S233757

IN THE

SUPREME COURT OF CALIFORNIA

BIANKA M.,

Petitioner,

v.

THE SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,

Respondent;

GLADYS M.,

Real Party in Interest.

AFTER A PUBLISHED DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION THREE · CASE NO. B267454

OPENING BRIEF ON THE MERITS

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Issues Presented

In ruling on a child's request under Code of Civil Procedure section 155 for findings necessary to enable the child to petition the United States Citizenship and Immigration Services for classification as a Special Immigrant Juvenile:

1. Does a California court improperly usurp the authority of the federal government by denying the child's request based on a conclusion that the proceeding in which the request is made is not "bona fide"?

2. May a California family court deny the child's request on the ground that the parentage of the child's non-custodial alleged parent has not been adjudicated?

Introduction

For over a quarter century, it has been the federal government's policy to provide humanitarian relief in the form of Special Immigrant Juvenile Status ("SIJS") to abandoned, abused and neglected children born abroad. Section 155 of the Code of Civil Procedure ("section 155") implements the important but limited role of California courts in effectuating this policy by making certain factual findings ("SIJS findings") the federal government requires to determine whether or not to exercise its discretion to grant a child's petition for SIJS. Reflecting the California Legislature's commitment to facilitating access to SIJS for eligible children, section 155 gives the State's courts both jurisdiction and an obligation to make SIJS findings when supported by the evidence.

SIJS is intended to provide relief for children like Bianka. Abandoned by her alleged father before birth, Bianka left Honduras in August 2013 when she was ten years old to escape rampant gang violence and reunite with her mother in the United States. Immigration authorities detained Bianka when she crossed the border and placed her in a shelter in Texas, later releasing Bianka to her mother Gladys, who had previously come to California to better provide for her daughter. Bianka now lives in a safe, stable family environment that unquestionably promotes her health, safety and welfare, in stark contrast to the situation she left behind in

Honduras. Yet, because she lacks legal status, Bianka remains in jeopardy of deportation.

SIJS is one of the few realistic paths to legal status available to Bianka. She pursued that path as the law required her to do, bringing an action in the Los Angeles Superior Court ("Family Court") in which she requested SIJS findings. As part of these proceedings, Bianka sought an order from the Family Court placing her in her mother's custody. The court was empowered to make this custody order at any point in the proceeding because Bianka demonstrated that it would serve her best interests. Both federal immigration policy and state family law make the child's best interests central to the court's determination. SIJS aims not only to prevent deportation of a child who has suffered abandonment, abuse or neglect, but also to ensure the child will be cared for in this country if SIJS is granted. Thus, a court must find that the child has been placed in the custody of a court-appointed individual. The order Bianka requested would enable this SIJS finding.

The Family Court denied Bianka's request for a custody order and SIJS findings. The court concluded it could not issue the requisite custody order (and therefore could not make the needed SIJS findings) unless Bianka first joined her alleged father as a necessary party, and established personal jurisdiction over him. Only in this way, the Family Court believed, could it protect Bianka's alleged father's due process rights as a

parent and ensure that there was a "justiciable controversy" – in short, a fight over custody – for it to resolve.

Bianka sought writ review from the Court of Appeal. The Court of Appeal denied the writ. (*Bianka M. v. Superior Court* (2016) 245 Cal.App.4th 406 ("*Bianka M.*").) The court noted that Bianka's request for a custody order was uncontested and that "her mother has had no difficulty obtaining health care, education or anything else." (*Id.* at pp. 427-428.) From this, the Court of Appeal surmised that Bianka's parentage action "appears to have been brought only to obtain SIJ findings" and therefore "was not a bona fide custody proceeding under the UPA." (*Ibid.*) Having decided her parentage action was a pretext to obtain SIJS findings, the court concluded the "findings will not be useful to Bianka" because the federal government would view her petition for SIJS as not "bona fide" and deny it. (*Ibid.*) Thus the cost to Bianka of seeking SIJS findings was the inability to obtain them.

Going further, the Court of Appeal approved the Family Court's refusal to place Bianka in her mother's custody, despite Bianka's best interests, or to make the SIJS findings Bianka requested and supported with evidence, until it adjudicated her alleged father's paternity. (*Bianka M.*, *supra*, 245 Cal.App.4th at pp. 427-428.) This meant Bianka would "not only need to join [her alleged father] to the action but must also establish a basis for personal jurisdiction over him." (*Id.* at pp. 430-431.) Because the

Family Court lacked, and could not compulsorily obtain, personal jurisdiction over Bianka's alleged father, this condition effectively ended Bianka's chances of obtaining a custody order or SIJS findings (and therefore SIJS).

The Court of Appeal erred in two fundamental ways. First, by refusing SIJS findings on the assumption that the federal government would not accept them, the court disabled Bianka from even requesting, let alone obtaining SIJS. The Court of Appeal thereby supplanted the federal government as the sole and final arbiter of whether to grant or deny SIJS to a child. Moreover, by denying SIJS findings to children who "appear" to have brought a state court proceeding for the purpose of obtaining those findings, when that is what the law requires, the Court of Appeal sacrificed the ends of SIJS to the means of obtaining it. This decision upset the careful balance created by the federal SIJ statute between state courts' authority over matters affecting child welfare and the federal government's prerogative to control immigration. And it contradicted prior holdings by the Court of Appeal. If affirmed, the decision also would isolate California among a growing body of decisions from other states admonishing their courts to stick to a limited fact-finding role under the SIJ statute and leave immigration policy to the federal government.

Second, the Court of Appeal's insistence on litigating Bianka's alleged father's paternity, necessitating his voluntary submission to the

Family Court's jurisdiction, interposed an insurmountable obstacle to a custody order that is both demonstrably in Bianka's best interests and prerequisite to SIJS findings. Here, too, the Court of Appeal's decision departed from those of other panels which found no legal basis for conditioning SIJS findings on establishing an alleged father's paternity. If allowed to stand, the court's decision would deny SIJS to an entire class of eligible children, like Bianka, who were abandoned by a parent residing abroad.

For these reasons, this Court should reverse the Court of Appeal and remand with directions to order the trial court to make the SIJS findings and related custody order Bianka requested.

Statement of the Case

A. SIJS Carefully Allocates Federal and State Responsibility in a Framework Designed to Protect Children Who Suffered Abandonment, Abuse or Neglect.

"Congress created [SIJS] classification to protect abused, neglected, and abandoned unaccompanied minors through a process that allows them to become permanent legal residents." (*In re Y.M.* (2012) 207 Cal.App.4th 892, 915, citation omitted.) "[T]he purpose of SIJ status [is] to 'protect the applicant from further abuse or maltreatment by preventing him or her from being returned to a place where he or she is likely to suffer further abuse or neglect.'" (*In re Israel O.* (2015) 233 Cal.App.4th 279, 291 ("*Israel O.*"),

quoting *Marcelina M.-G. v. Israel S.* (N.Y.App.Div. 2013) 973 N.Y.S.2d 714, 723-724.)

Discretion to grant or deny SIJS to a child is reserved exclusively to the federal government through USCIS. (*Eddie E. v. Superior Court* (2015) 234 Cal.App.4th 319, 326 [Fourth Dist., Div. Three] ("*Eddie E. II*") ["[T]he federal government has exclusive jurisdiction with respect to immigration . . . , including the final determination whether an alien child will be granted permanent status as [an] SIJ."], citations omitted.) State courts, however, "play an important and indispensable role in the SIJ application process." (*Leslie H. v. Superior Court* (2014) 224 Cal.App.4th 340, 348 ("*Leslie H.*"), quoting *In re Mario S.* (N.Y. Fam. Ct. 2012) 38 Misc.3d 444, 451 [954 N.Y.S.2d 843] ("*Mario S.*").) They "are charged with making a preliminary determination of the child's dependency and his or her best interests, which is a prerequisite to an application to adjust status as a special immigrant juvenile." (*Leslie H.*, *supra*, 224 Cal.App.4th at p. 348, citation omitted.) In conjunction with this preliminary determination, state courts make three SIJS findings that enable a child to petition USCIS for SIJS. (*Id.* at p. 348, citations omitted.)

The SIJS findings needed to petition the federal government for SIJS are that (1) the child is "dependent" upon a juvenile[1] court or "committed

[1] A "juvenile court" is any U.S. court "having jurisdiction under state law to make judicial determinations about the custody and care of

to, or placed under the custody of" the State or other court-appointed individual or entity; (2) the child cannot be reunified with one or both parents "due to abuse, neglect, abandonment, or a similar basis found under State law," and (3) it is not in the child's "best interest" to be "returned" to her country of origin. (*Leslie H., supra*, 224 Cal.App.4th at p. 349, citing 8 U.S.C. § 1101(a)(27)(J); see also Code Civ. Proc., § 155, subd. (b)(1).)

A state court's decision to make SIJS findings in no way guarantees that the federal government will grant a child's request for SIJS. (*See Marcelina, supra*, 112 A.D.3d at p. 113 [SIJS findings "do not bestow any immigration status on SIJS applicants."].) Conversely, a state court's *refusal* to make SIJS findings guarantees that the federal government will *not* grant a child's request for SIJS. (*Ibid.*)

Section 155 reflects the California Legislature's determination that "it is in the best interest of the child for a superior court to issue the SIJS factual findings if requested and supported by evidence." (Sen. Rules Comm., Off. of Sen. Floor Analyses, Rep. on Assem. Bill No. 1603 (2015-2016 Reg. Sess.) Jun. 16, 2016 ("Senate Floor Analysis"), p. 6.) A court "has the authority ***and duty*** to make [SIJS] findings" pursuant to section 155 where these conditions are met. (*B.F. v. Superior Court* (2012) 207

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juveniles" (8 C.F.R. § 204.11(a)), and "includes, but is not limited to, the juvenile, probate, and family court divisions of the superior court." (Code Civ. Proc. § 155, subd. (a)(1).)

Cal.App.4th 621, 630 ("*B.F.*"), emphasis added; see also Code Civ. Proc., § 155, subd. (b)(1).)

B. Bianka is a Special Immigrant Juvenile.

Bianka was abandoned by her father in Honduras before she was born. (See Dkt. No. 3, Petitioner's Appendix of Exhibits, Vol. 1 ("1 AE") 2-3; 1 AE 9.)[2] Her alleged father refused to provide Bianka with any support. (*Id.*, Vol. 2 ("2 AE") 2-337:4, 2 AE 342:3-19.) He said he would rather Bianka die than provide her with money for milk. (*2* AE 336:14-16.) He mocked Bianka's poverty and hunger by giving her mother Gladys fish heads when she begged him for food, and taunted her with the whole fish he was saving for himself. (2 AE 342:6-16.)

Bianka's childhood was punctuated by violence. While out riding her bicycle, Bianka saw a group of men being held up at gun point, then heard gunshots as she passed them. (1 AE 9, ¶ 5.) Armed men burst into Bianka's school during class and robbed her teacher at gunpoint in front of Bianka and her fellow elementary school students. (*Ibid.*) Bianka's experiences are emblematic of endemic violence in Honduras and demonstrate the importance of SIJS. (See, e.g., United Nations High Commissioner for Refugees, Children on the Run (Mar. 2016) p. 10 ["Forty-four percent of these displaced children [from Honduras] were

[2] "Dkt. No." refers to sequential entries in the Court of Appeal docket for *Bianka M.*, *supra*, 245 Cal.App.4th 406.

threatened with or were victims of violence by organized armed criminal actors" and "[t]wenty-four percent of the children reported abuse in the home."].)

Unable to provide for Bianka in Honduras – and receiving no support from Bianka's alleged father – Bianka's mother Gladys traveled to the United States to find work. (1 AE 3, ¶ 6.) Bianka remained in Honduras with her older sister. (*Id.* ¶¶ 6-7.) After arriving in California, Gladys called Bianka every week and sent her clothing, shoes, school supplies, and money. (1 AE 9, ¶ 4.) Despite the remittances from Gladys, however, Bianka's older sister struggled to provide for Bianka because she had her own children to care for. (1 AE 10, ¶ 8.) Eventually she no longer could do both. (*Ibid.*) Faced with the prospect of homelessness in a country plagued by violence, Bianka fled to the United States. (1 AE 9, ¶ 6.) After being detained by federal immigration authorities, Bianka was reunited with her mother. (*Ibid.*) Bianka feels safe now, living in a stable family environment with her mother and two siblings and attending Carver Middle School. (1 AE 10, ¶ 7.)

C. Bianka Did Everything the Law Required of Her to Obtain a Custody Order and SIJS Findings.

In 2014, Bianka initiated a parentage action in Los Angeles County Superior Court (the "Family Court"). (1 AE 11.) She filed a request for order ("RFO") placing her under her mother's sole legal and physical

custody and making SIJS findings. (1 AE 105.) A custody order has intrinsic value to Bianka in ensuring a stable home situation that protects her health, safety and welfare. It is also a prerequisite to a SIJS finding that a child has been "[l]egally committed to, or placed under the custody of... an individual or entity appointed by the court." (Code Civ. Proc., § 155, subd. (b)(1)(A)(ii).) As such, a request for SIJS findings "may be filed in any proceeding under the Family Code in which a party is requesting sole physical custody of the child who is the subject of the requested findings" and may be made "[a]t the same time as, or any time after, a [RFO] requesting sole physical custody of the child." (See California Rules of Court, rule 5.130(b)(2)(B).) Bianka's mother wants custody of Bianka and did not oppose the RFO. (1 AE 4, ¶¶ 10, 12-13.)

Although section 155 allows Bianka to request SIJS findings in any division of the Superior Court, in practice, one-parent SIJS cases like hers can only proceed in family court. A family court action is the only kind of proceeding Bianka can initiate on her own and in which her mother can serve as "an individual ... appointed by the court" to take custody of Bianka, supporting the first SIJS finding. (Code Civ. Proc., § 155, subd. (b)(1)(A)(ii).) Probate proceedings will not work because Bianka resides with her mother, who is ineligible for appointment as her guardian. (Prob. Code, §§ 1514, subd. (b)(1)-(2) & 1600, subd. (a).) Dependency proceedings are also unavailable to Bianka because her mother provides her

with a loving and safe home. (Welf. & Inst. Code, § 300.) Juvenile delinquency proceedings would require Bianka to engage in some misconduct (*id.*, § 601), an unreasonable requirement since Bianka has no intention (and no history) of misbehaving. Further, only the State can initiate dependency or juvenile delinquency proceedings – Bianka has no right to do so herself. (Welf. & Inst. Code, §§ 325, 650.) Nevertheless, "the prerequisites for SIJS findings are the same across superior court divisions." (Senate Floor Analysis, p. 6.)

The Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") provides a California court "the exclusive jurisdictional basis for making a child custody determination." (Fam. Code, § 3421, subd. (b).) In general, the UCCJEA permits the court to make an initial child custody determination if, as in Bianka's case, California "is the home state of the child on the date of the commencement of the proceeding" (*id.*, subd. (a)(1)), and the order is in the child's best interest. (*Id.*, §§ 3011, 3021, subd. (f), 3022; accord *In re Marriage of Burgess* (1996) 13 Cal.4th 25, 31.) The court's primary concern in making a custody determination is the child's health, safety, and welfare. (Fam. Code, § 3020, subd. (a).)

"Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child custody determination." (Fam. Code, § 3421, subd. (c).) Bianka need only provide notice of the

proceeding to any alleged, natural, or presumed parent[3] and an opportunity to be heard, in accordance with California law. (Fam. Code, § 7635.) Notice to a parent residing in Honduras, like Bianka's alleged father, may be accomplished "by personal delivery of a copy of the summons and of the complaint" (Civ. Code, §§ 413.10, 415.10), at least 10 days before the proceeding. (Fam. Code, §§ 3408, subd. (a), 7635, subd. (b), 7666, subd. (a).)[4] Assuming these criteria are met, the court may "during the pendency of a proceeding or at any time thereafter, make an order for the custody of a child during minority that seems necessary or proper." (*Id.*, § 3022.)

Bianka satisfied each of the prerequisites to obtain the custody order she sought. Her home state is California. (See 1 AE 13; see also 1 AE 7.) She provided notice of the proceeding to both her mother – the proposed custodial parent – (1 AE 121), and her alleged father, who was personally served on May 28, 2015. (1 AE 125.) Bianka also served her alleged father with the same documents – the parentage petition, summons, RFO and all supporting documents – by mail on June 2, 2015. (1 AE 126.)[5]

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[3] The distinctions between these categories are discussed in more detail below. (See Legal Discussion § II.B.)

[4] Honduras is not a signatory to the Hague Service Convention, as the Court of Appeal acknowledged. (*Bianka M.*, 245 Cal.App.4th at p. 436.) As a result, service may be executed by means authorized under California law.

[5] In addition, Bianka's attorney called her alleged father on April 27, 2015 and notified him of the date, time, and location of the July 14, 2015 hearing on Bianka's RFO. (1 AE 116, ¶ 2.)

And Bianka made "a sufficient factual showing" that an award of sole custody to her mother is in her best interest. (2 AE 362:9-15.)

Bianka also satisfied every requirement under section 155 to obtain SIJS findings. The Family Court had jurisdiction to make those findings (all divisions of the Superior Court do). (Code Civ. Proc., § 155, subd. (a).) Bianka supported each SIJS finding with uncontroverted evidence, including (among other things) her own declaration (1 AE 109), which section 155 makes expressly sufficient to sustain the findings (Code Civ. Proc., § 155, subd. (b)(1)).

The custody order Bianka requested – and the Family Court should have made – would "[l]egally commit[] [her] to, or place[] [her] under the custody of ... an individual or entity appointed by the court," satisfying the first SIJS findings. (Code Civ. Proc., § 155, subd. (b)(1)(A)(ii).)

The uncontroverted evidence that Bianka's alleged father abandoned her before birth (1 AE 2-3, ¶ 4), never had a relationship with her (1 AE 9, ¶ 3), and does not want a relationship now (1 AE 100, ¶ 2; 1 AE 116, ¶ 2), demonstrated that reunification was "not ... viable because of abuse, neglect, [or] abandonment," satisfying the second SIJS finding. (Code Civ. Proc., § 155, subd. (b)(1)(B).)

The Family Court's own finding that "both the overall level of violence in her city and the lack of available relatives to care for her, is untenable, and supports a finding that **it would not be in the best interest[]**

of [Bianka] to be returned" to Honduras (2 AE 311, original emphasis) supports the third SIJS finding that "it is not in the best interest of [Bianka] to be returned to" Honduras. (Code Civ. Proc., § 155, subd. (b)(1)(C).)

In light of the foregoing facts, the Family Court should have granted Bianka's RFO. Instead, the court denied the RFO on the grounds that due process and the apparent lack of a "justiciable controversy" prevented it from making the requested custody order or SIJS findings without first adjudicating Bianka's alleged father's paternity. (2 AE 305.) Bianka petitioned for writ review.

D. The Court of Appeal Affirmed the Family Court's Order, Foreclosing Bianka's Ability to Obtain SIJS.

The Court of Appeal issued a published decision denying the writ petition. (*Bianka M.*, *supra*, 245 Cal.App.4th at p. 406.) Based on the apparent lack of controversy over custody, the court surmised that "Bianka's primary goal in bringing her parentage action was to obtain an order containing SIJ[S] findings." (*Id.* at p. 433.) It concluded that her maternity action was therefore "not a bona fide custody proceeding under the UPA" for purposes of SIJS. (*Id.* at pp. 427-428.)

The Court of Appeal also held "it was within the [Family Court's] discretion" to compel Bianka to join her alleged father to the proceeding and adjudicate his paternity "to attempt to give [him] a meaningful

opportunity to refute [her] allegations" – by which it meant SIJS findings – "before making the orders [she] requested." (*Id.* at p. 430.)

The Court of Appeal's decision to permit the Family Court to withhold SIJS findings based on its own conclusion that Bianka's maternity action was not "bona fide" effectively ended Bianka's hopes of receiving SIJS. The Court of Appeal misapprehended the role of the State's courts in the SIJS framework. Their task is to make a factual determination that the federal government uses to identify children eligible for SIJS. It is not to make the federal government's decision to grant or deny SIJS to those children; that is the government's sole prerogative. The Court of Appeal usurped that prerogative by allowing California courts to withhold SIJS findings based on their own conjecture about a child's motives and the assumption that these motives would prompt the federal government to deny the child's request for SIJS. The court also confused the relative priorities the Legislature has assigned to a child's interests and those of her parents; the former are a California courts' paramount concern in custody matters. (Fam. Code, § 3020, subd. (a).) Yet *Bianka M.* subordinated them to the hypothetical interests of an alleged father who has disclaimed any intent to assert them.

As for its decision mandating a paternity determination, the Court of Appeal acknowledged that this would require "Bianka . . .not only . . .to join [her alleged father] to the [maternity] action but . . . also [to] establish a

basis for personal jurisdiction over him." (*Bianka M., supra*, 245 Cal.App.4th at p. 430.) Personal jurisdiction, however, cannot be obtained by service or joinder alone – it "depends on three factors: (a) jurisdiction of the state; (b) due process, *i.e.*, notice and opportunity for hearing; and (c) compliance with statutory jurisdictional requirements of process." (*Howard v. Data Storage Associates, Inc.* (1981) 125 Cal.App.3d 689, 696.) Bianka cannot control or satisfy the first of these: her alleged father lives in Honduras and has no contacts with California. (See, e.g., 1 AE 125 [proof of personal service on Bianka's alleged father in Honduras].) Because the Family Court cannot obtain personal jurisdiction over him, it cannot adjudicate his paternity. (*Cty. of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215, 1227 ["even though a statutory scheme may empower the trial court to determine paternity ... in a family law matter, such power only extends 'to parties over whom it has personal jurisdiction.'"].)

Although it "appreciate[d] that [the] process may prove difficult for Bianka and other similarly situated children seeking SIJ status," the Court of Appeal offered no viable solution to the dilemma its holding created. (*Bianka M., supra*, 245 Cal.App. 4th at pp. 430-431.) To the contrary, the court advised Bianka to go through the motions of a procedure it acknowledged would likely prove pointless. She was to amend her pleadings to name her alleged father as a party to the action and serve him again with another summons and copy of the petition. (*Id.* at p. 416.)

Then, if he "fail[ed] to respond—the most likely outcome if, as Bianka alleges, he has no interest in her welfare—Bianka may then attempt to proceed by way of default and obtain the relief she seeks." (*Ibid.*)

But without personal jurisdiction over her alleged father, a default judgment adjudicating his paternity is void. (*Gorham*, *supra*, 186 Cal.App.4th at p. 1234.) This is true whether or not Bianka's alleged father failed to bring a motion to quash after being served. (*Strathvale Holdings v. E.B.H* (2005) 126 Cal.App.4th 1241, 1250.) To this the Court of Appeal responded that "[i]f obtaining personal jurisdiction over [her alleged father] is problematic, Bianka may attempt to obtain the relief she seeks by entering into a stipulated judgment of paternity with her father." (*Bianka M.*, *supra*, 245 Cal.App. 4th at p. 416.)

Although it is theoretically possible that a person who abandoned Bianka would willingly enter into a stipulated judgment agreeing that he is her father, the Court of Appeal's suggestion that this is the procedure Congress intended children to follow to obtain SIJS is fanciful. It fails to provide a reliable path to SIJS and the stable custody arrangements that are needed to protect children from further mistreatment. It places the burden on an already-traumatized child to not only interact with a person who endangers their "health, safety, and welfare," but also to plead for that person's help. And it would allow an abandoning, abusive, or neglectful parent to continue to victimize the child (and the other parent) by simply

declining to act. Mindful of the current budget crisis facing courts in California, the Court of Appeal previously rejected a similar procedure as a "duplicative and unnecessary burden on the superior court." (See *B.F.*, *supra*, 207 Cal.App.4th at p. 629.) Yet this is the only path the Court of Appeal left open to Bianka and similarly situated children – the very children the Congress and the California Legislature specifically intended to help by creating and facilitating access to SIJS.

Legal Discussion

I. A California Court Improperly Usurps the Authority of the Federal Government by Denying a Child's Request for SIJS Findings Based on a Conclusion that the Proceeding in Which the Request is Made is Not "Bona Fide."

Until *Bianka M.*, the Courts of Appeal had repeatedly recognized the federal government's "exclusive jurisdiction with respect to immigration." (*Leslie H.*, *supra*, 224 Cal.App.4th at p. 348; accord *Eddie E. II*, *supra*, 234 Cal.App.4th at p. 333 [error to deny SIJS findings on the basis of "misplaced policy concerns," quoting *Leslie H.*, *supra*, 224 Cal.App.4th at p. 350]; *Israel O.*, *supra*, 233 Cal.App.4th at p. 289 ["A state court's role in the SIJ process is not to determine worthy candidates for citizenship..."].) California's courts were to have no "role, through the SIJ[S] statute, in effectuating federal immigration policy." (*Israel O.*, *supra*, 233 Cal.App.4th at p. 289.) Instead, the State's courts were "simply called upon to determine" discrete factual issues so that a child may then petition

the federal government for SIJS. (*Leslie H.*, *supra*, 224 Cal.App.4th at p. 351, quotation omitted; accord *Israel O.*, *supra*, 233 Cal.App.4th at p. 289 [State court's role "simply to identify abused, neglected, or abandoned alien children under its jurisdiction who cannot reunify with a parent or be safely returned in their best interests to their home country."].)

The decisions of other states' courts are, almost without exception, in accord.[6] The Supreme Court of New Jersey, for example, recently "examin[ed] the role of our state courts in making the predicate [SIJS] findings" in *H.S.P. v. J.K.* (2015) 223 N.J. 196, 199. Although not binding on this Court, *H.S.P.* is instructive because it addressed an appellate court's decision that, like *Bianka M.*, "expressed concern that [the] petition for custody ... was filed 'primarily for the purpose of obtaining the status of an alien lawfully admitted for permanent residence, rather than for the purpose of obtaining relief from abuse or neglect or abandonment.'" (*Id.* at p. 214.) The New Jersey Supreme Court lauded the "panel's attempt to divine and support Congress's intent." (*Ibid.*) But it reiterated that "state courts are

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[6] The exception is the Supreme Court of Nebraska's opinion in *In re Erick M.* (2012) 284 Neb. 340 ("*Erick M.*"), which interpreted the federal SIJ statute to allow one-parent SIJS cases only in limited circumstances. *Erick M.* has been criticized as is inconsistent with federal law and the practice of USCIS, discussed above, of accepting one-parent SIJS petitions. (See, e.g., *Eddie E. II*, *supra*, 234 Cal.App.4th at p. 330 ["[N]ot only did the *Erick M.* court fail to identify an ambiguity in the [federal SIJ] statute, but its resolution of the ostensible ambiguity is unpersuasive."]; accord *Israel O.*, *supra*, 233 Cal.App.4th at pp. 290-291 [noting USCIS decisions relied on by *Erick M.* do not show agency's rejection of one-parent SIJS].)

not charged with undertaking a determination of whether an immigrant's purpose in applying for SIJ status matches with Congress's intent in creating that avenue of relief." (*Ibid.*) "That determination is properly left to the federal government." (*Ibid.*)

Similarly, the Appellate Court of Illinois, citing *Eddie E. II* and *Israel O.*, held that "state courts are not gatekeepers, charged with weeding out motions for SIJ findings that they believe are not bona fide." (*In re Estate of Nina L. ex rel. Howerton* (Ill. App. Ct. 2015) 41 N.E.3d 930, 937-938 ["[T]he bona fides of and reasons for the abandonment are not our concern and will be addressed, to the extent that they are deemed relevant, in the context of [the] application for SIJ status.)

Each of the foregoing decisions cites with approval the New York Family Court's explanation in *Mario S.* of the proper scope of a state court's inquiry under the federal SIJ statute. (*Mario S.*, *supra*, 38 Misc.3d 444.) Rejecting the reasoning of the Nebraska Supreme Court's decision in *Erick M.*, *supra* fn. 6, *Mario S.* explained that nothing in the federal SIJ statute or its implementing regulation "indicates that the Congress intended that state juvenile courts pre-screen potential SIJ applications for possible abuse on behalf of the USCIS." (*Id.* at p. 456.) Thus, "[w]hether or not a juvenile's application constitutes a potential abuse or misuse of the SIJ provisions ... is beyond the scope of what a state juvenile court is required to decide." (*Ibid.*)

Bianka M. departed sharply from the prior consensus of *Leslie H.*, *Israel O.*, and *Eddie E. II*, as well as other state courts. Whereas these courts recognized that a court "need not determine ... what the motivation of the juvenile in making application for the required findings might be [citations]," or "whether the USCIS, the federal administrative agency charged with enforcing the immigration laws, may or may not grant a particular application for adjustment of status as a SIJ" (*Leslie H.*, *supra*, 224 Cal.App.4th at p. 351), *Bianka M.* authorized the State's courts to withhold SIJS findings on the basis of *both* of these considerations.

Observing that Bianka "has lived with her mother for many months in Los Angeles and her mother has had no difficulty obtaining health care, education or anything else" (*Bianka M.*, 245 Cal.App.4th at p. 428), the Court of Appeal surmised that Bianka's motivation in bringing a maternity action "appears to have been ... only to obtain SIJ[S] findings." (*Id.* at pp. 427-428.) Based on this inferred motivation, the court concluded that Bianka's parentage action "was not a bona fide custody proceeding under the UPA." (*Ibid.*) Intuiting that USCIS would not consent to Bianka's eventual SIJS petition if the Family Court made SIJS findings "through specially constructed proceedings designed mainly for the purpose of issuing orders containing SIJ findings" (*id.* at p. 422) the Court of Appeal decided that "SIJ[S] findings will not be useful to Bianka." (*Id.* at p. 427.)

Bianka M. did not identify any instance in which USCIS denied a child's SIJS petition because the child brought a state court action primarily to obtain SIJS findings. Even if it had, "it would not follow that this conclusion determines how *state* courts should fulfill their role because USCIS's charge is broader than ours." (*Eddie E. II*, 234 Cal.App.4th at p. 329, original emphasis.)

Bianka M.'s conjecture about Bianka's motives is also unfounded; the family court proceeding Bianka commenced was *not* "specially constructed" mainly to obtain SIJS findings. The proceeding undeniably related to and served child welfare – Bianka's – which is why the Family Court found there had been "a sufficient factual showing" that the custody order Bianka seeks is in her best interest. (2 AE 362:9-15.) Moreover, the Legislature has clarified that "***it is in the best interest of the child for a superior court to issue the SIJS factual findings*** if requested and supported by evidence." (Floor Analysis, p. 6.)

As a different panel of the Court of Appeal has explained, "abandonment by one parent, even if another parent is present, can cause a [child]'s life to tailspin out of control." (*Eddie E. II*, *supra*, 234 Cal.App.4th at p. 332.) Like the petitioner in *Eddie E. II*, Bianka "has presented a case from which a reasonable USCIS field director could conclude that [she] has applied for SIJ status in good faith to obtain relief from ... abandonment." (*Ibid.*) "On the other hand," as the Court of

Appeal in this case speculated, "a USCIS field director may determine that is not the case." (*Ibid.*) The problem with *Bianka M.*'s interpretation of the federal SIJ statute, like the *Erick M.* interpretation rejected in *Eddie E. II*, "is that it completely forecloses the ability of USCIS to make that determination" and thereby "improperly usurped [the federal government's] role." (*Ibid.*)

By enabling California courts to withhold SIJS findings on the basis of a child's purported motives, *Bianka M.* would deprive children who satisfy the requirements of section 155 of any opportunity to seek SIJS from the federal government. (*Israel O.*, *supra*, 233 Cal.App.4th at p. 283 ["[SIJS] findings are a prerequisite for filing an SIJ[S] application with [USCIS]"], citing 8 C.F.R. § 204.11(d) (2014); c.f. 3–35 Immigration Law and Procedure § 35.09[3][a] [Matthew Bender 2013] [noting that "in refusing to make SIJ findings where one parent was present, the Nebraska court [in *Erick M.*, *supra* fn. 6] blurred the federal and state roles under the SIJ statute," with "the troubling effect of precluding the USCIS from applying its interpretation of the federal statute to determine whether a youth would qualify in a particular case."].)

A. The Court of Appeal Erroneously Inferred Authority to Deny a Request for SIJS Findings It Deemed Not "Bona Fide" from Superseded and Inoperative Federal Law Rather than Section 155.

Section 155 sets forth the procedure and requirements for making SIJS findings. In short, section 155 imposes on a court with jurisdiction – *i.e.*, any division of the Superior Court – "'the duty to make [SIJS] findings' if the evidence before it supports those findings." (*Israel O.*, *supra*, 233 Cal.App.4th at p. 285, citing *B.F.*, *supra*, 207 Cal.App.4th at p. 630; Code Civ. Proc., § 155, subds. (a), (b)(1).)

Recognizing the division of state and federal authority under the SIJS framework, section 155 does not permit a California court to inquire into the motivations of a child or to refuse to make SIJS findings on the basis of that inquiry. In fact, following this Court's grant of review, Governor Brown signed into law AB 1603, which "clarifies: ... [t]hat the perceived motivations of the child/juvenile in seeking classification as a special immigrant juvenile shall not be included or referred to in the findings under this section," *i.e.*, section 155. (Assem. Bill No. 1603, approved by Governor Jun. 27, 2016, Assem. Weekly Hist. (2015-2016 Reg. Sess.) p. 366; see also Code Civ. Proc., § 155, subd. (b)(1)(C)(2).) The Legislature's recent clarification of section 155 ought to be dispositive: *Bianka M.* improperly authorized the State's courts to refuse to make SIJS findings on the basis of a child's motivation in seeking those findings.

Bianka M., however, did not support its bona fide analysis or conclusion with reference to section 155. Instead it purported to ground its holding in federal law – specifically the legislative history of a prior version of the SIJ statute and a proposed, but never adopted, federal rule. (*Bianka M.*, 245 Cal.App.4th at p. 422.) As such, a decision by this Court still is necessary to confirm that the State's courts may not withhold SIJS findings on the basis of a child's perceived motivation for seeking those findings.

To begin with, the legislative history cited by *Bianka M.* simply states that "the consent determination ***by the Secretary*** [of Homeland Security], through the USCIS District Director, is an acknowledgment that the request for SIJ classification is bona fide." (*Bianka M.*, 245 Cal.App.4th at p. 422, citing H.R.Rep. No. 105–405, at p. 130 (1997).) On its face, this bare observation shows no intention to confer on state courts the power to engage in a bona fide inquiry. And, even if the Court of Appeal were correct that "bona fide" in this context means "the SIJ benefit was not 'sought primarily for the purpose of obtaining the status of an alien lawfully admitted for permanent residence, rather than for the purpose of obtaining relief from abuse or neglect or abandonment" (*ibid.*), Bianka satisfies this test. No one has ever contended that Bianka is seeking SIJS (or SIJS findings) for any reason other than to obtain relief from abandonment, abuse, or neglect.

As for the proposed federal rule *Bianka M.* cited, the Court of Appeal acknowledged that it would, "if adopted, ... ***authorize the USCIS*** to 'consider, among other permissible discretionary factors, whether the alien has established, based on the evidence of record, that the State court order was sought primarily to obtain relief from abuse, neglect, abandonment, or a similar basis under State law and not primarily for the purpose of obtaining lawful immigration status; and that the evidence otherwise demonstrates that there is a bona fide basis for granting special immigrant juvenile status.'" (*Bianka M.*, *supra*, 245 Cal.App.4th at p. 422, citing 76 Fed.Reg. 54985 (Sept. 6, 2011) [proposed 8 C.F.R. § 204.11(c)(i)], emphasis added.) The proposed rule was *not* adopted and "proposed regulations carry no more weight than a position advanced on brief." (*Tedori v. United States* (9th Cir.2000) 211 F.3d 488, 492, as amended (May 18, 2000); see also *LeCroy Research Systems Corp. v. United States* (2d Cir.1984) 751 F.2d 123, 127 ["Proposed regulations are suggestions made for comment; they modify nothing"]; *Yocum v. United States* (Fed.Cl. 2005) 66 Fed.Cl. 579, 590 & fn. 14 ["in general, proposed regulations have no legal force or effect until they become final"].) This is true even where an agency "allows a proposed regulation to linger, unadopted, over a long period of time." (*Ibid.*)

Had the proposed federal rule *Bianka M.* cited actually been adopted, it would have authorized ***only USCIS*** to consider, among other

factors, whether there was a bona fide basis for granting a child's petition for SIJS. (*Bianka M.*, *supra*, 245 Cal.App.4th at p. 422, citing 76 Fed.Reg. 54985 (Sept. 6, 2011) [proposed 8 C.F.R. § 204.11(c)(i)].) Nothing in the materials cited by the Court of Appeal suggests a Congressional intent to allow state courts to make their own bona fide determination. As of the most recent amendments, neither the federal SIJ statute nor its implementing regulations allow for a "bona fide" analysis or determination even by USCIS. (See 11 U.S.C. § 1101(a)(27)(J); 8 C.F.R. § 204.11.) The Court of Appeal therefore denied Bianka relief on the basis of a non-existent legal requirement.

Moreover, the Court of Appeal's conclusion that a state court action is not bona fide if a child brought it "mainly for the purpose of obtaining SIJS findings," not only garbles the language of the proposed rule, but is illogical. (*Bianka M.*, 245 Cal.App.4th at pp. 427-428, 433.) A child seeking SIJS findings necessarily will be motivated by a desire to obtain them and will have brought the state court action in which she requests the findings at least in part for that purpose. That is the way Congress designed the SIJS framework to function, and section 155 reflects the Legislature's efforts to facilitate that process. The Court of Appeal's decision would make all children ineligible for SIJS findings except those who profess least

to want them. SIJS-eligible children should not be made to suffer such Kafkaesque contortions to obtain relief Congress desires them to have.[7]

B. Like Federal Law, California Law Does Not Permit the State's Courts to Withhold SIJS Findings Based on a Conclusion that a Child's Request for the Findings is Not "Bona Fide."

Ironically, despite holding that Bianka's parentage action was not bona fide, the Court of Appeal conceded the proceeding was "not expressly prohibited under the UPA or the applicable rules of court." (*Bianka M.*, *supra*, 245 Cal.App.4th at p. 427.) The court's concept of a "bona fide custody proceeding" is foreign to California law. The Family Code does not contain a "bona fide" requirement for a custody proceeding in the Family Court. It does not require a child to demonstrate any "difficulty obtaining health care, education or anything else." (*Id.* at p. 428.) Instead, a custody proceeding is *permissible* if the Family Court has jurisdiction over the child – *i.e.*, the child's home state is California – (Fam. Code, §§ 3402(g) & 3421(a)(1)), and the requested custody order is in that child's best interest. (*Id.*, §§ 3011(a), 3020(a), 3022; see also *In re Marriage of*

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[7] The United States Supreme Court has expressed skepticism that ordinary pre-emption principles would not apply to state law that "impose[d] legal duties that would conflict directly with federal regulatory mandates, say, by premising liability upon the presence of the very ... requirements that federal law requires." (*Geier v. American Honda Motor Co., Inc.* (2000) 529 U.S. 861, 871; see also *DeCanas v. Bica* (1976) 424 U.S. 351, 358 fn. 6 [states "can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens..."].)

Burgess, *supra*, 13 Cal.4th at p. 31 ["In an initial custody determination, the trial court has 'the widest discretion to choose a parenting plan *that is in the best interest of the child*,'" citing Fam. Code, § 3040, subd. (c), emphasis added].) Bianka's parentage action satisfied each of these criteria.

The Family Court had jurisdiction to make a custody order. (1 AE 13.) And it found that Bianka's evidence and testimony constituted "a sufficient factual showing" that the custody order she seeks is in her best interest. (2 AE 362:9-15.) The Family Court therefore should have made the requested custody order and corresponding SIJS finding that Bianka had been "placed under the custody of... an individual... appointed by the court." (Code Civ. Proc., § 155(b)(1)(A)(ii).) Because the undisputed evidence showed that reunification with Bianka's alleged father is not viable because of abandonment, and that "**it would not be in the best interest[] of Child to be returned to Honduras**" (2 AE 311, original emphasis), the Family Court also was obligated to make the remaining two SIJS findings. That is still the correct outcome.

II. A California Family Court May Not Deny a Child's Request for SIJS Findings on the Ground that the Parentage of the Child's Non-Custodial Alleged Parent Has Not Been Adjudicated.

In Bianka's maternity action, the Family Court ruled it could not make SIJS findings, or the attendant custody order, without first adjudicating Bianka's alleged father's paternity. (*Bianka M.*, *supra*, 245 Cal.App. 4th at pp. 419.) In the Family Court's view, unless it took this

step, the undisputed evidence of Bianka's abandonment was unreliable, and normal due process protections were inadequate to protect her alleged father's interests. (*Ibid.*) The Family Court accordingly concluded that joinder of Bianka's alleged father was mandatory under California Rule of Court 5.24(e). (*Id.* at p. 429.)

In the months preceding the Family Court's decision in Bianka's case, Division Five of the Court of Appeal held that a "[family] court did not possess the judicial discretion to rule that the father is a necessary party in denying petitioner's request that mother be awarded sole custody, or to fail to exercise its discretion to make SIJS findings." (See Dkt. No. 10, Request for Judicial Notice, Exhibit A, *Bryan S. v. Superior Court* (Feb. 24, 2015, B267454), unpublished [Second Dist., Div. Five] ("*Bryan S.*") at p. 3; see also B267454, Dkt. No. 14, Order Granting Request for Judicial Notice.) *Bryan S.* also specifically held that joinder of the child's non-custodial father was "not required by any . . . legal principle." (*Ibid.*)

Division Eight of the Court of Appeal agreed that "[s]ection 155 does not require a paternity adjudication before a court can make SIJS findings, as long as a proper declaration or other evidence identifies the person the child claims to be his father." (See Dkt. No. 10, Exhibit B, *Elder O. v. Superior Court* (Sept. 3, 2015, B266546), unpublished [Second Dist., Div. Eight] ("*Elder O.*") at pp. 4-5.)

As with its bona fide holding, *Bianka M.*'s insistence on adjudicating a non-custodial parent's parentage represents a retreat from prior consensus. Despite agreeing that "as a general matter, ***Bianka was not required to name [her alleged father] as a respondent*** in her action to establish a parental relationship with [her mother]," the Court of Appeal required Bianka to do just that. (*Bianka M.*, 245 Cal.App.4th at p. 428, emphasis added.) It found joinder of Bianka's alleged father "appropriate" under the *permissive* joinder provisions of California Rule of Court 5.24(e)(2) ("permissive joinder rule"). (*Ibid.*)

The result of *Bianka M.*'s application of the "permissive joinder rule" was no different from the Family Court's determination that joinder of Bianka's alleged father was "mandatory." By obligating Bianka to sue her alleged father, the Court of Appeal made him a necessary party who must be joined to her erstwhile maternity action in order for her to get a custody order and SIJS findings. It also effectively ended Bianka's chances of obtaining SIJS. As previously discussed (Statement of the Case § D above), a paternity determination requires personal jurisdiction over the alleged parent, which Bianka cannot obtain but by the implausible beneficence of a man demonstrably indifferent to her best interest. This outcome defies reason. It is completely antithetical to Congress's efforts to protect children like Bianka. And it has no sound basis in the law.

A. The Permissive Joinder Rule Does Not Mandate Adjudication of a Non-Custodial Alleged Father's Paternity Before Making a Custody Order or SIJS Findings.

This Court has previously admonished that courts "should, in dealing with 'necessary' and 'indispensable' parties, be careful to avoid converting a discretionary power or a rule of fairness in procedure into an arbitrary and burdensome requirement which may thwart rather than accomplish justice." (*Bank of California Nat. Ass'n v. Superior Court in & for City & Cty. of San Francisco* (1940) 16 Cal.2d 516, 521.) *Bianka M.* jettisoned that admonition, insisting on joinder of Bianka's alleged father even at the cost of denying her a custody arrangement and SIJS findings to which she is entitled and that unquestionably serve her best interest.

The permissive joinder rule on which the Court of Appeal based its holding allows a court to "order that a person be joined as a party to the proceeding." (Cal. Rules of Court, rule 5.24(e)(2).) But it does so only "if the court finds that it would be appropriate to determine the particular issue in the proceeding *and* that the person to be joined as a party is either indispensable for the court to make an order about that issue or is necessary to the enforcement of any judgment rendered on that issue." (*Ibid.*, emphasis added.) Neither the Family Court nor the Court of Appeal cited anything in the Family Code or section 155 that would make an alleged

father indispensable to establish Bianka's mother's maternity, to award her custody of Bianka, or to make SIJS findings.

Bianka's alleged father was not "indispensable for the court to make an order about" custody. The UCCJEA, which is the "the exclusive jurisdictional basis for making a child custody determination ...." (Fam. Code, § 3421, subd. (b)), empowered the Family Court to make the requested custody order without the "physical presence of or personal jurisdiction over" *either* parent, let alone joinder of Bianka's non-custodial alleged father. (*Id.*, subd. (c).) Even before the UCCJEA made this explicit, the Court of Appeal held that "due process of law is [not] offended by an adjudication of parental custody rights in the absence of personal jurisdiction over a parent." (*In re Marriage of Leonard* (1981) 122 Cal.App.3d 443, 458.) Nor was Bianka's alleged father necessary to the enforcement of any judgment rendered on custody. A custody order made after notice and an opportunity to be heard would be enforceable against Bianka's parents whether or not they were joined to the proceeding. (Fam. Code, § 3406.)

Bianka's alleged father is not "indispensable" for the Family Court to make SIJS findings either. Section 155 permits and obligates a court to make such findings, if supported by the evidence, without regard to joinder of either parent. (Code Civ. Proc., § 155, subd. (b)(1).) Moreover, it requires a court to make such findings in proceedings, such as probate, that

by definition do not involve parents at all. (*Id.*, § 155, subd. (a)(1); see also Prob. Code, § 1510.) Furthermore, Bianka's alleged father is not necessary to the enforcement of any judgment with respect to SIJS findings. As long as he was "served... or notified" of Bianka's custody proceeding (he was), the Family Court's custody determination is conclusive as to "all decided issues of fact," which is all SIJS findings are. (Fam. Code, § 3406; see also Code Civ. Proc., § 155, subd. (a)(1) [describing SIJS findings as "factual findings necessary to enable a child to petition [USCIS] for classification as a special immigrant juvenile..."].)

B. Bianka's Request for SIJS Findings Did Not Impliedly Seek to Adjudicate Her Alleged Father's Hypothetical Custody Rights or His Paternity.

The Court of Appeal acknowledged that Bianka brought a ***maternity*** action (*Bianka M.*, *supra*, 245 Cal.App.4th at p. 429), which as discussed above renders the permissive joinder rule inapplicable to her alleged father. The court nevertheless reasoned that Bianka had "placed [his] paternity squarely at issue by requesting an order containing a [SIJS] finding that *her father* abandoned her." (*Id.* at p. 429, original emphasis.) From this, the court concluded that Bianka was "impliedly asking the [family] court to adjudicate [her alleged father's] custody rights." (*Id.* at p. 427.) That conclusion is unsound.

Bianka's alleged father's custody rights are hypothetical at best. California law distinguishes between "alleged," "biological," (or "natural")

and "presumed" fathers. (*Francisco G. v. Superior Court* (2001) 91 Cal.App.4th 586, 595.) "A man who may be the father of a child, but whose biological paternity has not been established, or, in the alternative, has not achieved presumed father status, is an 'alleged' father. [Citation.]" (*In re Zacharia D.* (1993) 6 Cal.4th 435, 449, fn. 15.) Furthermore, "a biological or natural father is one whose biological paternity has been established, but who has not achieved presumed father status," as defined in the Uniform Parentage Act ("UPA"). (*Ibid.*) To become a presumed father, a man must fall within the categories recognized under the UPA. (*Gabriel P. v. Suedi D.* (2006) 141 Cal.App.4th 850, 857.) Bianka's alleged father does not fall within any of those categories, in particular because he abandoned Bianka before birth and never since took her into his home or openly held her out as his natural child. (See Fam. Code, §§ 7610(a), 7611.)

A "*presumed* father is entitled to custody of the child." (*Gabriel P.*, *supra*, 141 Cal.App.4th at p. 857, quoting *In re Jesusa V.* (2004) 32 Cal.4th 588, 610, emphasis added.)[8] "Alleged fathers," like Bianka's, however, "have only limited rights to notice of proceedings bearing on the paternity of a child." (*Id.*, citing *Francisco G.*, *supra*, 91 Cal.App.4th at p. 595.) Bianka's *maternity* action is not such a proceeding. But for the Court of

[8] Bianka's mother, Gladys, also is a presumed parent entitled to custody. (See Statement of the Case § C; Fam. Code, § 3010, subd. (a).)

Appeal's insistence on gratuitously litigating the issue, Bianka's maternity action would have no bearing on her alleged father's paternity. And, in any event, Bianka's alleged father received notice of the proceeding.

Bianka's alleged father's paternity and his hypothetical parental rights do not permit the Family Court to refuse to make a custody determination the evidence shows is in a child's best interest. It is true, as the Court of Appeal noted, that "in the context of a custody proceeding, a court properly considers a wide range of factors bearing on a child's best interest[]." (*Bianka M.*, *supra*, 245 Cal.App.4th at p. 429, citing Fam. Code, § 3020, subd. (b).) Foremost among those factors, however, is the child's health, safety and welfare. (Fam. Code, § 3020, subd. (a).) Where it conflicts with this paramount concern, a parent's interest in "frequent and continuing contact" with a child must give way. (*Id.*, § 3020, subd. (b).)

Even if Bianka's alleged father had a legally protected interest in contact with Bianka (he does not), the uncontroverted evidence shows that this interest would conflict with Bianka's health, safety and welfare. The evidence shows Bianka's alleged father not only abandoned her before birth (1 AE 2-3, ¶ 4), but has never sought to establish a relationship with her and never provided for her welfare. (1 AE 9, ¶ 3; 2 AE 336:2-337:4, 2 AE 342:3-19.) In fact, he said he preferred that Bianka die than that he should have to provide milk money for her. (2 AE 336:14-16.) The evidence also shows that Bianka's alleged father poses a grave risk to Bianka's safety,

having regularly beaten her mother, including with a machete. (1 AE 2-3 ¶ 4.) The Family Court agreed, moreover, that "the overall level of violence" in Honduras, where Bianka's alleged father lives, "is untenable." (2 AE 311.) It also found that Bianka has no "available relatives to care for her" in Honduras. (*Ibid.*)

The Court of Appeal agreed that the Family Court "could have inferred ... [that Bianka's alleged father] does not claim any interest in Bianka's custody because he has not taken any action to establish his parentage or right to custody in the pending proceeding." (*Bianka M.*, *supra*, 245 Cal.App.4th at p. 429.) But it held the Family Court "was not required to do so."(*Ibid.*) In fact, the opposite is true. The Family Court need not have "inferred" anything about Bianka's alleged father's "right to custody." As just discussed, the fact that Bianka's alleged father has not taken any action to establish this right means the right does not exist.

The Family Court could not simply ignore Bianka's uncontradicted evidence in favor of its own conjecture about the custody arrangement that would best protect Bianka's health, safety and welfare. (*Leslie H.*, *supra*, 224 Cal.App.4th at p. 352 [rejecting trial court findings based on "anecdotal impressions, untethered to any evidence in this case."]; accord *Eddie E. II*, *supra*, [rejecting conclusion with "no support in either reason or evidence."].) To the contrary, the Family Court ***must*** consider Bianka's evidence. (Fam. Code, § 3011, subd. (a).) And her health, safety and

welfare "***shall*** be the court's primary concern in determining the best interests of children when making any orders regarding ... custody." (*Id.*, § 3020, subd. (a), emphasis added.) The Family Court agreed that Bianka had made "a sufficient factual showing" that an order awarding sole custody to her mother was in her best interests. (2 AE 362:9-15.) It should have made that order and the corresponding SIJS finding.

C. Due Process Did Not Require or Permit the Family Court to Refuse to Make SIJS Findings Without First Adjudicating Bianka's Alleged Father's Paternity.

Bianka M. also approved the Family Court's consideration of Bianka's alleged father's due process rights as a basis for refusing to make SIJS findings without first adjudicating his paternity. (*Bianka M.*, *supra*, 245 Cal.App.4th at p. 432.) The Court of Appeal concluded that due process required Bianka to join alleged father as a party to enable him "to make a special appearance in the action" and thereby have "a meaningful opportunity to be heard." (*Id.* at p. 432, citing Fam. Code, § 3409, subd. (a).) That conclusion is baseless.

If Bianka's alleged father wanted to make a special appearance in the proceeding – and there is no evidence that he did – he could have sought to intervene. (See Code Civ. Proc., § 387; see also *In re Paul W.* (2007) 151 Cal.App.4th 37, 57 [mother lacked standing to appeal outcome of *habeas* proceeding where she "made no attempt to intervene" in the proceeding or otherwise become a party].) There is no reason – and the

Court of Appeal did not give one – why the burden should fall on *Bianka* to ensure that her alleged father participates in a proceeding in which he has shown no interest and to which his presence is unnecessary (but for the court's insistence that she litigate his paternity). The burden of asserting parental rights must fall squarely on the alleged father – not the child. (*In re Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1131 [father's parental rights protected from termination absent showing of unfitness "if (*but only if*) ... [he] demonstrated the necessary commitment to his parental responsibilities."], original emphasis.)

Because Bianka's alleged father has never taken "any action to establish his parentage or right to custody," his due process rights are limited to notice and an opportunity to be heard (*Gabriel P.*, *supra*, 141 Cal.App.4th at p. 857, citation omitted), which he received. (See, e.g., 1 AE 125-127 [personal service]; 1 AE 119-120 [service by mail].) His refusal to take that opportunity should not deprive Bianka of relief. (See *In re Marriage of Nurie* (2009) 176 Cal.App.4th 478, 494 [no denial of due process where out-of-state parent "had an opportunity to be heard and simply failed to avail herself of it."]; *cf. In re Dakota S.* (2000) 85 Cal.App.4th 494, 502 [a party cannot "deliberately stand by in silence and thereby permit the proceedings to reach a conclusion in which the party could acquiesce if favorable and avoid if unfavorable."].)

D. Bianka's Request for SIJS Findings Was Not Tantamount to Termination of Her Alleged Father's Hypothetical Parental Rights.

The Court of Appeal also justified its insistence that Bianka join her alleged father and adjudicate his paternity on the ground that the [RFO] she sought would effectively terminate his parental rights. (*Bianka M.*, *supra*, 245 Cal.App.4th at p. 430.) Yet, the court acknowledged that "Bianka's [maternity] petition does not expressly seek to terminate [her alleged father's] parental rights." (*Ibid.*) It also conceded that "[o]rdinarily, a sole custody order does not deprive the noncustodial parent of all parental rights." (*Ibid.*, citation omitted.) And it agreed that "Bianka's [maternity] petition takes no position on visitation." (*Ibid.*) Nevertheless, the Court of Appeal reasoned that "as a practical matter [Bianka] would have to oppose any visitation rights for [her alleged father], as visitation is incompatible with the requested SIJ[S] finding that reunification is not viable." (*Ibid.*)

As an initial matter, section 155 does not give courts discretion to withhold SIJS findings for any reason once a child requests them and supports the findings with evidence. (Code Civ. Proc., § 155 subd. (b)(1); see also see also *B.F. v. Superior Court*, *supra*, 207 Cal.App.4th at p. 630 [family court "has the authority and duty to make [SIJS] findings" if the evidence supports them].) Bianka's request for a SIJS finding that "*her father* abandoned her" – as the Court of Appeal paraphrased it – does not create an exception to this rule.

On its face, section 155 says nothing about the legal classification of the parent(s) with whom "reunification of the child ... was determined not to be viable." (Code Civ. Proc., § 155, subd. (b)(1)(B).) It does not state that only a man adjudged to be a child's *biological* or *presumed* father is capable of abandonment, abuse or neglect within the meaning of SIJS law.

Nothing in section 155 (or the federal SIJ statute), moreover, requires Bianka to oppose her alleged father's hypothetical right to visitation. First, this scenario is academic; the Court of Appeal conceded that Bianka has not taken any position on visitation. (*Bianka M.*, *supra*, 245 Cal.App.4th at p. 430.)

Second, Bianka's alleged father has no parental rights, such as visitation, because he has not accepted his parental responsibilities. (See section B, *supra.*) "Parental rights do not spring full-blown from the biological connection between parent and child." (*Lehr v. Robertson* (1983) 463 U.S. 248, 260, quoting *Smith v. Organization of Foster Families* (1977) 431 U.S. 816, 862-863 [opinion of Stewart, J., concurring in judgment].) "They require relationships more enduring." (*Ibid.*) Only by demonstrating a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child," does an alleged father's "interest in personal contact with his child acquire[] substantial protection under the due process clause." (*Id.* at p. 261, quoting *Caban v. Mohammed* (1979) 441 U.S. 380, 414.) But "the mere existence of a

biological link" – much less an alleged link – "does not merit equivalent constitutional protection." (*Ibid.*; accord *In re Guardianship of Ann S.*, *supra*, 45 Cal.4th at pp. 1130-1131, citing *Lehr*, *supra*, 463 U.S. at p. 262.)

Third, a SIJS finding is not an order stripping rights from Bianka's alleged father; it is a determination of fact identifying Bianka as eligible for SIJS. (See, e.g., *Leslie H.*, *supra*, 224 Cal.App.4th at p. 351.) No sanction against a parent, nor any obligation, flows from a SIJS finding; what matters for SIJS purposes is the fact that Bianka *was abandoned.* If the man Bianka alleges is her father is not, in fact, her father, he is not entitled to reunification anyway. (See *In re Zacharia D.*, *supra*, 6 Cal.4th at p. 439 ("[O]nly a presumed father is a 'parent' entitled to reunification services with and/or custody of his child..."].) Thus, a finding that reunification with him is non-viable cannot strip him of rights he never had.

Fourth, this SIJS finding is expressly retrospective: it requires the Family Court to "indicate the date on which reunification *was determined* not to be viable." (Code Civ. Proc., § 155(b)(1)(B), emphasis added.) Bianka's alleged father could always seek to modify a custody order in the future if circumstances made reunification viable again. (Fam. Code, §§ 3422, subd. (a) [court "has exclusive, continuing jurisdiction over the determination" of custody under the UCCJEA].) Assuming *arguendo* that visitation with her alleged father would jeopardize Bianka's eligibility for SIJS, her decision to oppose such visitation is not a *fait accompli.* The fact

that the decision to agree to visitation might carry with it difficult legal consequences does not mean Bianka is obligated to avoid it.

In short, there is no legal justification for the Court of Appeal's insistence on adjudicating Bianka's alleged father's paternity as a pre-condition to making SIJS findings Bianka requested and supported with evidence, or a custody order Bianka demonstrated was in her best interests.

Conclusion

For all of the foregoing reasons, Bianka respectfully requests that this Court reverse the Court of Appeal's decision in *Bianka M.* and remand with directions to order the Family Court to make the SIJS findings and custody order Bianka requested.

Dated: July 21, 2016

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

(CAL. RULES OF COURT, RULE 8.204(C)(1))

I hereby certify that pursuant to California Rules of Court, Rule 8.204(c)(1), the attached brief contains 10,612 words, as counted by the Word 2010 word-processing program used to generate the brief.

Dated: July 21, 2016

By: _____
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PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 1800 Avenue of the Stars, Suite 900, Los Angeles, California 90067-4276.

On July 22, 2016, I served the foregoing document described as Opening Brief on the Merits on each interested party, as stated on the attached service list.

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