Frequently Asked Questions in 1-Parent Special Immigrant Juvenile Status Cases in California Family Courts*

April 13, 2016

Special Immigrant Juvenile Status is a unique, hybrid form of immigration relief that depends on state court determinations about child custody and care to establish a child's eligibility to apply for a special immigrant juvenile visa with U.S. Citizenship & Immigration Services. This advisory provides guidance on basic procedural and substantive issues that commonly arise in family court custody cases when SIJS findings are being requested. State court practice varies widely among both counties and judges, even within California. A detailed, step-by-step guide is outside of the scope of this advisory. Advocates are encouraged to co-counsel or consult with local family law practitioners and review the court's local rules before filing a request for SIJS findings in a jurisdiction where they have not previously filed such a request.

What is Special Immigrant Juvenile Status?

Special Immigrant Juvenile Status (SIJS) is an avenue for undocumented children to obtain legal status when they cannot be reunified with one or both parents due to abuse, neglect, abandonment, or a similar basis under state law, and it is not in their best interest to return to their home country. (8 U.S.C. § 1101(a)(27)(J).) Youth who are successful in obtaining a special immigrant juvenile visa become immediately eligible to apply for a green card. However, before a youth may apply for the special visa, the process for SIJS begins in state court. To be eligible to apply to U.S. Citizenship & Immigration Services (USCIS) for SIJS classification, a child or youth must first obtain three findings from a state court:

1. The child has been declared dependent on a juvenile court or legally committed to or placed under the custody of a state agency or department or an individual or entity appointed by a state or juvenile court;
2. Reunification with one or both of the child's parents is not viable due to abuse, neglect, abandonment, or a similar basis under state law; and
3. It is not in the child's best interest to be returned to his or her country of nationality or last habitual residence.

When children are residing with one parent and are not otherwise court-involved (e.g., through dependency or delinquency proceedings), but have been abandoned, abused, or neglected by their non-custodial parent, they may be able to seek SIJS findings in conjunction with a request for an order of sole custody in family court. This advisory focuses on common issues that arise in California family courts in these circumstances.

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1. General Questions

a. What are the different types of family law proceedings in which a custody order may be made and SIJS findings may be requested?

Special Immigrant Juvenile Status ("SIJS") findings can potentially be made in any California family court proceeding in which the court has jurisdiction to make a custody order or has made a custody order.[1] For purposes of SIJS, a child placed in the sole custody of one parent is considered to be "placed under the custody of . . . an individual . . . appointed by [the] court."[2] California family courts typically have authority to make custody orders in the following proceedings:

- *Dissolution of Marriage or Legal Separation*: If the child's parents are legally married or are registered domestic partners, the court generally has jurisdiction to make custody orders as part of an action for dissolution or legal separation.[3]

- *Petition for Custody and Support of Minor Children*: California law[4] also allows a parent to file for custody and support without filing for divorce/legal separation if the child's parentage has already been established (generally by marriage, by both parents signing a "voluntary declaration of paternity," by adoption, or by a prior government child support or juvenile court case). Generally, a Petition for Custody/Support is a simpler procedure than dissolution in that the petitioner does not have to meet the residence/jurisdictional requirements for divorce.

- *Parentage (Petition to Establish Parental Relationship)*: If parentage has not been established by marriage/domestic partnership, voluntary declaration of paternity, adoption, or a prior court case, and the parents are not filing a domestic violence restraining order action, parents generally must file a Petition to Establish Parental Relationship to obtain custody orders. Parentage cases may be used both to establish the child's legal parents and to ask for child custody and support.[5]

- *Domestic Violence Restraining Order*s: The California Domestic Violence Prevention Act (DVPA)[6] permits courts to make custody orders in conjunction with a restraining order, if the petitioner is the child's parent under California law. Although most DVPA restraining orders are in effect for limited periods and have expiration dates, the custody orders included in these orders continue in effect

[1] SIJS orders may also be obtained as part of a probate guardianship (in which a nonparent obtains custody), or in dependency or delinquency juvenile court actions, as well as adoptions. This advisory only covers family court orders, in which the child is in the custody of one parent and seeks SIJS findings in family court.

[2] 8 U.S.C. § 1101(a)(27)(J)(i). Note that some judges have questioned whether awarding one parent sole custody meets the requirement of having placed the child under the custody of an individual "appointed" by the court, doubting that the court is appointing anyone by making custody orders. While no California case law addresses this specific issue, there are strong arguments that awarding sole custody fits within the SIJS statute. *See, e.g.* Cal. Code Civ. Proc. § 155 (making clear that California family courts have jurisdiction to hear SIJS petitions and make SIJS findings); Curtis L. Child, Chief Operating Officer, Judicial Council of Cal., *Memorandum to the Presiding Judges of the Superior Courts and the Court Executive Officers of the Superior Courts on Senate Bill 873 and the Special Immigrant Juvenile Process in the Superior Courts* (Sept. 30, 2014), p. 14 (stating "a child whose parent was awarded sole custody based on another parent's conduct, or a ward whose guardianship was established based on parental conduct each could, assuming no other impediments, be eligible for this finding.")

[3] *See* Cal. Fam. Code § 3021(a), (c).

[4] Cal. Fam. Code §§ 3021(d), 3120.

[5] *See* Cal. Fam. Code §§ 3021(f), 7630, 7635, 7637.

[6] Cal. Fam. Code § 6200 et seq.

even after the "restraining orders" (which typically order the restrained parent to stay away from and not contact the protected party) have expired.[7]

b. Under what circumstances would someone pursue each type of proceeding?

A parent may want to request legal and physical custody of a child if he or she wants sole power to make major decisions about the child's health, education, and welfare, and the right to have the child reside with him or her full-time. The type of proceeding in which a custody order may be issued will depend upon several factors. If the parents are married, but would like to get a divorce or legal separation, a Dissolution of Marriage or Legal Separation proceeding may be appropriate. Note, however, that divorce cases are much more legally complicated than custody, parentage, or domestic violence proceedings and should only be filed by experienced family law attorneys.

If the parents are married and are not interested in seeking a divorce, or if due to timing or financial reasons they are not able to seek a divorce at the time, but would like custody orders delineating which parent has the power to make decisions for the child(ren) and with which parent the child(ren) will reside, a Petition for Custody and Support of Minor Children may be appropriate.

If the parents were not legally married (and no Voluntary Declaration of Paternity has been signed by the parents), then a Parentage Petition would be the appropriate type of proceeding in which to request custody orders. Note that in a Parentage Petition, a minor may serve as a Petitioner and ask the court for orders establishing parentage as to one or both of their parents per Family Code Sections 7630 and 7650. Further, keep in mind that when the minor is age 12 or older, he or she must be made a party to the action pursuant Family Code Section 7635(a).

A domestic violence restraining order case would only be appropriate if one parent was asking for a restraining order against the other parent, and also wished to request custody of the child(ren).

Note that in making any custody determinations, the family court is guided by the "best interest of the child" standard.[8]

c. What are the different forms required for parentage and custody petitions?[9]

Parentage[10]

The following forms and documents are to be filed together initially, *along with any local forms*:

1. FW-001 [Request for Fee Waiver], if seeking fee waiver;
2. FW-003 [Order on Request for Fee Waiver], if necessary;
3. FL-200 [Petition to Establish Parental Relationship];
4. FL-210 [Summons (Uniform Parentage—Petition for Custody and Support)];
5. FL-105 [Declaration under UCCJEA];
6. FL-300 [Request for Order];[11]

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[7] *See* Cal. Fam. Code, §§ 3021(e), 6323, 6340, 6345(b).
[8] Cal. Fam. Code § 3020(a).
[9] Guidance on filing divorce and domestic violence cases is outside of the scope of this advisory. Please contact an experienced family law attorney for guidance if you are pursuing either of these types of proceedings.
[10] For guidance on completing each form, see the California Court's Judicial Branch, Self-Help, *Steps for Filing a Parentage Case*, *available at* http://www.courts.ca.gov/11298.htm (last visited Jan. 14, 2016). It is also advisable to check the local court's website for information about local forms.
[11] The FL-300 Request for Order can be filed either concurrently with the Petition, or separately. In most cases, individuals seeking custody find that it is more efficient to file these forms together so that service can be performed once. If the FL-300 and FL-200

    a. *Note*: Request SIJS findings as "Other Relief" (#8) on the FL-300 and state "Special Immigrant Juvenile Status Findings pursuant to California Code of Civil Procedure section 155. This request is attached hereto as form FL-356."
7. FL-311 [Child Custody and Visitation Application Attachment];
    a. *Note*: You may prepare the Form FL-311, but in most cases it will not be necessary since you will not be requesting visitation for the non-custodial parent. If used, this form should be attached to the FL-300.
8. FL-356 [Request for Special Immigrant Juvenile Findings – Family Law];
    a. *Note*: Currently, the FL-356 should be attached to the FL-300, or the FL-200 & 300. However, to simplify the filing process and to enable the courts to keep confidential the forms directly related to the request for SIJS findings, the Judicial Council has revised form FL-356. Effective July 1, 2016, this form must be filed separately from any other requests for orders in a family law proceeding. It may still be filed at the same time as the petition in the underlying action or the request for an order of sole custody.[12]
9. FL-935 [Application for Guardian ad Litem], if minor is the petitioner, or if otherwise required by the court;[13]
10. Declarations in support of SIJS findings (from minor, parent, others);
11. Memorandum of Points and Authorities in Support of Request for Order Regarding Eligibility for SIJS, if you wish to state additional arguments beyond those included in the FL-356;
12. FL-357/GC-224/JV-357 [Special Immigrant Juvenile Findings], with proposed findings;[14]
13. Copy of birth certificate with translation (may be optional).[15]

The following forms and documents are to be filed with the court after documents are served:

1. FL-115 [Proof of Service of Summons], documenting service on Respondent;
2. FL-330 [Proof of Personal Service], documenting service on other parent *if* minor is the petitioner (unless service on other parent performed by other method – see discussion on service and notice below);
3. FL-335 [Proof of Service by Mail], *if* subsequent notices are served.

If the other parent does not file a response and there is no written agreement between the parties, the following forms may be filed to finish the parentage case in default:

1. FL-165 [Request to Enter Default (Family Law)];
2. FL-230 [Declaration for Default or Uncontested Judgment];
3. FL-250 [Judgment (Uniform Parentage – Custody and Support)];
4. FL-190 [Notice of Entry of Judgment (Family Law – Uniform Parentage – Custody and Support].

Custody

The following forms and documents are to be filed together initially, *along with any local forms*:

1. FW-001 [Request for Fee Waiver], if necessary;

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are filed separately, service must be provided twice: (1) of the Summons and initial filing, and (2) of the RFO and hearing date. Note as well that the filing of the FL-200 Petition to Establish Parental Relationship alone does not trigger a hearing. In order for a hearing to be scheduled, the Petitioner must file the FL-300.

[12] For more information, see Cal. R. Ct., rule 5.130 and forms FL-357 and FL-358 (effective July 1, 2016).

[13] Note that the *Bianka M.* decision stated without analysis that the court must appoint a GAL for a child who is a party to a UPA action. *Bianka M. v. Superior Court* (2016) 245 Cal. App. 4th 406, 418.

[14] The proposed order may also be brought to court at the time of the hearing, depending on local rules.

[15] For additional information, see Cal. Fam. Code § 3140 (providing that when either or both parents have not appeared in the proceeding, the appearing party may have to submit a certified copy of the child's birth certificate as a prerequisite to issuance of a custody order, but that notwithstanding a parent's nonappearance, the birth certificate is not required when the custody dispute arises in a marriage dissolution or paternity proceeding provided there is proof of personal service of the petition on the absent parent).

2. FW-003 [Order on Request for Fee Waiver];
3. FL-260 [Petition for Custody and Support of Minor Children];
4. FL-210 [Summons (Uniform Parentage—Petition for Custody and Support)];
5. FL-105 [Declaration under UCCJEA];
6. FL-300 [Request for Order];
    a. *Note*: Request SIJS findings as "Other Relief" (#8) on the FL-300 and state "Special Immigrant Juvenile Status Findings pursuant to California Code of Civil Procedure section 155. This request is attached hereto as form FL-356."
7. FL-311 [Child Custody and Visitation Application Attachment];
    a. *Note*: You may prepare the Form FL-311, but in most cases it will not be necessary since you will not be requesting visitation for the non-custodial parent. If used, this form should be attached to the FL-300.
8. FL-356 [Request for Special Immigrant Juvenile Findings – Family Law];
    a. *Note*: Currently, the FL-356 should be attached to the FL-300, or the FL-210 & 300. However, to simplify the filing process and to enable the courts to keep confidential the forms directly related to the request for SIJ findings, the Judicial Council has revised form FL-356. Effective July 1, 2016, this form must be filed separately from any other requests for orders in a family law proceeding. It may still be filed at the same time as the petition in the underlying action or the request for an order of sole custody.[16]
9. Declarations in support of SIJS findings (from minor, parent, others);
10. Memorandum of Points and Authorities in Support of Request for Order Regarding Eligibility for SIJS, if you wish to state additional arguments beyond those included in the FL-356;
11. FL-357/GC-224/JV-357 [Special Immigrant Juvenile Findings], with proposed findings;[17]
12. Copy of birth certificate with translation (may be optional).[18]

The following forms and documents are to be filed with the court after documents are served:

1. FL-115 [Proof of Service of Summons], documenting service on Respondent;
2. FL-335 [Proof of Service by Mail], *if* subsequent notices are served.

If the other parent does not file a response and there is no written agreement between the parties, the following forms may be filed to finish your custody case in default:

1. FL-165 [Request to Enter Default (Family Law)];
2. FL-230 [Declaration for Default or Uncontested Judgment];
3. FL-250 [Judgment (Uniform Parentage – Custody and Support];
4. FL-190 [Notice of Entry of Judgment (Family Law – Uniform Parentage – Custody and Support].

2. Jurisdictional Questions

a. What laws confer jurisdiction on the superior court to make child custody determinations?

Section 200 of the Family Code confers jurisdiction over all proceedings brought under that code on the superior court. As discussed above, proceedings under the Family Code in which custody and visitation of a child may be sought include a proceeding for dissolution or nullity of marriage or for

[16] For more information, see Cal. R. Ct., rule 5.130 and forms FL-357 and FL-358 (effective July 1, 2016).
[17] Note that the proposed order may also be brought to court at the time of the hearing, depending on local rules.
[18] See *supra* note 15.

legal separation, an action for exclusive custody, a proceeding under the DVPA, and an action under the Uniform Parentage Act (UPA).[19]

To exercise the jurisdiction conferred by the Family Code to make child custody determinations, the superior court must also have subject matter jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).[20] The UCCJEA was designed to prevent conflicting state court custody orders from different states or countries, and to help ensure that decisions made in one jurisdiction are respected and enforced in other jurisdictions. Jurisdiction under the UCCJEA turns primarily on whether California is the child's "home state." The UCCJEA defines "home state" as the state in which the child lived with a parent or person acting as a parent for at least six consecutive months, including any period of temporary absence, immediately before the filing of the action.[21] A superior court has jurisdiction to make a child custody determination if California is the child's home state on the date the proceeding begins or, if the child is absent from the state but a parent or person acting as a parent still lives here, it was the child's home state within six months before the beginning of the proceeding.[22]

b. Under what circumstances may a court make a custody determination for a child who has recently arrived in California?

If a California court does not have home-state jurisdiction, it may still have jurisdiction to make a custody determination if: 1) no other state qualifies as the child's home state or a court of the child's home state has declined jurisdiction because California is a more appropriate forum;[23] 2) all other courts with jurisdiction have declined to exercise it because California is a more appropriate forum;[24] or 3) no court of any other state would have home state jurisdiction, or jurisdiction under the prior two sets of criteria.[25] In order for the child's home state to decline jurisdiction, this would require the California court to contact the foreign court to inquire whether it declines jurisdiction over the child custody matter despite being the child's home state.[26]

In addition, a California court that lacks jurisdiction to make a final custody determination may nonetheless take temporary emergency jurisdiction over a child as provided in section 3424 of the Family Code. That section authorizes a California court to exercise jurisdiction if the child is present in the state and the child has been abandoned or it is necessary to protect the child because the child, a sibling, or a parent is subjected to or threatened with mistreatment or abuse.[27] This type of "emergency" exists when there is an immediate risk of danger to the child if he or she is returned to

[19] An action to free a child from parental custody and control filed under section 7820 et seq. may also qualify in the context of an adoption proceeding, although it is determined under different standards.
[20] Cal. Fam. Code § 3400 et seq. Although the UCCJEA defines the term "state" as a state or territory of the United States (Fam. Code § 3402(o)), it also requires the superior court to treat a foreign country as if it were a state of the United States for purposes of jurisdiction unless that country's custody law violates fundamental principles of human rights (Fam. Code § 3405). Of course, neither the statute nor the court has the power to impose a reciprocal obligation on the foreign country.
[21] Cal. Fam. Code § 3402(g).
[22] Cal. Fam. Code § 3421(a)(1). In every child custody proceeding, each party must submit to the court a completed copy of *Declaration Under Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)* (form FL-105/GC-120) to provide information sufficient for the court to determine that it has subject matter jurisdiction to adjudicate the request for a custody determination.
[23] Cal. Fam. Code § 3421(a)(2).
[24] Cal. Fam. Code § 3421(a)(3).
[25] Cal. Fam. Code § 3421(a)(4).
[26] *See, e.g., In re Gino C.* (2014) 224 Cal. App. 4th 959 (finding that the juvenile court did not comply with the UCCJEA before assuming permanent subject matter jurisdiction because the court failed to contact Mexico to determine if it declined to exercise its home state jurisdiction).
[27] Cal. Fam. Code § 3424(a). *See, e.g., In re A.M.* (2014) 224 Cal. App. 4th 593 (holding that the juvenile court had properly assumed temporary emergency jurisdiction over children whose home state was Mexico because they were at substantial risk of danger in that they were found in a car with their mother while she was attempting to smuggle a controlled substance into the United States).

a parent.[28] The effective duration of orders made under emergency jurisdiction will vary depending on whether a previous custody determination exists, as well as the further actions of the parties and any court having jurisdiction under sections 3421–3423.[29]

c. How does a prior custody determination in another jurisdiction (including another country) affect the California court's jurisdiction?

Unless it has temporary emergency jurisdiction, a California court may only modify a custody determination by a court of another state or country if the court of the other state or country determines that it no longer has exclusive, continuing jurisdiction;[30] a California court would be a more appropriate forum; or a California court or a court of the other state determines that the child and the child's parents do not reside in the other state. In order for a court in another country to determine that it no longer has exclusive, continuing jurisdiction, or that a California court would be a more appropriate forum, the California court would need to contact the foreign court to inquire about its position on these issues.[31]

d. In what situations may a California court take jurisdiction of the minor(s) for purposes of custody despite a prior custody determination in another jurisdiction?

A California court may take jurisdiction to make a custody determination under the circumstances described in question (c) above, or in an emergency described in section 3424(a) and (c) of the Family Code.

e. If a child is close to turning 18, may the court make a custody order despite the minor having lived in California for less than 6 months?

It will depend on the factual circumstances. A California court may make a custody determination for a child approaching his or her 18th birthday who has not yet lived in California for 6 months if any of the jurisdictional requirements discussed in question (b) above is satisfied, including the requirements for temporary emergency jurisdiction.

f. What are the grounds for seeking an ex parte custody request (temporary emergency orders) under state law?

The child must be (1) present in California, and (2) abandoned, abused, or at risk of abuse. See discussion in question (b) above for additional information.

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[28] *In re Nada R.* (2011) 89 Cal. App. 4th 1166, 1174.
[29] Cal. Fam. Code § 3424(b)–(d).
[30] *See* Cal. Fam. Code § 3422.
[31] In a recent decision, the Court of Appeals held that a California court satisfied this requirement in a case where the court tried to contact a Japanese court and received a letter from the Supreme Court of Japan explaining that the Japanese trial court did not have authority to discuss custody matters with the California court. The court stated that "when a home state declines jurisdiction in any manner that conveys its intent *not* to exercise jurisdiction over a child in connection with a child custody proceeding, including inaction *or*, as in the instant case, by refusing to even discuss the issue of jurisdiction despite myriad good faith attempts to do so by the juvenile court, that such inaction or refusal is tantamount to a declination of jurisdiction by the home state on the grounds California is the more appropriate forum under subdivision (a)(2) of section 3421." *In re M.M.* (2015) 240 Cal. App. 4th 703, 717.

g. When is personal jurisdiction over an out-of-state parent required in a family law proceeding?

Under *Shaffer v. Heitner*, 433 U.S. 186 (1977), as interpreted by the California Court of Appeal in *In re Marriage of Leonard* (1981) 122 Cal. App. 3rd 443, a California court must have personal jurisdiction to impose child support obligations on a parent, but not necessarily to make a child custody determination. Based on the principles of mutuality and comity in the UCCJA (the predecessor to the UCCJEA), the *Leonard* Court held that, when the trial court has proper jurisdiction under the UCCJA and the out-of-state parent is given notice and an opportunity to be heard as provided in the predecessor to sections 3408 and 3430 of the Family Code, the Due Process Clause of the Fourteenth Amendment does not require the court to have personal jurisdiction over that parent to make a binding custody determination.[32] The court also held that personal jurisdiction was not required for the custody determination to be entitled to recognition by other states under the UCCJA and the Full Faith and Credit Clause of the U.S. Constitution.[33]

However, personal jurisdiction is required in order for the court to adjudicate the parentage of the out-of-state parent, which may or may not be required by the court prior to making a custody order.[34] See Section 5(h) below for additional information.

This may prove problematic for many SIJS eligible children as their abusive, neglectful, or absent parent will likely be residing abroad and will have no minimum contacts with the state of California. In such a situation, jurisdiction cannot be obtained by service or joinder alone,[35] though an out-of-state parent may file a general appearance and stipulate to parentage to establish personal jurisdiction.[36] As the court in *Bianka M.* noted, without personal jurisdiction over the out-of-state parent, any order regarding that parent's parentage would be void.[37]

As discussed in greater detail below, practitioners should be mindful about conceding that parentage of the non-custodial parent must be established before the court can make custody determinations for the custodial parent and SIJS findings for the child. If a determination of parentage is requested or required, personal jurisdiction must be established, which places SIJS eligible children in the difficult position of soliciting cooperation from the absent, neglectful or abusive parent. Advocates should note that filing a general appearance and/or stipulation may trigger court fees and should be careful when navigating the ethical issues this course of action raises.

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[32] *Leonard,* 122 Cal. App. 3rd at 459.

[33] Because *Leonard* involved parties in two states that had enacted the UCCJA, the extension of its holding to parents residing in foreign countries requires further analysis. As noted above, the *Leonard* Court recognized that the UCCJA established a mutual agreement among the states that had enacted it. Although the UCCJEA directs courts to treat a foreign country as if it were a state of the United States for the purpose of applying the Act's jurisdictional requirements, the UCCJEA is not binding on a foreign country. The mutual agreement noted by the *Leonard* court is absent. Neither does the Full Faith and Credit Clause apply. Furthermore, relations between California and foreign countries are subject to the requirements in various treaties. For purposes of custody determinations, relevant treaties include the Hague Convention on the Civil Aspects of International Child Abduction (see Fam. Code Sections 3441–3442), the Hague Service Convention, and the Vienna Convention on Consular Relations. Practitioners should be prepared to discuss the impact of these treaties on jurisdiction when seeking a custody determination involving a parent who lives in a country that is party to them.

[34] *Cty. of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215, 1227.

[35] *Howard v. Data Storage Associates, Inc.* (1981) 125 Cal.App.3d 689, 696 ("Personal jurisdiction 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.").

[36] *Id.*

[37] *Bianka M.*, 245 Cal. App. 4th at 431.

3. Service of Process/Notice Questions[38]

a. Who must be served in a parentage action when one parent is the petitioner?

When one parent is the Petitioner in a parentage action, the other parent will be the Respondent. In that event, the Respondent non-custodial parent must be served with the summons, parentage filings, and RFO filings, as well as a blank FL-220 [Response to Petition to Establish Parental Relationship] and a blank FL-105 [Declaration Under UCCJEA].[39]

Once service has been completed, the FL-115 [Proof of Service of Summons] should be filed with the court to demonstrate personal service of the summons. Alternatively, the FL-117 [Notice and Acknowledgment of Receipt] may be filed to demonstrate that this manner of service has been completed.

b. Who must be served in a parentage action when a child is the petitioner?

When a child is the Petitioner in a parentage action, either parent may be the Respondent. When the custodial parent is the Respondent, some courts also require that the non-custodial parent be joined as a party. See discussion in 5(c) below. If the custodial parent is the Respondent, he or she must be served with process. If the non-custodial parent is joined as a party, he or she must be served with process as well. Even if the non-custodial parent is not a party, he or she still must be provided notice of the proceedings and an opportunity to be heard, in order to protect his or her due process rights as a parent per Family Code Section 3425. Service of process or the provision of notice includes service of the summons, parentage filings, and RFO filings, as well as a blank FL-220 [Response to Petition to Establish Parental Relationship] and a blank FL-105 [Declaration Under UCCJEA].[40] Note that the fee waiver documents do not have to be served.

In order to demonstrate compliance with service and/or notice requirements, appropriate proof of service must be filed with the court. The type of proof filed with the court will depend upon the manner of service. See additional information in 3(d) below.

c. Who must be served in a parentage action when the non-custodial parent is deceased?

When the non-custodial parent is deceased, and the custodial parent is the Petitioner, the estate of the deceased parent should be the Respondent. In that case, the summons and petition must be served on the person(s) who have physical custody of the child, i.e. the person(s) the child lives with, and the child's siblings, half-siblings, and maternal and paternal grandparents, if known.[41] This is to ensure that anyone who may be interested in the child has an opportunity to participate in the case.

If the child is the Petitioner, such that the custodial parent is the Respondent, but the non-custodial parent is deceased, it is recommended that the Respondent parent as well as the individuals listed above also be provided with notice.

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[38] For general information on service and ways of providing service, see California Courts Judicial Branch, Self-Help, *Service of Process*, *available at* http://www.courts.ca.gov/selfhelp-serving.htm (last visited Jan. 29, 2016).
[39] If pursuing a Petition for Custody and Support of Minor Children, serve with a blank FL-270 [Response to Petition for Custody and Support of Minor Children], rather than the FL-220.
[40] If pursuing a Petition for Custody and Support of Minor Children, serve with a blank FL-270 [Response to Petition for Custody and Support of Minor Children], rather than the FL-220.
[41] Cal. Fam. Code § 7630(g); *see also* California Courts Judicial Branch, Self-Help, *Notice When a Parent is Deceased*, *available at* http://www.courts.ca.gov/20212.htm (last visited Jan. 28, 2016).

d. How may service of the summons and petition[42] be completed?

The rules for manner of service of the summons and petition in a family law case are outlined in California Rules of Court 5.68.

In general in California, personal service of the summons and petition is required. *See* Cal. Code Civ. Proc. § 415.10. Personal service means that the summons and petition must be served by hand-delivery to the person being served. *Id.* There are essentially two alternatives to personal service that may be an option in certain cases: substituted service and service by mail with a Notice and Acknowledgment of Receipt.

Substituted service may be permissible as an alternative to personal service when the person cannot be served at his or her home or workplace despite attempts to serve the person there (usually on three different days, at three different times of day). Substituted service is performed by leaving the documents at the person's home, business, or mailing address, with a competent member of the household or person who appears to be in charge of the office who is over 18, and then also mailing a copy of the papers to the address where the papers were left. *See* Cal. Code Civ. Proc. § 415.20 for more information.

The summons and petition may also be served by mail with a Notice and Acknowledgment of Receipt. This is accomplished by mailing a copy of the summons and petition to the Respondent together with two copies of the FL-117 [Notice and Acknowledgment of Receipt], along with a self-addressed, stamped envelope. Service is complete when the Respondent signs and returns the Notice and Acknowledgment. If the Respondent does not sign and return the form, then service is not complete. *See* Cal. Code Civ. Proc. § 415.30 for more information.

If none of the above options are possible, service by Posting or Publication may be acceptable if the Respondent cannot with reasonable diligence be served by any other method. *See* Cal. R. Ct. 5.72; Cal. Code Civ. Proc. §§ 415.50, 413.30. It should be noted that service by either Posting or Publication is not an alternative means of service that is available as an option in every case, but rather a method of last resort in cases where the whereabouts of the person to be served are truly unknown. The Petitioner must obtain a court order authorizing either type of service prior to pursuing it. This is done by filing an application (*see* FL-980 [Application for Order for Publication or Posting]) with the court showing that the Petitioner has used due diligence in trying to serve the Respondent using other methods. *See* Cal. Code Civ. Proc. § 415.50. Note that service via posting is only available to petitioners who have obtained a fee waiver. *See* Cal. R. Ct. 5.72(b).

The Code of Civil Procedure provides that **a summons may be served outside the state** in any manner provided by Section 415 (as discussed above), or by sending a copy of the summons and the petition to the person by first-class mail, postage prepaid, requiring a return receipt. *See* Cal. Code Civ. Proc. § 415.40.

For service outside of the United States, Section 413.10(c) of the Code of Civil Procedure states that service of summons should be completed: 1) as provided by the portion of the Code of Civil Procedure regarding service of summons (discussed above), *or* 2) as directed by the court where the action is pending, *or* 3) as prescribed by the law of the place where the person is served or as directed by the foreign authority in response to a letter rogatory. For service pursuant to a method

[42] There are distinct rules for the service of other motions and papers. *See* Cal. Code Civ. Proc. §§ 1010, 1011, 1012, 1013, 1015, 1016.

prescribed by the foreign country, the court here must find – before or after service – that the method is reasonably calculated to give actual notice, in order to ensure that due process requirements are met when such methods are employed; if the court finds that the methods are constitutionally defective, it may impose whatever additional requirements would make the service acceptable. **Service of summons outside of the United States is also subject to the Hague Service Convention.** *See* Cal. Code Civ. Proc. § 413.10(c). California Rule of Court 5.68(a)(5) further provides that service must be done in compliance with services rules of the Hague Service Convention or the Inter-American Convention on Letters Rogatory and the Additional Protocol to the Inter-American Convention on Letters Rogatory. See below for additional information about when the Hague Service Convention and Inter-American Convention apply.

e. Who can provide personal service?

Any person who is 18 years of age or older and not a party to the proceeding can serve the summons and petition. *See* Cal. Code Civ. Proc. § 414.10.

f. What international treaties govern the provision of service?[43]

As referenced in California Rules of Court 5.68, the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters,[44] and the Inter-American Convention on Letters Rogatory both provide processes for serving documents abroad.

g. When must service comply with international treaties governing service?

When any individuals who must be served under California law reside in a foreign country, service must comply with international standards for service of process. The standards will vary depending upon the conventions that the foreign country is a party to.

h. What is the Hague Service Convention?

The Hague Service Convention is a multilateral treaty that was formulated in 1964, with the goals of: 1) providing a simpler way to serve process abroad, 2) assuring that defendants sued in foreign jurisdictions would receive actual and timely notice, and 3) facilitating proof of service.[45]

i. When does the Hague Service Convention apply?

The Hague Service Convention applies if the following are true:

- The documents to be served are for *initial service of process* (the "formal delivery of documents that is legally sufficient to charge defendant with notice of a pending action");[46]
- The person to be served resides in a country that is a party to the Hague Service Convention;[47]

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[43] For general information on service abroad, see California Judicial Branch Home, Instructional Materials, *Cross-National Issues*, *available at* http://www.courts.ca.gov/partners/1252.htm (last visited Jan. 28, 2016).
[44] Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, art. 1, 20 U.S.T. 361, T.I.A.S. No. 6638 (hereinafter "Hague Service Convention").
[45] *See* http://www.hcch.net/index_en.php?act=text.display&tid=44 for the text of the treaty.
[46] *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988).
[47] For a list of the states parties to the Hague Service Convention, *see* http://www.hcch.net/index_en.php?act=conventions.status&cid=17 (last visited Jan. 28, 2016). Of the common countries of origin for unaccompanied minors, only Mexico is a party (not El Salvador, Guatemala, or Honduras).

- An address for the person to be served is known; and
- The document to be served relates to a civil and/or commercial matter.

j. What method of service of process is required by the Hague Service Convention?

The Hague Service Convention authorizes various methods of service of process. The Convention's main method of service of process is through a "Central Authority" designated by the foreign country to receive service of process. Service via the Central Authority should comply with the following steps:[48]

- Complete the Model Form, found in the Annex to the Convention;[49]
- Translate the documents to be served, if required;[50]
- Determine if a fee is required by the Central Authority;
- Take four copies (two in English, two translated into foreign language) of documents to be served and the Model Form to the California state court administrator in charge of processing for that courthouse so that the court can sign, date, and stamp all four service copies;
- Send all four packets to the Central Authority of the foreign country;

  The Central Authority for Mexico is:

  Ministry of Foreign Affairs
  Directorate-General of Legal Affairs
  Plaza Juárez No. 20, Planta Baja
  Edificio Tlatelolco
  Colonia Centro
  Delegación Cuauhtémoc
  C.P. 06010
  Mexico, Distrito Federal

- The Central Authority will then provide service upon the recipient and return the Certificate of service once it has been completed;
  - Note that Mexico requires 3 months to serve and return notice, so it is advisable to set your hearing out at least 4 months to allow time to complete notice.
  - If six months have elapsed and you have received no word from the Central Authority, notice may still be considered proper under the Convention.[51]
- File the Certificate and a translation with the Proof of Service of Summons with the California court.

The Hague Service Convention also authorizes alternative methods of service that are permissible so long as the country in question has not objected to those means:[52]

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[48] Presentation of Tania Karina Vargas, Directing Attorney, Immigrant Defenders Law Center (Mar. 23, 2015), on file with the author; *see also* Levitt & Quinn International Service Guide, p. 13, *available at* http://www.courts.ca.gov/partners/documents/ea_LevittQuinnGuides.pdf (last visited Mar. 28, 2016). For a helpful flowchart of the main channel of transmission through the Central Authority, *see* Hague Conference on Private International Law, *Outline*, Chart 1: Operation of the Main Channel of Transmission, *available at* http://www.hcch.net/upload/outline14e.pdf (last visited Mar. 8, 2016).

[49] *See* https://assets.hcch.net/docs/706e1b50-b541-4909-8ebe-460d85311cba.pdf (last visited Mar. 28, 2016).

[50] Although the Hague Service Convention does not require a translation, states party may require that documents be translated. Note that Mexico requires a Spanish translation of any judicial documents to be served. *See* Declarations of Mexico (May 2011), ¶ 2, *available at* http://www.hcch.net/index_en.php?act=status.comment&csid=412&disp=resdn (last visited Mar. 18, 2016).

[51] *See* Hague Service Convention, art. 15.

- Consular or diplomatic channels (Arts. 8(1) and 9);
- Postal channels (Art. 10(a));
- Direct communication between judicial officers, officials or other competent persons of the state of origin and the state of destination (Art. 10(b)); and
- Direct communication between an interested party and judicial officers, officials or other competent persons of the state of destination (Art. 10(c)).

Note that Mexico has objected to alternative means of service.[53]

k. If a country is a party to the Hague Service Convention, must service of process be achieved pursuant to its provisions?

Yes. Courts have invalidated service of process in foreign countries that are parties to the Hague Service Convention when the service does not abide by the procedures of the treaty. *See In re Vanessa Q. v. Jose T.,* 187 (2010) Cal. App. 4th 128 (stating that: "Both the United States and Mexico are signatories to the Hague Service Convention. . . . Accordingly, service on a resident of Mexico of a civil complaint filed in the United States, including petitions brought under family law or juvenile dependency law, must be accomplished in accordance with the Hague Service Convention's requirements.") (citing *In re Jennifer O.* (2010) 184 Cal.App.4th 539, 547; *In re Jorge G.* (2008) 164 Cal. App. 4th 125, 134; Cal. Code Civ. Proc. § 413.10, subd. (c) [California's provisions for service outside United States "are subject to" the provisions of Hague Service Convention]).

l. What is the Inter-American Convention on Letters Rogatory?

The Inter-American Convention on Letters Rogatory (IACLR) is a multi-national treaty designed to facilitate service of letters rogatory among the signatory nations. Letters rogatory, or letters of request, are "procedural mechanism[s] by which a court in one country may request authorities in another country to assist the initiating court in its administration of justice."[54]

m. When does the IACLR apply?

The United States is a party to both the IACLR and the Additional Protocol. If another country is a party to both the IACLR and the Additional Protocol, then a treaty relationship exists and the IACLR applies.[55] *However*, unlike the Hague Service Convention, courts have held that the IACLR does not mandate letters rogatory as the exclusive method of service of process in countries that are party to the IACLR. Instead, courts have held that letters rogatory are one method that may be used for

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[52] Prior to using one of these alternative channels, it should be determined whether the foreign country has objected to that alternative method. *See* Hague Conference on Private International Law, *Status Table*, *available at* http://www.hcch.net/index_en.php?act=conventions.status&cid=17 (last visited Jan. 28, 2016). For example, Mexico has objected to alternative methods of service, *id.*, so service through the Central Authority is the only permissible manner of service under the Hague Service Convention. For a helpful flowchart of the alternative channels of transmission, *see* Hague Conference on Private International Law, *Outline*, Chart 2: Operation of the Alternative and Derogatory Channels of Transmission, *available at* http://www.hcch.net/upload/outline14e.pdf (last visited Jan. 28, 2016). Note also that the Hague Service Convention permits the use of "derogatory channels" pursuant to other treaties to which contracting States may be parties. *See* Hague Service Convention, arts. 11, 24, 25.

[53] *Id.*

[54] *Kreimerman v. Casa Veerkamp*, 22 F.3d 634, 640 (5th Cir. 1994), cert. denied, 513 U.S. 1016 (1994).

[55] With respect to the common countries of origin for unaccompanied minors, Honduras is not a party to the Additional Protocol, so no treaty relationship exists with Honduras. However, El Salvador, Guatemala and Mexico are parties to both the IACLR and the Additional Protocol, and thus a treaty relationship exists between the United States and each of those countries. *See* http://travel.state.gov/content/travel/english/legal-considerations/judicial/service-of-process/iasc-and-additional-protocol.html (last visited Jan. 29, 2016).

service of process in countries that are party to the IACLR, for which the IACLR provides directions. *See Kreimerman v. Casa Veerkamp*, 22 F.3d 634 (5th Cir. 1994), *cert. denied*, 513 U.S. 1016 (1994); *see also Pizzabiocche v. Vinelli*, 772 F. Supp. 1245, 1249 (M.D. Fla. 1991); *Morgenthau v. Avion Res. Ltd.*, 898 N.E.2d 929, 934 (N.Y. 2008) (finding that the treaty does not mandate that letters rogatory be the exclusive means of service on a party in Brazil and that "the Letters Rogatory Convention allows for service of process pursuant to a state statute"). In *Kreimerman*, the plaintiffs sued defendants for libel, civil conspiracy, and slander. The plaintiffs served process on the defendants – who were all residents of Mexico – by direct mail through the Texas Secretary of State under the Texas Long-Arm statute, but the district court quashed service, holding that the IACLR was the exclusive means of effecting service on the defendants. Unable to effectively complete service through the use of letters rogatory pursuant to the IACLR, the plaintiffs appealed. On appeal, the Fifth Circuit held that the language, history, and purpose of the Convention all indicate that it does not preempt other methods of service.[56] The court then remanded the case to the district court to consider whether the method of service of process attempted by the plaintiffs comported with principles of comity, the Federal Rules of Civil Procedure, and any other applicable principles of domestic or international law.

Accordingly, the IACLR does not preempt other methods of service prescribed by California law, and service of process in countries that are not parties to the Hague Service Convention may be completed by complying with the IACLR (if it applies), *or* the methods outlined in the California Code of Civil Procedure, unless the country has objected to the means permitted by the Code of Civil Procedure. *See* Appendix A for a summary of acceptable methods of service in El Salvador, Guatemala, Honduras, and Mexico.

n. What method of service is prescribed by the IACLR?

The IACLR prescribes a method by which service may be completed via the use of letters rogatory. In order to comply with this method of service, complete the following steps:

- Request that the California state court issue letters rogatory;[57]
- File the proposed letters rogatory and certified copies of documents to be served to receive the judge's and clerk's signatures;
- Request authentication of the judge and clerk's signatures from the California Secretary of State by filling out the Authentication & Apostille Order Form;[58]
- After you receive the Apostille, translate all forms into the foreign language (note that Spanish versions of many Judicial Council Forms are available online), and copy the information in the English paperwork to the translated forms;
- Make two copies;

[56] Because the Hague Service Convention permits the use of what it calls "derogatory channels" pursuant to other treaties, service on parties in Mexico may be achieved pursuant to the IACLR or the Hague Service Convention. *See* Hague Service Convention, arts. 11, 24, 25. Unfortunately, service under the IACLR is often even more cumbersome than service pursuant to the Hague Convention.

[57] Presentation of Tania Karina Vargas, Directing Attorney, Immigrant Defenders Law Center (Mar. 23, 2015), on file with the author; *see also* Levitt & Quinn International Service Guide, pp. 14-15, *available at* http://www.courts.ca.gov/partners/documents/ea_LevittQuinnGuides.pdf (last visited Jan. 29, 2016). For sample instructions from Imperial and San Diego Counties on how to service process via letters rogatory, go to California Judicial Branch Home, Instructional Materials, Cross-National Issues, and click on "Informational and Instructional Materials," *available at* http://www.courts.ca.gov/partners/1252.htm (last visited Jan. 29, 2016).

[58] For additional information, *see* California Secretary of State, Notary & Authentications, Authentications: Apostille or Certification, *available at* http://www.sos.ca.gov/notary/authentication/ (last visited Jan. 29, 2016).

- Send the original and one copy to the private contractor carrying out the service functions of the U.S. Central Authority on behalf of the Department of Justice – Process Forwarding International[59]—and keep one copy for your records;
- Wait for service to be completed. Once service has been effected, the Certificate of Execution will be sent directly to the California state court.

o. What happens if I cannot serve the non-custodial parent pursuant to any of the methods discussed above?

In any case in which the whereabouts of the non-custodial parent are unknown, practitioners should proceed with caution. Unlike in some other state court proceedings (for example, guardianship of the person proceedings), service of process and/or notice are strictly required in parentage and custody cases because due process requires that persons being sued receive service of process and any parent receive proper notice of the proceedings.

If service on the non-custodial parent has proved impossible, it is recommended that the Petitioner prepare and submit a declaration of due diligence, documenting in detail his or her efforts to provide service. It will then be up to the judge to determine whether to dispense with notice to the non-custodial parent. In parentage proceedings, many practitioners have noted success in requesting the court to dispense with notice under Section 7666(b)(3) of the Family Code, which permits the court to dispense with notice to a man alleged to be the natural father in a parentage action when the "whereabouts or identity of the alleged natural father are unknown or cannot be ascertained."[60] Note that although Section 7666 generally applies to adoption proceedings, Section 7635 (which applies to parentage) directs the Petitioner to provide notice in the manner prescribed in Section 7666.

p. What are the timelines for service of the summons?

The summons should be served at least 16 *court* days in advance of the hearing pursuant to Code of Civil Procedure Section 1005(a)(13); (b). If the notice is served by mail, the required 16-day period of notice must be increased by 5 calendar days if the place of mailing and the place of address are within the state of California, 10 calendar days if either the place of mailing or the place of address is outside of California but within the United States, and 20 calendar days if either the place of mailing or the place of address is outside the United States. *Id.*

However, if service cannot be timely accomplished, the Petitioner can ask that the Request for Order be reissued and continued so that he or she has more time to serve. Courts can also grant orders shortening time for service in appropriate cases.

4. Guardian ad Litem Questions

a. When is a Guardian ad Litem required in family court proceedings?

Pursuant to Family Code Section 7635, any time a minor child is made a party to the proceedings (for example, when a child is the petitioner), he or she must be represented by a guardian ad litem (GAL) appointed by the court. Further, if the child is 12 years of age or older, he or she "shall" be made a party to the proceeding, in which case a guardian ad litem is required. Under Section 373 of

[59] For more information, *see* http://www.hagueservice.net/iac.html (last visited Jan. 29, 2016). Note that the IACLR and Additional Protocol permit courts in border areas of the states parties to directly execute the requests, but do not define the term "border areas." To the extent that this includes the state of California, documents may be transmitted directly to the Mexican family court in the state where the person to be served resides.
[60] Thanks to Chariane K. Forrey, Staff Attorney at Esperanza Immigrant Rights Project, for sharing this argument.

the Code of Civil Procedure, if the child is 14 years of age or older, he or she must apply for the appointment. If the minor is under 14 years of age, the application for appointment of the GAL must be made by a relative or friend of the child. In practice, advocates report that courts do not always require GALs, especially for older minors.

b. Who may serve as a Guardian ad Litem?

The GAL must be a lawyer or represented by a lawyer unless he or she is a relative[61] of the child. Note that the parent filing the paternity action *may* be able to be appointed as the GAL, although courts take differing approaches to this issue.

5. Procedural Questions

a. Must the petitioner have lawful immigration status?

No. Per Section 3040(b) of the Family Code, the immigration status of a parent, legal guardian, or relative shall not disqualify the parent, legal guardian, or relative from receiving custody.

b. Can one petition be brought for multiple children?

Yes. When a parent is the petitioner, simply complete the forms listing all of the children for whom custody is requested. It is unclear whether multiple children can be joint petitioners in a parentage case in light of potential conflicts of interest amongst the children, although at least one court has allowed a parentage petition to be structured in this manner. Another possibility is to file separate parentage petitions for each sibling and then move for the cases to be consolidated.

c. In a parentage action where the minor is the petitioner and is seeking a parentage finding and custody orders for her custodial parent, is the non-custodial parent a necessary and indispensable party to the proceeding?[62]

This is a fact-specific determination that must be made on a case-by-case basis. The Uniform Parentage Act ("UPA") does not require all natural, alleged, and presumed parents to be named as parties in every proceeding.[63] As the Court of Appeal recently noted in *Bianka M.*, the only mandatory party in a parentage action is the child if 12 years or older.[64]

Thus, whether joinder of the non-custodial parent is mandatory or permissive is a case-specific inquiry that requires application of the factors listed in Section 389 of the Code of Civil Procedure and Rule 5.24 of the Rules of Court. Under Section 389(a), the non-custodial parent is a necessary party to the parentage proceeding if he is "so situated that the disposition of the action in [his] absence may [] as a practical matter impair or impede [his] ability to protect that interest…." If the non-custodial parent meets this criterion, you must then determine whether the parent is also indispensable.[65] To determine whether a parent is indispensable, the court must consider the factors delineated in Section 389(b) of the Code of Civil Procedure to decide if "in equity and good

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[61] The term "relative" used in the statute is not defined, so a conservative interpretation – meaning relation by blood – should be used. Harriett Buhai Center for Family law, *California Family Law Basics* (26th ed.), p. 14-13.
[62] Thanks to Nickole Miller, Managing Attorney at Immigrant Defenders Law Center, for contributing this analysis.
[63] *See* Fam. Code § 7635(b) ("The natural parent, each person presumed to be a parent under Section 7611, and each man alleged to be the natural father, *may be* made parties and shall be given notice of the action in the manner prescribed in Section 7666 and an opportunity to be heard." (emphasis added).); *see also Bianka M.*, 245 Cal. App. 4th 406.
[64] *Bianka M.*, 245 Cal. App. 4th at 428.
[65] *American Indian Model Schools v. Oakland Unified School District* (2014) 227 Cal. App. 4th 258, 296.

conscience the action should proceed among the parties before it, or should be dismissed without prejudice."[66] Even if a party is deemed indispensable, the court still retains discretion to proceed with the action without that person.[67]

Under Rule 5.24(e)(1) of the Rules of Court, the family court is only obligated to order joinder of a person with "physical custody or [who] claims custody or visitation rights with respect to [the] minor child." Joinder is permissive, but not required, when it is "appropriate to determine the particular issue in the proceeding," *and* that person is either indispensable for the court to make an order about the issue at hand, or is necessary to the enforcement of any judgment.[68]

In deciding whether permissive joinder is appropriate, the court must consider a list of factors, including delay, confusion, interference, and any complication that joinder would cause in proceedings.[69] For example, in *Bianka M.*, the court noted that "as a general matter, the UPA does not require both alleged biological parents to be named as parties in every parentage action."[70] Nevertheless, the court went on to hold that joinder of Bianka's alleged father was appropriate in light of the particular facts of the case under the permissive joinder provision of California Rules of Court, rule 5.24.[71] Advocates should note that the Court of Appeal emphasized that the holding in *Bianka M.* is narrow and specific to the circumstances of the case.[72]

In determining whether joinder is appropriate in a given case, advocates should consider each factor in favor of and against joinder. For example, if the non-custodial parent is an alleged parent or has never been involved in the child's life, never provided any support, and never attempted to communicate with the child, it may be possible to argue that the parent does not "have an interest" in the custody of the child. Moreover, if the non-custodial parent's identity or whereabouts are unknown, joinder would not be appropriate.[73]

Practitioners should be mindful that this alignment of the parties – Minor Petitioner v. Custodial Parent Respondent – while permitted, is unusual in general family law practice. In general, both parents have an interest in the custody and visitation of their children, and consequently family courts ordinarily do not make custody orders unless both parents are parties. This makes sense given the important policy directive of the family courts to assure "frequent and continuing contact" with both parents and shared parenting.[74] Nevertheless, the family court is a court of equity and its primary concern should be the "heath, safety, and welfare of children."[75]

Although the noncustodial parent need not always be joined as a party to the proceedings, this does not mean that the noncustodial parents' due process rights do not need to be protected. Practitioners should ensure that the noncustodial parent – even if not a party to the proceedings – receives notice and an opportunity to be heard by serving him or her with copies of all filings as discussed in the sections above.[76]

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[66] *Id.*
[67] *Id.* ("'Courts must be careful to avoid converting a discretionary power or rule of fairness into an arbitrary and burdensome requirement that may thwart rather than further justice.'")
[68] Cal. R. Ct., rule 5.24(e)(2).
[69] *Id.*
[70] *Bianka M.*, 245 Cal. App. 4th at 428.
[71] *Id.*, at 429.
[72] *Id.*, at 431.
[73] *Id.*, at 431.
[74] Cal. Fam. Code § 3020(b).
[75] Cal. Fam. Code § 3020(a).
[76] *See* Cal. Fam. Code § 3425; *see also* Cal. Fam. Code § 7635 (UPA notice must comply with section 7666); Cal. Fam. Code § 7666 (notice not required where the identity or whereabouts of the alleged father are unknown).

d. Does the minor have to attend the hearing?

Normally, the minor should not attend the hearing unless he or she is a party to the proceedings. Many family courts do not allow minors to be in the courtroom. However, it is advised that practitioners check their local rules and consult with local practitioners as practices may vary by jurisdiction. For example, some judges may want to hear from minors, especially minors who are age 14 or older and/or minors who may have the most personal knowledge of the risk of returning to their home country or the parental abuse, neglect, or abandonment that is being alleged.

e. Can one parent request a custody order when the other parent is deceased?

Yes. The death of a parent does not bar the filing of an action. *See* Fam. Code § 7630. Further, pursuant to Section 3010(b) of the Family Code, if one parent is deceased, then the other parent is entitled to custody of the child. (Note that this provision is typically invoked for purposes of inheritance.)

f. Are there any special considerations when the custodial parent is the father (rather than the mother)?

Yes. If the father has any doubt that he is the father such that he wants DNA testing, he should not check any of the boxes in the petition stating that he is the father or parent; instead he should write in that he is unsure that he is the father and is bringing this action to determine if he is the father of the minor children.[77] If he states that he is the father and the mother does not contest this determination, he will likely have waived his right to paternity testing.

g. Can one parent request a custody order when the other parent is not listed on the child's birth certificate?

Yes. Other types of evidence, including a declaration from the mother or someone else with personal knowledge as to the identity of the father, may be presented. If the parent not listed on the birth certificate does not agree to parentage, the court may order DNA testing.

h. Does a parentage determination have to be made as to the non-custodial parent before the court can make a custody order?[78]

The Family Code authorizes a court with jurisdiction "during the pendency of a proceeding . . . [to] make an order for the custody of a child during minority that seems necessary or proper."[79] Section 3022 expressly applies to any "proceeding to determine physical or legal custody . . . in an action pursuant to the Uniform Parentage Act."[80] The only limitation on the court's ability to make custody orders is the satisfaction of the due process requirements of notice and an opportunity to be heard.[81]

However, in the *Bianka M.* decision, the court held that "a request for sole legal and physical custody in a parentage action necessarily requires a court to consider the parentage of both parents."[82] Because the Court of Appeals' holding requires only that courts "consider" the parentage of both

[77] Harriett Buhai Center for Family law, California Family Law Basics (26th ed.), p. 14-22.
[78] Thanks to Nickole Miller, Managing Attorney at Immigrant Defenders Law Center, for contributing this analysis.
[79] *See* Cal. Fam. Code § 3022.
[80] Cal. Fam. Code § 3021.
[81] *Id.; see also* Cal. Fam. Code §§ 3425(a), 3408(a); *In re Marriage of Nurie* (2009) 176 Cal. App. 4th 478, 494.
[82] *Bianka M.*, 245 Cal. App. 4th at 419.

parents and does not require that a legal determination of parentage be made as to each parent, it is unclear whether the parentage of the absent parent must be established prior to awarding sole legal and physical custody to the proposed custodial parent.[83] Practically speaking, requiring that the parentage of the absent parent be established prior to awarding custody to the proposed custodial parent would limit the ability of many children to get custody orders because in most cases the California court will not have personal jurisdiction over the out-of-state parent, and the parent may not be willing to stipulate to parentage. This is an evolving area of law, and practitioners are encouraged to research the case law in this area and speak to local practitioners to determine the best strategy for obtaining custody orders for their clients in these situations.

i. Can a parent request a custody order when the birth certificate lists others, for example, the grandparents, as the child's parents?

Yes. However, evidence of the child(ren)'s true biological parents that explains why different persons are listed as the parents on the birth certificate must be presented.

j. Are any family court procedures different in uncontested cases, i.e. cases that proceed in default?

Yes. If the Respondent does not respond within the deadline (generally 30 days after service of process), the Petitioner can ask the court to enter a default judgment against the Respondent. See Section 1(c) above for information on the forms needed to enter judgment in default.

6. Other

a. Are proceedings in family court confidential?

Dissolution of marriage/legal separation, child custody petitions, and domestic violence restraining order cases are normally public, while paternity actions are confidential under Family Code Section 7643.

California Code of Civil Procedure Section 155(c) also provides that in any proceedings in which a request for SIJS findings is made, information regarding the child's immigration status that is not otherwise protected by state confidentiality laws shall remain confidential and is only available for inspection by certain listed individuals.[84] Further, Code of Civil Procedure Section 155(d) provides that records of the proceedings in which a request for SIJS findings is made may be sealed using the procedure set forth in California Rules of Court 2.550 and 2.551.

b. In which county should a custody action be brought?

Pursuant to Section 7620(b)(1) of the Family Code and Section 395 of the Code of Civil Procedure, a custody action should be brought in the county where the child lives or can be found.

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[83] It is however clear that the court must determine the parentage of the proposed custodial parent prior to awarding custody. *Bianka M.*, 245 Cal. App. 4th at 425 ("And, in an action brought under the UPA, the court must determine parentage of the proposed custodial parent(s) before making a custody order.")

[84] Cal. R. Ct. 5.130(g) (effective July 1, 2016) will require that forms FL-356, FL-357, and FL-358 be kept in a confidential part of the case file or, alternatively, in a separate, confidential file, and that any information regarding the child's immigration status contained in a record related to a request for SIJ findings kept in the public part of the file must be redacted to prevent its inspection by any person not authorized under Cal. Code Civ. Proc. § 155.

Appendix A

Cheat Sheet for Service of Process to Persons in Mexico, El Salvador, Guatemala & Honduras

Country	Is the country a party to the Hague Service Convention?	Does a treaty relationship exist with the Unites States with respect to the IACLR?	What means of service of process are acceptable?	Additional Considerations
Mexico	Yes	Yes	• Hague Service Convention: Service pursuant to the "main channel" (Central Authority) under Articles 3-7 of the Convention • IACLR: Service pursuant to the IACLR[85] • If a foreign party's address is truly unknown, the Hague Service Convention does not apply, and neither will service pursuant to the IACLR be possible. In this situation, pursue regular service of process procedures under the Cal. Code of Civil Procedure, such as service by posting or publication. If service by posting or publication is not possible, the Petitioner should inform the court of his/her efforts to find the individual through a declaration of due diligence and request that the court dispense with notice.	• Generally, service under the IACLR is more cumbersome than service under the Hague Service Convention because the IACLR's Additional Protocol requires that the U.S. party requests the court to transmit documents to the U.S. Central Authority for forwarding to the Mexican Central Authority, an additional step that is not required by the Hague. • Advocates report that service pursuant to both the Hague Service Convention and IACLR is time-consuming, expensive and slow.
El Salvador	No	Yes	• Service may be completed pursuant to the IACLR; or • Any other methods authorized by the Code of Civil Procedure	Note that some sources state that El Salvador is not a party to the IACLR Additional Protocol, suggesting that no treaty

[85] Although service pursuant to the Hague Service Convention is mandatory in Mexico, the Hague Service Convention does permit the use of "derogatory channels" pursuant to other treaties to which contracting states may be parties. Accordingly, when serving process in Mexico, service pursuant to the IACLR is an alternative option for U.S. litigants. *See* Charles B. Campbell, *No Sirve: The Invalidity of Service of Process Abroad by Mail or Private Process Server on Parties in Mexico Under the Hague Service Convention*, 19 Minnesota Journal of Int'l Law 1 107, 110-111 (2010) (*citing* Hague Service Convention, arts. 11, 24, 25).

Country	Is the country a party to the Hague Service Convention?	Does a treaty relationship exist with the Unites States with respect to the IACLR?	What means of service of process are acceptable?	Additional Considerations
			(including as directed by the court)	relationship exists
Guatemala	No	Yes	• Service may be completed pursuant to the IACLR; or • Any other methods authorized by the Code of Civil Procedure (including as directed by the court)	
Honduras	No	No	• Service may be completed pursuant to any methods authorized by the Code of Civil Procedure (including as directed by the court)	Per the U.S. State Dep't Website: In the absence of any prohibition against it, service of process in Honduras may be effected by mail, by agent, such as a local attorney, or through letters rogatory. Litigants may wish to consult an attorney in Honduras before pursuing a particular method of service of process, particularly if enforcement of a U.S. judgment is contemplated in the future.[86]

[86] See http://travel.state.gov/content/travel/english/legal-considerations/judicial/country/honduras.html (last visited Jan. 29, 2016).