

No. 923-2015

IN THE
STATE OF WHITTIER SUPREME COURT
Spring Term, 2016

Marta DOMINGUEZ,

Petitioner,

v.

**STATE OF WHITTIER,
Ms. Kathryn Chandler, Director of the
Whittier Department of Child Welfare**

Respondent.

ON WRIT OF CERTIORARI TO THE STATE OF WHITTIER SUPREME COURT

BRIEF FOR THE RESPONDENT

Attorneys for Respondent

Team R16

QUESTIONS PRESENTED

1. Whether the Juvenile court correctly ruled when it took jurisdiction of Jasmine, adjudicated her as neglected and abandoned, and made an order for Special Immigrant Juvenile Status?
2. Whether the Juvenile court correctly ruled when it found that the Department of Child Welfare made reasonable efforts toward reunification and terminated Ms. Dominguez's reunification services?

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OPINIONS BELOW

The Whittier Court of Appeal opinion, affirming that Jasmine was properly adjudicated as a dependent who had been neglected and abandoned, that an SIJS order was appropriate, and that the DCW made reasonable efforts toward reunification and correctly terminated reunification services as Petitioner was unwilling and unable to benefit from the plan, is located on pages 8 – 14 of the record. *Dominguez v. State*, --- P.3d --- (Whit. Ct. App. 2015).

STATEMENT OF JURISDICTION

“The federal courts have long recognized that states courts have jurisdiction over child welfare determinations, including matters pertaining to undocumented minors.” *In re Y.M.*, 207 Cal.App.4th 892, 908 (Cal. Ct. App. 2012). While federal law mandates certain requirements regarding a minor’s dependency, it “recognizes the institutional competence of state courts as the appropriate forum for child welfare determinations regarding abuse, neglect or abandonment, and a child’s best interest.” *Id.* (internal citation omitted). Accordingly, the State of Whittier Supreme Court obtained jurisdiction to review the Whittier Court of Appeal’s decision regarding the welfare of Jasmine, an unaccompanied minor, alleged to have experienced neglect and abandonment pursuant to Whittier Juvenile Code section 100. (App. at A.1). This Court granted an order of certiorari on November 16, 2015.

STATEMENT OF THE CASE

Background

The State of Whittier (“Respondent”) initiated abuse and neglect proceedings against Marta Dominguez (“Petitioner”) after discovering that Petitioner left her daughter, Jasmine, in the middle of the night without notice, failed to provide adequate medical care and financial support, made minimal efforts to maintain communication with her daughter, and was unable to be located by the Department of Child Welfare (“DCW”). (R. at 4).

Jasmine, now fifteen-years-old, was born on November 1, 2000, in Guatemala. (R. at 1). Jasmine’s father passed away before her birth. *Id.* At the time of her birth, Petitioner learned that Jasmine had a rare cardiac condition that was unable to be treated in Guatemala. *Id.* Based on her doctor’s recommendation, Petitioner obtained visas for both she and her daughter to travel to the United States in order to obtain appropriate medical care. (R. at 1-2). The two arrived on January 20, 2002, and began living with Petitioner’s sister, Ana Ortiz. (R. at 2).

Ten days later, on January 30, 2002, Jasmine went into cardiac arrest and required life-saving surgery. *Id.* By June of that year, Jasmine regained stability, but still required ongoing outpatient care. *Id.* Petitioner, however, returned to Guatemala and left Jasmine in the care of Ms. Ortiz because of an expiring visa. *Id.* Ms. Ortiz believed that Petitioner would return to care for Jasmine as soon as she was able. *Id.*

For the next three years, Petitioner made “little effort” and only attempted to contact Jasmine six times – each year for her birthday and on Christmas. (R. at 2, 10). Furthermore, Petitioner never inquired about Jasmine’s health, nor did she send financial support. (R. at 2). Yet in spite of having minimal contact with Petitioner, Jasmine continued to remain stable under

the care of Ms. Ortiz. *Id.* Ms. Ortiz ensured that Jasmine received all necessary medication and was taken to all follow-up medical appointments. *Id.*

In June of 2005, however, Jasmine returned to Guatemala to live with Petitioner and attend school. *Id.* Jasmine remained in Guatemala for the next several years, but during that time, Petitioner and Jasmine were habitually homeless. *Id.* “Jasmine [also] did not have regular medical check-ups or access to much-needed medication and only occasionally went to school.” *Id.*

In 2013, after Jasmine’s health started to dramatically decline, doctor’s again suggested that Jasmine seek treatment in the United States. (R. at 3). In January of 2013, Petitioner obtained a visa for Jasmine, who again went to go live with Ms. Ortiz. *Id.* While living with Ms. Ortiz, Jasmine received necessary medical treatment, which included open-heart surgery. *Id.* Although the surgery provided a temporary fix, doctor’s informed Jasmine that she would eventually need a transplant. *Id.* However, due to Jasmine’s immigration status, the screening committee concluded that she was not a candidate for the transplant list. *Id.* Ms. Ortiz relayed this news to Petitioner, who returned to the United States on a six-month visa in June. *Id.* Approximately one month later, Petitioner left her daughter in the middle of the night, without notice, because she felt “overwhelmed” by Jasmine’s medical condition. *Id.* Jasmine was left “confused and distraught” by Petitioner’s sudden departure to Guatemala. *Id.*

On January 6, 2014, Jasmine was participating in physical education class when she began to have difficulty breathing. *Id.* After being transported by ambulance to the hospital, Jasmine was admitted to the Pediatric Intensive Care Unit. *Id.* After being along there for several hours, the hospital social worker called Jasmine’s school and learned that Jasmine was cared for by Ms. Ortiz. *Id.* After learning that Petitioner went back to Guatemala, consequently,

leaving Jasmine without a legal guardian in the country, the social worker called the DCW who initiated an investigation. *Id.* at 3-4.

The DCW social worker, Sam Wells, conducted an interview with Ms. Ortiz at her home. *Id.* at 4. Mr. Wells learned that Petitioner left her daughter in the middle of the night and failed to provide Ms. Ortiz any financial support to care for Jasmine. *Id.* Mr. Wells attempted to contact Petitioner seven times – twice by mail and five times by telephone – all of which went unanswered. *Id.* After the unsuccessful contact attempts, Mr. Wells filed a petition alleging neglect and abandonment by Petitioner with the Jennings County Juvenile Court pursuant to Whittier Juvenile Code sections 100(b) and 100(g). (R. at 4; App. at A-1).

Procedural History

On January 29, 2014, pursuant to the aforementioned statutes, the Jennings County Juvenile Court detained Jasmine based on Petitioner’s “disappearance” to Guatemala, and also due to Jasmine’s heart condition and the subsequent care she required. (R. at 4). After appointing attorneys – Jeffrey Stone to represent Jasmine and Maria Sanchez to represent Petitioner – the court ordered the DCW to locate Petitioner. *Id.* Petitioner was eventually located and found to be living with her new boyfriend. *Id.* Petitioner waived all appearances in court, and the DCW authorized Ms. Ortiz to continue to care for Jasmine. *Id.*

On February 28, 2014, the Juvenile Court declared Jasmine a dependent of the court after sustaining findings of abuse and neglect. *Id.* Specifically, the court found that Petitioner “failed to supervise Jasmine, and failed to provide Jasmine with proper medical treatment” pursuant to Whittier Juvenile Code section 100(b). (R. at 4-5; App. at A.1). Additionally, the court found that Petitioner “did not provide proper financial support to Jasmine, and that [Petitioner] failed to maintain a parental relationship with Jasmine.” (R. at 5; App. at A.2).

The court ordered Petitioner to make regular contact with Jasmine, and to maintain ongoing communication with the DCW caseworker, Mr. Wells, as part of Petitioner's reunification request. *Id.* Petitioner was ordered to comply with these stipulations from Guatemala, unless she returned to the United States. *Id.*

Six-months later, the Juvenile Court held a review hearing in accordance with Whittier law. *Id.* During the hearing, Mr. Wells reported that Petitioner was attempting to obtain a visa to return to the United States, but Petitioner failed to give Mr. Wells an expected timeframe regarding her return. *Id.* Although Petitioner stated that she wanted to be with Jasmine, she admitted she was not complying with court orders as the services needed were not available in Guatemala. *Id.* Mr. Wells further reported that Petitioner had not made contact with her daughter in thirteen months. *Id.*

Jasmine's attorney, Mr. Stone, requested that the Juvenile Court grant an order authorizing Special Immigrant Juvenile Status ("SIJS") for Jasmine. *Id.* Still wanting to give Petitioner more time for reunification, the court declined the request. *Id.* The court then scheduled the twelve-month review, warning Petitioner's attorney that Petitioner "only had six more months to attempt reunification." *Id.* at 5-6.

Over the next six-months, Petitioner only made contact with Jasmine three times, but was able to maintain contact with Mr. Wells. *Id.* Petitioner also failed to provide financial support for Jasmine, claiming socioeconomic hardship. *Id.* Although Petitioner said she planned on returning to the United States by the end of the year, she was unable to complete employment classes and only attended three classes on basic child rearing. *Id.*

At the twelve-month review hearing, Mr. Wells reported Petitioner's status updates and stated that Jasmine was doing well with in the care of Ms. Ortiz in spite of the Petitioner not

providing financial support. *Id.* Although the Petitioner appeared by phone, Jasmine appeared in person stating that she liked living with Ms. Ortiz, and that she was getting necessary medical care. *Id.* Jasmine further testified that “she did not want to return to Guatemala where she regularly witnessed violence and did not attend a good school.” *Id.* Additionally, Jasmine’s doctor supplied a letter stating that if Jasmine returned to Guatemala, she would likely die as her necessary heart medication would be unavailable. *Id.*

Upon review, the Juvenile Court terminated Petitioner’s reunification services finding that although Petitioner had made some progress, the DCW had “made reasonable efforts toward reunification.” *Id.* Although Petitioner’s attorney objected, stating that Petitioner was unable to complete the process since she was out of the country, the Juvenile Court overruled the objection and established a permanent plan for legal guardianship placing Jasmine with Ms. Ortiz. *Id.* at 6-7.

The court also made the following findings regarding SIJS request in accordance with federal law:

1. Jasmine is and has been a dependent child of the court in within the meaning of 8 U.S.C. section 1101(a)(27)(J), which states that a child is dependent upon the court if she has been “placed under the custody of the court;”
2. Jasmine has been “neglected and abandoned” pursuant to Whittier Juvenile Code sections 100(b) and 100(g); and
3. It is in Jasmine’s best interest to remain in the United States in order to obtain necessary medical treatment instead of returning to Guatemala as mandated within the meaning of 8 U.S.C. section 1101(a)(27)(J), and 8 C.F.R. section 204.11(d)(2)(iii). (R. at 7).

Based on these findings, Petitioner's attorney filed an appeal per Petitioner's request to challenge the abuse and neglect adjudication and the termination of the reunification efforts. *Id.* at 7-8.

SUMMARY OF THE ARGUMENT

This Court should affirm the ruling of the Jennings County Juvenile Court and the decision Whittier Court of Appeal by holding that Petitioner's daughter, Jasmine, was properly adjudicated as a dependent of the court based on abandoned and neglected pursuant to Whittier Juvenile Code section 100(b) and (g), the court correctly made an order for Jasmine's Special Immigrant Juvenile Status, and also that reunification services were no longer necessary as the DCW made reasonable efforts toward reunification and further attempts would have been futile.

Petitioner willfully left Jasmine in the United States without a legal guardian and repeatedly failed to provide adequate parental support. Petitioner left Jasmine in the middle of the night without notice, Petitioner did not provide adequate shelter, medical treatment or financial support, and Petitioner made only token efforts to communicate, thus justifying the court's finding for abandonment and neglect. Further, the court appropriately made an order to for Jasmine's Special Immigrant Juvenile Status, finding that reunification with the Petitioner was not viable due to neglect and abandonment, and that a return to Guatemala was not in the best interests of Jasmine, given her enhanced needs for medical treatment.

The DCW efforts toward reunification were reasonable because it placed clear, attainable expectations on the Petitioner that were logically calculated to remedy Jasmine's status as abandoned and neglected dependent. The plan required that, (1) Petitioner take classes where she would learn how to care for Jasmine's health condition and job skills, (2) Petitioner make regular contact with Jasmine, and (3) Petitioner keep in contact with the DCW caseworker. Petitioner failed to fully satisfy all of these stipulations. Petitioner contends that the

DCW should have provided more services to aid reunification. However, the extra services she suggested would be ineffectual. Additionally, the juvenile court was not clearly erroneous when it determined that future efforts at reunification would be futile. Petitioner is unable to provide safe, stable and adequate housing, as well as access to medical care Jasmine needs to stay alive.

ARGUMENT

I. THE JUVENILE COURT CORRECTLY TOOK JURISDICTION OF JASMINE, PROPERLY ADJUDICATED HER AS NEGLECTED AND ABANDONED, AND APPROPRIATELY MADE AN ORDER FOR SPECIAL IMMIGRANT JUVENILE STATUS.

The Juvenile Court properly obtained jurisdiction over Jasmine after it ruled that Jasmine was a dependent of the court pursuant to Whittier State Code sections 100(b) and (g). (R. at 4-5; App. at A.1-2). Petitioner willfully disappeared and left Jasmine, a minor child, in the United States without a legal guardian to obtain proper medical treatment. (R. at 4). As a result, the court found that Jasmine was placed at a substantial risk because of Petitioner's failure to properly supervise Jasmine, and failure to provide Jasmine with adequate medical care to treat her potentially fatal heart condition. (R. at 4-5; App. at A.1). Due to Petitioner's minimal communication efforts and lack of financial support, the court also found that Jasmine had been abandoned in accordance with section 100(g). (R. at 5; App. at A.2). Based on Petitioner's actions, the court appropriately made an order for SIJS finding: (1) Jasmine is a dependent of the juvenile court, (2) reunification with Petitioner was not viable due to abandonment and neglect, and (3) it is not within Jasmine's best interest to return to Petitioner's home country of Guatemala. (R. at 7).

When evaluating if a child has been neglected or abandoned, "the State must prove the allegations of [abandonment] or neglect by a preponderance of the evidence, meaning it must demonstrate that the allegations are more probable than not." *In re Edward T.*, 799 N.E.2d 304,

316 (Ill. Ct. App. 2003) (internal citations omitted). Giving great deference to the trial court, when reviewing these cases, a “reviewing court will not reverse a trial court’s finding of [abandonment or] neglect unless it is against the manifest weight of the evidence,” with a reversal only made if the evidence is clearly erroneous and in the opposite direction of the conclusion. *Id.* (internal citations omitted).

A. The Court properly adjudicated Jasmine as a dependent child due to neglect and abandonment after Petitioner willfully left Jasmine in the United States without a legal guardian and repeatedly failed to provide adequate parental support.

Parental obligations entail certain minimal attributes, including: expressing love and affection for the child; showing concern for the health, education and general; providing clothing, food and medical care; and ensuring an adequate domicile. *In re Oreoluwa O.*, 116 A.3d 400, 408 (Conn. App. Ct. 2015) (internal citation omitted). However, when a parent has “failed to maintain a reasonable degree of interest, concern or responsibility,” the court may intervene and determine the dependency of a child if it finds that a child’s physical and emotional well-being is at risk due to abandonment or neglect. *See Id.* at 502; *In re Y.M.*, 207 Cal.App.4th 892, 913 (2012); *In re Richard S.*, 130 A.D.3d 630, 633 (N.Y. App. Div. 2015). Working to provide maximum safety and protection for children, the child’s best interest is the court’s “guiding light.” *In re Y.M.*, 207 Cal.App.4th at 913.

1. Jasmine was correctly adjudicated dependent because Petitioner left her in the United States without a legal guardian.

Courts have the responsibility to ensure that children within its jurisdiction are cared for in a safe and secure environment. *See In re K.B.L.V.*, 176 So.3d 297, 300 (Fl. Dist. Ct. App. 2015). Accordingly, section 100 of the Whittier Juvenile Code allows the court to adjudicate a child as a dependent of the court if it finds that the child been subjected to abuse, abandonment, or neglect. (App. at. A.1). Although Jasmine was left in the care of her aunt, other jurisdictions

have found children under the same circumstances and under similar statutory provisions to be dependent, even when the child is not at risk for imminent harm. *In re Y.V.*, 160 So.3d 576, 578 (Fl. Dist. Ct. App. 2015).

In *In re Y.V.*, the court found Y.V. to be a dependent even though he had locatable, living parents, and was being cared for by a responsible adult on a voluntary basis. *Id.* at 579.

Similarly, in *L.T. v. Department of Children and Families*, the court determined children to be dependent of the court when they were orphaned, did not have a legal guardian, but were also being cared for voluntarily by a responsible adult. 48 So.3d 928, 929 (Fla. Dist. Ct. App. 2010).

In *In the Interest of T.J.*, the court ordered a child to be a dependent after she traveled illegally to the United States from Guatemala, after her mother had died and her father had left, even though she lived with her aunt who was voluntarily taking care of her. 59 So.3d 1187, 1190 (Fla. Dist. Ct. App. 2011).

Jasmine's situation directly parallels that of *Y.V.*, *L.T.*, and *T.J.* Jasmine is a minor alone in the United States without a proper legal guardian. (R. at 3). Although Jasmine's aunt voluntarily cares for her, it does not negate the finding that Jasmine, who has a serious medical condition, has been abandoned by her mother who returned to Guatemala. *Id.* The court therefore appropriately adjudicated Jasmine as dependent of the court so that it can ensure Jasmine is taken care of and protected.

2. The court properly adjudicated Jasmine as abandoned and neglected as defined in sections 100(b) and (g) of the Whittier Juvenile Code.

"The right to family integrity is not absolute." *In re Pedro J.C.*, 105 A.3d 943, 956 (Conn App. Ct. 2014). Instead, as stated in section 100 of the Whittier Juvenile Code, a court is justified to intervene in family matters when it finds that a child is being abandoned or neglected. (App. at A.1-2). Pursuant to section 100, when considering only the pertinent factors of

subsections (b) and (g), the court properly found that Petitioner abandoned and neglected her daughter, Jasmine.

- a. *The court appropriately ruled Jasmine to be abandonment and neglect after Petitioner willfully left Jasmine without proper supervision or support.*

Petitioner abandoned Jasmine after she left without notice in the middle of the night because she “was overwhelmed with Jasmine’s health condition.” (R. at 3). Abandonment occurs if a “a parent willfully forsak[es] the obligations owed to his or her child.” *H.S.P. v. J.K.*, 223 N.J. 196, 202 (2015). Accordingly, under section 100(g) of the Whittier Juvenile Code, the court may properly adjudicate a child as a dependent due to abandonment or neglect if the “child has been left without reasonable support . . . including normal supervision” (App. at A.2).

In *In re Estate of Nina L. ex rel. Howerton*, the court found that Nina had been abandoned after her mother went to California without making arrangements for Nina. --- N.E.3d. ---, --- (Ill. App Ct. 2015, 2015 Ill. App. (1st) 152223, ¶5. Nina, still in Illinois, moved in with the Howerton’s, the parent’s of a classmate, who began to provide for Nina. *Id.* at ¶¶ 6, 30. Although Nina remained in contact with her mother, one-year later, the court found that Nina had been abandoned and appointed guardianship of Nina to the Howerton’s. *Id.* at ¶ 30.

In *In re Smith v. Fontaine*, the court held that a father neglected his son when he dropped his son off with an uncle for six-and-a-half months, did not come to the hospital when his son was ill, and had the uncle pay for his son’s medical bills. No. CS05-03167, 2009 WL 3674446, at *2-3, 9 (Del. Fam. Ct. July 31, 2009). Also during that time, the father did not come to see the child, nor did he contact the uncle to check on the child’s wellbeing. *Id.* at 2. The court therefore found that the father’s willingness to leave his child for an extended period of time demonstrates that the father neglected the child’s basic needs for parental love and affection, and would likely continue to do so in the future. *Id.* at 9.

Petitioner, like the parents who abandoned and neglected their children in *In re Estate of Nina L.* and *In re Smith*, intentionally and willfully left Jasmine without knowledge of when she would return. (R. at 3). Jasmine was left “confused and distraught” showing Petitioner’s lack of “reasonable support” and concern for her daughter’s emotional or physical wellbeing. (R. at 3; App. at A.2). Additionally, Petitioner’s feelings of being overwhelmed from Jasmine’s heart condition are evident of Petitioner’s inability to provide proper support for Jasmine’s fragile condition. (R. at 3; App. at A.2). Therefore, because Petitioner willfully left her daughter without reasonable support and failed to provide supervision, precedent along with section 100(g), supports Jasmine’s adjudication as a dependent who has been abandoned or neglected. (R. at 4; App. A.2)

b. Petitioner did not provide Jasmine with adequate shelter and medical treatment justifying the court’s ruling of abandonment and neglect.

Petitioner did not adequately provide for Jasmine’s wellbeing, including her potentially fatal medical condition. (R. 2-5). To adjudge a child as neglected and abandoned under section 100(b) of the Whittier Juvenile Code, the court must find that the child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness because of the parent’s actions. (App. at A.1). The court may specifically consider if the parent willfully or negligently failed to provide the child with adequate food, clothing, shelter, or medical treatment. *Id.*

In *Adoption of Ramon*, the court found that a child had been neglected when his parents had the inability to get the child to his medical appointments, the child’s severe diaper rash went untreated, and the “parents had no diapers or food, and ‘no plan’ for obtaining them.” 672 N.E.2d 574, 578 (Mass. App. Ct. 1996). Ramon’s parents only sought medical attention for their son after their caseworker insisted they do so. *Id.* at 575-76. The court also found that Ramon was often dirty, and his parents could not provide a stable environment and experienced

homelessness. *Id.* Accordingly, the court found that Ramon had been subjected to neglect and his parent's were unfit to take care of him. *Id.* at 579.

In *In re Oreoluwa O.*, the court found that limited interest and concern is not reasonable and thus justifies a court's abandonment determination. 116 A.3d at 410. The court evaluated a situation in which the minor child was declared a dependent of the court because the minor was being denied proper care for his congenital heart defect. *Id.* at 403. The court further declared that the child's father, who lived in Nigeria, had abandoned the child because the father did not establish appropriate support for his child, did not supply him with food, clothing, or medical care that that the son required, did not provide him with a residence, and did not express love or affection for the child on a continuing basis. *Id.* at 404. The court found that although the father demonstrated some interest and concern regarding the welfare of his child – the father would email or call at least once a week to inquire about his son – “some” is not sufficient. *Id.* at 409. Additionally, the court found that absence from this country was not a justifiable excuse for a parent's lack of interest, concern or responsibility. *Id.* at

Analogous to Ramon's untreated rash, Jasmine also did not receive the proper medical care necessary to treat her heart condition. (R. at 2). Petitioner, like Ramon's parents, was “plagued” by homelessness and instability, failed to bring Jasmine to her medical appointments, and did not obtain Jasmine's necessary medication. *Id.* However, unlike diaper rash, Jasmine faces a much more serious health condition that requires on-going treatment and constant access to medical care. *Id.* It was therefore critical for Petitioner to be a proper caretaker for Jasmine, which she failed to do. *Id.* at 9.

Also, like *In re Oreoluwa*, Petitioner's limited interest in Jasmine's wellbeing was not reasonable. (R. at 10). Although Petitioner, like Oreoluwa's father, did demonstrate “some”

interest in Jasmine's wellbeing, she did not support Jasmine, did not express love or affection, and did not provide Jasmine with appropriate medical care when Jasmine was in Petitioner's custody. (R. at 2-5). Also, like Oreoluwa's father, Petitioner is not able to rely on the excuse that she was absent from the United States, for Petitioner's lack of interest in her child's wellbeing is evident in the fact that in the few times that she did call, she did not inquire about Jasmine's health. (R. at 10). Thus, the court appropriately adjudicated Jasmine as neglected and abandoned so that it could ensure that Jasmine has an appropriate guardian who adequately cares and provides for Jasmine's medical needs.

c. The court properly found that Jasmine had been neglected and abandoned because Petitioner failed to provide financial support for Jasmine, and only made minimal efforts to communicate with Jasmine.

“From a child's perspective, family [] consists of nurturance and protection. It is not conceptual; rather it is practice and tangible, moment by moment.” *In re Pedro J.C.*, 105 A.3d at 956 (quoting *In re Tayquon H.*, 821 A.2d 796 (Conn. App. Ct. 2003)(internal quotation marks omitted)). Yet, in Jasmine's case, Petitioner made little, if any, effort to support Jasmine. (R. at 10). Whittier Juvenile Code section 100(g) states that a child is considered abandoned if the court finds that “a parent has made only minimal efforts to support and communicate with the child.” (App. at A.2) Additionally, the statute states that “[f]ailure to maintain a normal parental relationship with the child without just cause constitutes prima facie evidence of abandonment.” *Id.*

In *Marcelina M.-G. v. Israel S.*, the court found that the child had been abandoned after her father left, and did not provide financial support or guidance. 112. A.D.3d 100, 104 (N.Y. App Div. 2013). Additionally, in *In re Jacklyn F.* the court stated that “failure to provide support, or failure to communicate is presumptive evidence of the intent to abandon. If a parent

has made only token efforts to communicate with the child, the court may declare the child abandoned by the parent” 114 Cal.App.4th 747, 753 (Cal. Ct. App. 2003).

In *Adoption of Oukes*, the court held that failure to communicate for the “requisite statutory period of time” is adequate grounds for abandonment adjudication. 14 Cal.App.3d 459, 467 (Cal. Ct. App. 1971). The court found that when a mother only took interest in her children’s welfare after she was threatened with legal action, and only called her children three times over the span of a year, the communications were considered token communications.” *Id.* at 466-67. Although the mother claimed she had no intention of abandoning her children, her lack of communication, which she claimed was due to mental strain, was not a legal excuse to justify her failure to communicate. *Id.* at 467.

As in *Marcelina, Jacklyn, and Oukes*, where the courts found that abandonment is proper after a parent has failed to support or communicate with their children, Petitioner did not financially support Jasmine and repeatedly went months without communicating with her. (R. at 2-5). Over the course of three years, Petitioner only attempted to contact Jasmine six times – once each year in November and once in December (R. at 2). After Petitioner abandoned Jasmine without notice, she also failed to contact Jasmine. (R. at 4-5). It was not until she was contacted by a DCW social worker that she started to initiate more communication, but even at that time, communication was minimal. (R. at 5-6). In spite of claiming to have difficulty accessing a telephone, Petitioner was able to remain in contact with the DCW social worker, but still failed to initiate increased communication with her daughter. (R. at 6). Therefore, because Petitioner “failed to maintain regular contact” with Jasmine, and would go approximately a year without contacting Jasmine without “just cause,” her communications are simply token

communications which justify the court's ruling that Petitioner had abandoned Jasmine. (R. at 2-5; App. at A.2)

B. The court appropriately made an order for Special Immigrant Juvenile Status finding that Jasmine is a dependent of the court, that reunification with Petitioner is not viable based on abandonment and neglect, and it is not in Jasmine's best interest to return to Guatemala.

“An unaccompanied minor is subject to deportation unless granted permission to stay in the United States.” *In re Y.M.*, 207 Cal.App.4th at 914. However, if a minor is eligible for SIJS, he or she may be permitted to legally remain in the country and obtain United States citizenship after five years. *Id.* A minor may be eligible for SIJS if the juvenile court makes the following findings:

- (1) The minor is under the age of 21 and unmarried;
- (2) The minor is a dependent of a juvenile court in accordance with state law;
- (3) Reunification with one or both of the juvenile's parents is not viable due to abuse, abandonment, or neglect; and
- (4) It is not in the “best interest” of the child to return to his or her parents' country of nationality.

H.S.P. v. J.K. 121 A.3d at 858 (citing 8 U.S.C. § 1101(a)(27)(J)(ii)). The SIJS statute's goal is to protect child welfare by permitting “vulnerable and mistreated children to qualify for this form of legal relief.” *Marcelina M.-G.*, 112 A.D.3d at 112 (internal citation omitted); *See also H.S.P.*, 121 A.3d at 859.

In *In re Pedro J.C.*, the court held that an SIJS order was appropriate after a minor boy traveled to the United States from Guatemala because his family did not have food, he was forced to work in the fields instead of attend school, and he felt threatened by people around him. 105 A.3d at 948. The boy was sent with a stranger to be smuggled into the United States, which

the court found to constitute neglect. *Id.* at 528. Once he arrived in the United States, the boy lived with his a cousin who was declared by the court to be a “suitable and worthy caretaker.” *Id.* at 529. The court therefore found that (1) reunification with his parents was not viable due to neglect; and (2) it was in the boy’s best interest to remain in the United States and not return to Guatemala. *Id.* at 543.

Similarly, in *In re Y.M.*, the court found that an intellectually disabled, partially deaf, minor’s request for SIJS should be considered even though she was abducted and brought into the United States against her will, experienced abuse from her father while in the country, but would not receive adequate treatment and care if she returned to her home country of Guatemala. 204 Cal.App.4th at 900-01. The court specifically referenced concerns that if she were to return to Guatemala, she would not receive appropriate medical treatment, and she would be at risk for being abducted again due to her mother’s apathy. *Id.* at 903-04. Therefore, based on the abuse received by her father, and the lack of services available to Y.M. in Guatemala, the court found the Y.M. may be a candidate for SIJS. *Id.* at 916.

Similar to *Pedro*, the court properly made an SIJS order for Jasmine. (R. at 12). Jasmine fulfills the necessary statutory requirements for an SIJS ruling because she is a dependent of the court, reunification with Petitioner is not viable due to abandonment and neglect, and it is not within Jasmine’s best interest to return to Guatemala. *Id.* In spite of Petitioner’s request to have Jasmine returned to her country of origin, like *Pedro*, it would not be in Jasmine’s best interest as Jasmine feels unsafe and does not receive a proper education while in Guatemala. *Id.* at 6. Also, similar to *Y.M.*, if Jasmine were to return to the care of Petitioner, the record shows that Jasmine would likely not receive the care needed or the necessary heart transplant, thus likely resulting in Jasmine’s death. *Id.* at 3. The court appropriately ruled that it is within Jasmine’s best interest to

remain in the United States with Ms. Ortiz who continues to care for Jasmine, ensures that Jasmine receives an education, and provides proper medical care for Jasmine. (R. at 6).

II. THE JUVENILE COURT CORRECTLY FOUND THAT THE DEPARTMENT OF CHILD WELFARE MADE REASONABLE EFFORTS TOWARD REUNIFICATION AND TERMINATED PETITIONER’S REUNIFICATION SERVICES.

The Whittier Court of Appeal was correct when it held that the DCW made reasonable efforts toward reunifying Petitioner and her daughter, and the Juvenile Court’s decision to terminate reunification services was not clearly erroneous.

State child welfare agencies have a duty to provide parents with reasonable reunification services in all cases. *In re Kittridge*, 185 Misc.2d 876 (Fam. Ct. 2000). The United States Supreme Court has recognized the interest of parents in raising their children as a right, which deserves deference and protection. *In re Alexander T.*, 841 A.2d 274, 278 (Conn. Ct. App. 2004) (citing *Stanley v. Illinois*, 405 U.S. 645, 651(1972)). However, this right is always balanced with the best interests of the child, and where the child’s best interests and parent’s interests are in conflict, the child’s best interests shall prevail. *Matter of Burns*, 519 A.2d 638, 644 (Del. 1986). Courts are especially protective of sick and mentally challenged children because parental rights shall not be enforced “to the detriment or destruction of the health and wellbeing of the child.” *Johnson v. Arkansas Dep’t of Human Servs.*, 782 S.W.3d 183, 187 (Ark. Ct. App. 2002). The court or the agency determining the child’s best interest must “give great weight to the stability, security, and permanency of the relationship between the child and the child's caregiver.” *Ex parte T.V.*, 971 So. 2d 1, 11-12 (Ala. 2007).

The United States Supreme Court and many state courts have held that the requirement that the DCW make an effort to preserve the family is mandated on constitutional grounds, as a necessary element to overcome the “fundamental liberty interest of the natural parents in the care, custody and management of their child.” *Mary Lou C. v. Arizona Dep’t of Econ. Sec.*, 83

P.3d 43, 49 (Ariz. Ct. App. 2004) (quoting *Santosky v. Kramer*, 455 U.S. 745, 753 (1982)).

However, in a cases involving child abandonment, a lesser constitutional standard exists, and a parent is not entitled to require a state agency to provide her with reunification services. *Toni W. v. Arizona Dep't of Econ. Sec.*, 993 P.2d 462, 467 (Ariz. Ct. App. 1999).

Courts review decisions to terminate parental rights on a case-by-case basis to determine whether or not the DCW made reasonable efforts toward reunification. *In re Oreoluwa O.*, 116 A.3d at 405. In reviewing whether the DCW made reasonable efforts, a court considers the reunification efforts as a whole because a plan that may have failed a parent temporarily may ultimately be cured later in the process to satisfy the reasonable efforts standard. *Barbara P. v. State, Dep't of Health & Soc. Servs.*, 234 P.3d 1245, 1262 (Alaska 2010). Reviewing courts have upheld a finding that the DCW made reasonable efforts overall even when efforts were not reasonable during a particular period of time. *Id.*

Even if the DCW does not make reasonable efforts, an appellate court may affirm the decision to terminate reunification services if the record does support the implicit finding that rehabilitative measures would have been futile. *Mary Lou C.*, 83 P.3d at 50. It is well established that the law does not require a party to carry out a knowingly futile or vain act. *Beltran v. Allan*, 926 P.2d 892, 901 (Utah Ct. App. 1996).

The standard of review in termination cases is well settled, and appellate courts review the Juvenile Court's decision to determine whether it is clearly erroneous. *In re Tyqwane V.*, 85 857 A.2d 963, 968 (Conn. App. Ct. 2004). As part of this type of review, the court views the evidence in the light most favorable to the juvenile court's judgment. *In re S.L.E.*, 633 S.E.2d 454, 455 (Ga. App. Ct. 2006). The appeals court "will not reweigh the evidence but will look only to determine if there is evidence to sustain the court's ruling." *Mary Lou C.* 83 P.3d at 47. A

decision is not clearly erroneous when the findings are supported by substantial and competent evidence, even if there is some evidence that is conflicting. *State, Dep't of Health & Welfare v. Doe*, 234 P.3d 733, 735 (Idaho 2010).

At the trial/juvenile court level the burden is on the DCW to demonstrate by clear and convincing evidence that it made reasonable efforts toward reunification. Clear and convincing evidence is described as: “that degree of proof that will produce in the factfinder a firm conviction as to the allegation sought to be established.” *Baker v. Arkansas Dep't of Human Servs.*, 8 S.W.3d 499, 503 (Ark. 2000). Clear and convincing evidence does not need to rise to the level where it proves that placing the child back in the custody of the parent is wholly inadequate for the child's very survival. *Egley v. Blackford County Dep't of Pub. Welfare*, 592 N.E.2d 1232, 1233 (Ind.1992). Rather, it is sufficient to show by clear and convincing evidence that the child's “emotional and physical development are *threatened*” by the parent's custody. *Bester v. Lake Cty. Office of Family & Children*, 839 N.E.2d 143, 148 (Ind. 2005) (emphasis added).

The DCW may meet its burden in showing it made reasonable effort toward reunification in one of three ways: “(1) by showing that it made such efforts, (2) by showing that the parent was unable or unwilling to benefit from reunification efforts, or (3) by a previous judicial determination that such efforts were not appropriate.” *In re Gabriella A.*, A.3d 805, 809 (Conn. App. Ct. 2014) *aff'd*, 319 Conn. 775 (2015).

This Court should follow the reasoning of the Whittier Court of Appeal and give deference to the juvenile court’s finding that the Whittier DCW demonstrated by clear and convincing evidence that it made reasonable efforts to reunify Petitioner with her daughter to satisfy the first factor of the test. It also showed that Petitioner was unable and unwilling to

benefit from reunification efforts under the second factor. There have been no prior judicial proceedings, so an analysis under third factor is not necessary for this case. As the DCW met its burden, the decision by the Juvenile Court to terminate reunification services was not clearly erroneous.

A. Efforts toward reunification were reasonable.

The DCW efforts toward reunification were reasonable because it placed clear, attainable expectations on the Petitioner that were logically calculated to remedy daughter's abandonment.

Determining whether reasonable efforts were made to provide the ordered reunification services requires the Court to evaluate what actions the DCW took as it relates to offering services and setting clear expectations of a parent in relation to that parent's situation and limitations. It is a fact-sensitive inquiry that must consider the totality of circumstances on a case-by-case basis. *In Interest of Torrance P.*, 522 N.W.2d 243, 245 (Wis. Ct. App. 1994). Reasonableness is an objective standard and whether reasonable efforts have been shown by clear and convincing evidence requires an appellate court to carefully consider the circumstances of each individual case. *In re Kyara H.*, 83 A.3d 1264, 1274 (Conn. Ct. App. 2014). State courts recognize that the term "reasonable efforts" in the area of reunification derives from federal law, and thus defines it as "efforts that are reasonably likely to achieve the objectives set forth." *In re James G.*, 943 A.2d 53, 75 (Md. Ct. App. 2008).

The objective in any reunification plan is to reunite children with their families. *Ex parte T.V.*, 971 So. 2d 1, 11 (Ala. 2007). However, efforts to obtain such reunification should not extend for unlimited periods of time to the detriment of children. *Id.* Some states, in furtherance of mandatory federal statutes like the Adoption and Safe Families Act ("ASFA"), see 42 U.S.C. § 620 et seq., and the Social Security Act, § 471, have gone so far as to pursue reunification over

a period of a decade or more. *Id.* This pursuit has often resulted in extremely negative consequences for children, including, but not limited to, what social service experts call “foster care drift,” where children move from one foster home to another. *Id.* “Foster care drift” puts the child at serious risk for attachment disorders, where children are incapable of emotional attachment to another human being. *Id.* In response, Congress amended the ASFA in 1997 and modified it to place equal or greater emphasis on a child's *safety* and *permanence* when a court or an agency is determining what is in the best interests of the child.” *Id.* (emphasis added.)

Most states only require the child welfare agency to make more “active” reunification efforts in special cases, like those involving the Indian Child Welfare Act. *Barbara P. v. State, Dep't of Health & Soc. Servs.*, 234 P.3d 1245, 1262 (Alaska 2010). Some states have healthier budget allotments dedicated to social services than others, which raises the bar concerning reasonable efforts in those jurisdictions. Taking into account these policy and budgetary differences across state lines is important to understanding what constitutes reasonable efforts at reunification. The United States Supreme Court has stated that the Constitution does not empower the Court to “second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.” *Dandridge v. Williams*, 397 U.S. 471, 487 (1970). In recognition of the limited social service resources courts have pointed out that “[n]either the federal nor the state constitution *guarantees* family unity at state expense.” *Brown v. Feaver*, 726 So. 2d 322, 325 (Fla. Dist. Ct. App. 1999) (emphasis added).

The standard for reasonable efforts require a logical connection between the services provided and the expectations placed upon the parent, and those efforts must seek to address the problems that led to the court asserting jurisdiction over the child. The minimum requirements

are for the child welfare agency to evaluate and determine the parent's needs, and to put clear, attainable expectations in place. *In re Morrow*, No. 299096, 2011 WL 182166 (Mich. Ct. App. Jan. 20, 2011). A mismatch between the needs of the parent and the services provided is grounds for a finding of the DCW failing to make reasonable efforts. *In re James G.*, 943 A.2d at 78. In *In re James G.*, a single referral to an inappropriate employment program did not address the major identified impediment to reunification, and the father's lack of education, lack of skills, and prior criminal record clearly indicated father's need for more intensive assistance. *Id.* Failure to make reasonable efforts has also been found when the child welfare agency failed to refer a mother to suggested services such as cognitive behavioral therapy or parent aide services. *In re Manuel P.*, 889 A.2d 192, 197 (R.I. 2006).

Here, no such failure to make reasonable efforts at reunification occurred. The Juvenile Court laid out a simple, clear, and attainable reunification plan, which Petitioner could complete while continuing to live in Guatemala. The plan required that Petitioner take classes to help her with taking care of Jasmine's condition, to learn job skills, make regular contact with Jasmine, and to keep in contact with the DCW caseworker.

Petitioner's contentions—that the DCW should have provided her with funds for phone calls and postage, offered the required classes online, as well as immigration counsel to assist with obtaining a visa—are inconsistent with the limitations she claims prevent her from obtaining a visa back to the United States. Petitioner was able to call and send letters without assistance during the period she remained in Guatemala while Jasmine was in the United States. DCW funded immigration counsel is not necessary as Petitioner was able to *twice* obtain a visa for herself and Jasmine without the assistance of counsel. Lastly, Petitioner's contention that classes should be offered online is a demand of a futile act. Even if the classes on parenting

fragile children were offered online, there is no way Petitioner would have been able to utilize them as she claims to not have access to computer or the internet. These limitations are merely claimed by Petitioner, and do not hold up under their own weight.

The DCW has showed by clear and convincing evidence that it made reasonable efforts to reunite Petitioner with Jasmine.

B. Petitioner was unwilling and unable to benefit from the reunification plan.

The Juvenile Court was correct in terminating reunification services as Petitioner was unwilling and unable to benefit from the plan.

The law requires that reunification services continue for the entire statutory period or as long as reasonable unless the court finds that the “parent is *unable* or unwilling to benefit from reunification efforts.” *In re Ebony H.*, A.2d 1158, 1162 (Conn. App. Ct. 2002). Mere improvement is not enough to continue reunification services for an unreasonable amount of time. In *In re Keyashia*, the court found that the respondent had “made progress in all of the areas of her life regarding rehabilitation” but had not consistently demonstrated that she could provide for herself or for the child.” 120 Conn. App. 452, 457, 991 A.2d 1113, 1117 (2010). Failure by a parent to maintain contact with the child is a substantial barrier to reasonable or successful compliance with a reunification plan. *People ex rel. J.A.S.*, 160 P.3d 257, 260 (Colo. App. Ct. 2007). Compliance cannot be found if the parent has not attended visitations with the child unless good cause can be shown for failing to maintain contact. *Id.* Unjustifiable failure by a parent to comply with the reunification plan is solid ground for a juvenile court to terminate services. *In re S.L.E.*, 633 S.E.2d 454, 455 (Ga. App. Ct. 2006). A parent failing to maintain safe, stable and adequate housing is also grounds for terminating services. *State Dep't of Health & Welfare v. Doe*, 234 P.3d 733, 736 (Idaho 2010).

Conspicuous acts of reaching out to a child, where a parent may be poverty stricken or in a remote country or region, demonstrates a determination to be reunified despite economic or geographic difficulties, and may be considered as grounds for continuing reunification services. *In re Interest of Angelica* 767 N.W.2d 74, 83 (Neb. 2009). Such acts of reaching out have been demonstrated from remote areas in Guatemala in other cases. In *In re Interest of Angelica L.* the mother contacted two missionaries, a few months after arriving in Guatemala, seeking help regaining custody of her children. *Id.* The mother provided her caseworker with the missionaries' contact information and gave permission for the caseworker to discuss her case with the missionaries. *Id.* The record also indicated that the mother contacted [DCW] several times to inquire about how she could get her children back. *Id.*

In determining whether a parent is unable or unwilling, an appellate court should give deference to factual determinations by the juvenile court as to whether the parent has "remedied the conduct or conditions . . . that place the child at substantial risk" and whether "returning the child to the parent would place the child at substantial risk of physical or mental injury." *Barbara P. v. State, Dep't of Health & Soc. Servs.*, 234 P.3d 1245, 1253 (Alaska 2010). These findings are best made by a trial court after hearing witnesses and reviewing evidence to determine its credibility. *Id.*

Here, Petitioner testified as to her desire to be reunified with Jasmine, however the juvenile court, which had the opportunity to hear her testimony and determine her credibility via telephone determined additional efforts to be futile. In the course her reunification plan, Petitioner has also given rise for the court to consider her lack of stable and safe housing as grounds for termination. Petitioner's inability to shelter and feed herself has left little doubt that she would not be able to take care of Jasmine with her enhanced medical needs. The trial court

below reasoned the decision to terminate was in the best interest of Jasmine. It correctly emphasized Jasmine's need for a stable and predictable environment, where her health care needs could be met. The Court of Appeals echoed this sentiment, relying heavily on the testimony of Jasmine's doctor that she would likely die if returned to Petitioner's care in Guatemala.

In light of these facts and the standard of review, the Juvenile Court was correct in terminating reunification services as Petitioner was unwilling and unable to benefit from the plan.

CONCLUSION

Respondent respectfully requests the judgment of the lower courts be affirmed in all respects ruling that Jasmine is a dependent of the court, that Jasmine is a neglected and abandoned child, that the juvenile court made the appropriate findings in support of SIJS, and that the DCW made reasonable efforts towards reunification.

Dated this 2nd day of January, 2016.

Respectfully submitted,

*Attorneys for Respondent
Team 16*

APPENDIX

State of Whittier Juvenile Code § 100 – Conditions of Abuse or Neglect

Any child who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge that person to be a dependent child of the court:

- (a) The child has suffered, or there is a substantial risk that the child will suffer, serious physical injury harm inflicted non-accidentally upon the child by the child's parent or guardian. For the purposes of this subdivision, a court may find there is a substantial risk of serious future injury based on the manner in which a less serious injury was inflicted, a history of repeated inflictions of injuries on the child or the child's siblings, or a combination of these actions by the parent or guardian which indicate the child is at risk of serious physical harm. For purposes of this subdivision, "serious physical harm" does not include reasonable and age-appropriate spanking to the buttocks where there is no evidence of serious injury.
- (b) The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child, or the willful negligent failure of the child's parent or guardian to adequately supervise or protect the child from the conduct of the custodian with whom the child has been left, or by the willful or negligent failure of the parent or guardian to provide the child with adequate and appropriate food, clothing, shelter, or medical treatment, or by the inability of the parent or guardian to provide regular care for the child due to the parent's or guardian's mental illness, developmental disability, or substance abuse.
- (c) The child is suffering serious emotional damage, or is at a substantial risk of suffering serious emotional damage, evidenced by severe anxiety, depression, withdrawal, or untoward aggressive behavior toward self or others, as a result of the conduct of the parent or guardian or who has not parent or guardian capable of providing appropriate care. No child shall be found to be a person described by the subdivision if the willful failure of the parent or guardian to provide adequate mental health treatment is based on a sincerely held religious belief and if a less intrusive judicial intervention is available.
- (d) The child has been sexually abused, or there is a substantial risk that the child will be sexually abused, by his or her parent or guardian or a member of his or her household, or the parent or guardian knew or reasonably should have known that the child was in danger of sexual abuse.
- (e) The child is under the age of five years and has suffered severe physical abuse by a parent, or by any person known by the parent, if the parent knew or reasonably should have known that the person was physically abusing the child. For the purposes of this subdivision, "severe physical abuse" means any of the following: any single act of abuse which causes physical trauma of sufficient severity that, if left untreated, would cause

permanent physical disfigurement, permanent physical disability, or death; any single act of sexual abuse which causes significant bleeding, deep bruising, or significant external or internal swelling; or more than one act of physical abuse, each of which causes bleeding, deep bruising, significant external or internal swelling, bone fracture, or unconsciousness; or the willful, prolonged failure to provide adequate food. A child may not be removed from the physical custody of his or her parent or guardian on the basis of a finding of severe physical abuse unless the social worker has made an allegation of severe physical abuse.

- (f) The child's parent or guardian caused the death of another child through abuse or neglect.
- (g) The child has been left without reasonable support; the parent has failed to maintain regular contact with the child, including normal supervision. Abandonment includes a judicial finding that a parent has made only minimal efforts to support and communicate with the child. Failure to maintain a normal parental relationship with the child without just cause for a period of six months constitutes prima facie evidence of abandonment.
- (h) The child has been freed for adoption by one or both parents for 12 months by either relinquishment or termination of parental rights or an adoption petition has been granted.
- (i) The child has been subjected to an act or acts of cruelty by the parent or guardian or a member of his or her household, or the parent or guardian has failed to adequately protect the child from an act or acts of cruelty when the parent or guardian knew or reasonably should have known that the child was in danger of being subjected to an act or acts of cruelty.
- (j) The child's sibling has been abused or neglected, as defined in subdivision (a), (b), (d), (e), or (i), and there is a substantial risk that the child will be abused or neglected, as defined in those subdivisions. The court shall consider the circumstances surrounding the abuse or neglect of the sibling, the age and gender of each child, the nature of the abuse or neglect of the sibling, the mental condition of the parent or guardian, and any other factors the court considers probative in determining whether there is a substantial risk to the child.

As used in this section, "guardian" means the legal guardian of the child.