)(27)(J)(i). Similarly, the Court of Appeals concedes that several state statutory grounds could support the additional factual finding in 8 U.S.C. § 1101(a)(27)(J)(i) that the child was subject to abuse, neglect or abandonment as that issue "may and all too often does, arise in the course of a Virginia court's determination of

child custody." *Canales v. Torres-Orellana,* No. 1073-16-4, 2017 WL 2644214, *10 (Va. Ct. App. June 20, 2017)(citing Va. Code § 16.1-228; Va. Code § 18.2-371.1; Va. Code § 20-81); *see also,* 8 U.S.C. § 1101(a)(27)(J)(i). To make these findings, the Court of Appeals notes, "a Virginia court would turn to the best interests of the child factors found in Code § 20-124.3." *Canales,* No. 1073-16-4, 2017 WL 2644214, at *10. The Court then specifically lists the statutory, mandatory factors that the state court is authorized to consider. *Id.*

The foregoing holdings simply affirm and formalize long-standing principles of practice in Virginia Juvenile and Domestic Relations Courts around the Commonwealth.

## II. *Canales* does not prevent the trial courts from making findings related to return to home country where those findings are in the "normal course" and follow "normal procedures interpreting state law."

The difficulty in applying this opinion lies in subsection (b) of the Court's opinion regarding whether the juvenile before the Court is one "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." *Canales,* at *11; *cf.* 8 U.S.C. § 1101(a)(27)(J)(ii).

The Court of Appeals interprets the term "administrative or judicial proceedings" to refer to "federal administrative or judicial proceedings" and rejects Canales' argument that "this subsection is part of the SIJ findings of fact and therefore is a determination made by state courts." *Canales,* at *11. Holding that "a Virginia court has no authority to answer this specific question" (contained in 8 U.S.C. § 1101(a)(27)(J)(ii)), the Court states in an expansive footnote that "any language that does not explicitly indicate that proceedings are to be adjudicated in a state forum should presumptively refer to federal proceedings." *Canales v. Torres-Orellana,* No. 1073-16-4,

2017 WL 2644214, *10 n.22 (Va. Ct. App. June 20, 2017). In the same footnote, however, the Court offers a critical conclusion that frames this holding:

> … it is clear that the only "best interests" analysis involving a state court is the one it would undertake through the application of state law pursuant to subsection (i) of the SIJ statute and whether or not the determination made by a state court satisfies subsection (ii) is beyond our purview; that question is reserved for the federal officials charged with the administration of the SIJ program.

*Id.* The Court of Appeals' interpretation that a state court may make findings under subparagraph (i) of 8 U.S.C. § 1101(a)(27)(J) (that the child is dependent on the state court, has suffered abuse, neglect or abandonment and is in the custody of an agency or individual) but not subparagraph (ii) (regarding best interests to return to the home country) is based on the plain statutory language in the larger context of the federal special immigrant juvenile statute and is limited to that context. The Court is simply reiterating what it has already made clear: that "whether or not the determination made by a state court satisfies subsection (ii) is ... reserved for the federal officials charged with the administration of the SIJ program" and "whether [a state court] judgment and supporting factual findings satisfy the definition of a special immigrant as contemplated by 8 U.S.C. § 1101(a)(27)(J) is solely a matter for determination by officials of the Department of Homeland Security."

In order to read this subsection consistently with the rest of the opinion, one must consider the posture of the *Canales* case, in which the issue before the Court of Appeals was whether the state court was obligated to make a factual finding on return to home country. The Court of Appeals' distinction on this point arises from the specific legal and factual issues before it. To read *Canales* as prohibiting any finding on whether it is in the best interests of a child to return to their home country would undermine custody jurisdiction generally, and run counter to existing jurisprudence.

Whether the child should remain in the U.S. with Petitioner or return home to another country is the same sort of determination that state courts make in myriad custody proceedings between prospective custodians in different states under the original jurisdiction statutorily granted to the Juvenile and Domestic Relations Court under Va. Code § 16.1-241 and concurrent jurisdiction in the Circuit Courts under Va. Code § 16.1-244. *See, Johnson v. Johnson*, 493 S.E.2d 668, 672 (Va. Ct. App. 1997) (holding that in determining relocation modification, "the trial court must make the child's best interests its primary concern"); *see also, Wheeler v. Wheeler*, 591 S.E.2d 698, 702 (Va. Ct. App. 2004) (considering whether relocation to Florida was in child's best interests). In fact, the Court in *Canales* concedes that "[a] Virginia court applying the laws of the Commonwealth hears evidence and then decides who should be awarded custody based upon the evidence presented regarding the circumstances of the parents and the best interests of the child."

The best interests factors enumerated in Va. Code § 20-124.3 are often used by state courts to determine appropriate home placement for a child and whether a child should return to a former home. *Id.* The state courts' consideration of the statutory best interests factors requires the courts to consider factors that have a direct and consequential bearing on the child's ultimate living arrangements and physical placement, and the statute clearly indicates that the mandatory factors are to be considered "for purposes of determining custody ... arrangements" which in some cases involves intrastate and intracountry placement. *Id.* In fact, nearly every factor that the statute requires the state court to consider has a direct bearing on the ultimate question of child placement and the determination of one home residence over another. *See generally* Va. Code § 20-124.3.

Accordingly, the Juvenile and Domestic Relations Courts, within the context of a properly filed custody case, *may* make a best interests determination pursuant to Va. Code § 20-124.3 that includes a factual determination that *may satisfy* the federal requirement that "it is not in the child's

best interests to be returned to the alien's or parent's previous country of nationality or country of last habitual residence" where that finding is made in the "normal course" of the state proceeding based on the evidence before the fact-finding court. The Court of Appeals only demands that state courts "simply follow their normal procedures interpreting state law and leave federal officials with the decision as to whether the end product is sufficient to meet the federal statutory criteria." *Canales v. Torres-Orellana,* No. 1073-16-4, 2017 WL 2644214, *11 (Va. Ct. App. June 20, 2017). This interpretation is consistent with the Court to Appeals consistent and unequivocal holding that:

> [s]o long as a Virginia court's judgment and subsequent order are the product of a proceeding that was authorized by the General Assembly to conduct and result from the court's application of Virginia law in the normal course, the Virginia court has not exceeded its authority as granted by the General Assembly.

*Canales,* No. 1073-16-4, 2017 WL 2644214, at *10.

This interpretation is consistent with the remainder of the opinion, including the Court of Appeals' application of these holdings specifically to the *Canales* case in section (d) of the opinion.

Even more broadly, this interpretation is consistent with existing Virginia jurisprudence on the scope of the provisions of Virginia Chapter 16.1, detailed below, which is intended to be liberally construed, granting judges "all necessary and incidental powers and authority, whether legal or equitable in their nature" to "further the welfare of the child and the family." Va. Code Ann. § 16.1-227.

## III. *Canales* must be applied consistently with general jurisdictional authority over custody determinations in the lower courts.

The General Assembly sets forth in the purposes of Title 16.1 of the Virginia Code that its provisions:

> … shall be construed *liberally* and as *remedial* in character, and the powers hereby conferred are intended to be general to effect the beneficial purposes herein set forth. It is the intention of this law that in all proceedings *the welfare of the child and the family, the safety of the community and the protection of the rights of victims* are the paramount concerns of the Commonwealth and to the end that these purposes may be attained, *the judge shall possess all necessary and incidental powers and authority, whether legal or equitable in their nature.*

Va. Code § 16.1-227.

A liberal or equitable construction of a statute, as interpreted by the Virginia Supreme Court "expands the meaning of the statute to meet cases which are clearly within the spirit or reason of the law, or within the evil which it was designed to remedy, provided such an interpretation is not inconsistent with the language used." *The South Hill, Etc., Ass'n v. Hudson,* 174 Va. 284, 6 S.E.2d 668 (Va. 1940). Such an expansive construction requires the Court to "resolve[] all reasonable doubts in favor of the applicability of the statute to the particular case." Remedial means "affording a remedy; … intended to remedy wrongs and abuses, abate faults, or supply defects." *Id.* This Court has myriad remedies available to it, some of which are not statutorily mandated or permitted or even specifically enumerated. By stating the broad purposes of this Act, the General Assembly authorized the Virginia Juvenile and Domestic Relations Court (or the Circuit Courts with concurrent jurisdiction or on appeal) to apply all remedies within the scope of its statutory jurisdiction and to construe statutes available for this Court's interpretation liberally wherever possible to achieve the purpose of the Act.

The *Canales* case must be interpreted consistently with existing jurisprudence as well. Virginia courts with jurisdiction over child custody matters have broad discretion "in determining what promotes the children's best interests." *Brown v. Brown,* 30 Va. App. 532, 538 (1999). A court is empowered to make "decisions necessary to guard and to foster a child's best

interests." *Farley v. Farley*, 9 Va. App. 326, 328 (1990). The Court must consider the best interests of the child as paramount in any custody decision. Va. Code Ann. § 20-124.3 (B). And consistent with the holding in *Canales*, the court must first consider all facts pertaining to custody and visitation arrangements before considering "other considerations arising in the matter." Va. Code Ann. § 20-124.3 (A) (emphasis added).

The Virginia Code's reference to "other considerations arising in the matter" necessarily provides for courts to consider issues beyond the factors listed in Virginia Code § 20-124.3. Va. Code Ann. § 20-124.2 (A). Virginia courts have analyzed and made findings concerning factors including relocation, the home environment, moral climate, living arrangements, and parental "devotion" among others not explicitly listed in Virginia Code 20-124.3. *See, e.g. Bottoms v. Bottoms*, 249 Va. 410, 419 (1995) (finding that "the nature of the home environment," a potential custodian's living arrangements, and the "moral climate" were important considerations in determining custody); *Goodhand v. Kildoo*, 37 Va. App. 591, 602 (2002) (analyzing a parent's "devotion" to the child); *Scinaldi v. Scinaldi*, 2 Va. App. 571, 576 (1986) (considering a father's relationship with another woman and past court order preventing him from allowing her to sleep over when his children were visiting). In addition, courts consider any "material change in circumstances" for the purposes of modifying custody orders. *See, e.g., Surles v. Mayer*, 48 Va. App. 146, 171 (2006). Ultimately, the court may consider all evidence and issues pertinent to determining a child's best interests. *See Joynes v. Payne*, 36 Va. App. 401, 416 (2001) (affirming the chancellor's consideration and weighing of factors beyond those listed in Va. Code § 20-124.3, including one parent's "forays" with another woman, in determining the child's best interests).

The Court of Appeals in *Canales v. Torres-Orellana* unequivocally holds that "8 U.S.C. § 1101(a)(27)(J) does not in any way alter the jurisdiction of Virginia courts," but rather "simply allows immigrant juveniles to use certain state court judgments and supporting factual findings—such as those made under the best interests analysis of Code § 20-124.3—to support a petition for SIJ status with the Department of Homeland Security." *Canales v. Torres-Orellana,* No. 1073-16-4, 2017 WL 2644214, *13 (Va. Ct. App. June 20, 2017). Thereafter, federal authorities "determine whether the state court findings are sufficient to meet the requirements of the SIJ statute." *Id.*

The Court of Appeals' decision in *Canales* affirms state courts' autonomy, consistent with the broad authority conferred in Va. Code § 16.1-227, and the specific jurisdictional limitations in Va. Code § 16.1-228 and existing case law. In the context of special immigrant juvenile status, the Court recognized that "a Virginia court focused solely on the dispute properly before it, may render a judgment that federal officials deem insufficient to meet the SIJ requirements, leaving the applicant ineligible for SIJ status." *Id.* at *13.

On the other hand, the Court agreed "with Canales and the Attorney General that there may be circumstances when a Virginia court, by rendering a custody determination in the normal course, will deliver a judgment and resulting order that may satisfy the SIJ requirements." *Id.* at *11. Ultimately, that determination is one for this Court as fact-finder at the final hearing on the underlying custody petition after thorough consideration of the facts and testimony before it.

## CONCLUSION

As stated in the foregoing sections of this brief, the Virginia Court of Appeals' opinion in *Canales* does not prevent this Court from making factual findings relevant to the underlying custody determination that would incidentally support SIJS as determined by federal authorities. Nothing in *Canales v. Torres-Orellana* should be interpreted to limit this Court's jurisdiction to

hear this matter and make all relevant and necessary findings within the context of Va. Code § 16.1-228 and Va. Code § 20-124.3.

Petitioner will provide a written amended custody order at the time of the hearing.

Respectfully submitted on this the __th day of July 2017.

By_____
[ATTORNEY SIGNATURE BLOCK]

*Attorney for INSERT FULL CLIENT NAME*

**CERTIFICATE OF SERVICE**

I certify that on this ____th day of July 2017, I mailed by regular mail a copy of the foregoing INSERT BRIEF TITLE to INSERT GAL FULL NAME *guardian ad litem* for INSERT FULL CLIENT NAME at INSERT GAL ADDRESS.

_____
[ATTORNEY SIGNATURE BLOCK]