

Family Court Bench Card on Issues That Arise in Custody Cases Involving Immigrant Parents, Children and Crime Victims¹

By Leslye E. Orloff, Andrea Carcamo Cavazos, and Abigail Whitmore²
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Ensuring That Best Interest of the Child Standards Apply to Families That Include Immigrants

In recent years, a growing number of families coming before state family courts are “mixed-status” families that contain at least one undocumented immigrant and one citizen family member.³ Foreign born persons make up 13% of the U.S. population,⁴ and 24% of children ages 17 and under live in households with at least one immigrant parent.⁵ As a result, increasing numbers of state court judges are adjudicating custody cases involving immigrant litigants and children. This Bench Card is designed to provide court access to accurate information that will help courts fairly judge cases in which immigration issues, questions, or concerns are raised by litigants in custody cases.

Domestic Violence, Immigration, and Best Interest of the Child

Under state law, judicial actions affecting the care of children are determined using the “best interest of the child” standard. This is particularly true in families experiencing domestic violence.⁶ Best practices and evidence-based research support consideration of domestic violence in custody cases.⁷ Abusers use child custody litigation as a vehicle to maintain control over the victims.⁸ Domestic violence is harmful to the entire family.⁹ The American Bar Association (ABA) has long taken the position that any history of abuse toward an adult in the home of the parent seeking custody must be considered the primary factor in applying the “best interest” standard.¹⁰ The ABA has also recognized that:

“Batterers whose victims are immigrant parents use threats of deportation to avoid criminal prosecution for battering and to shift the focus of family court proceedings away from their

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² Copyright © The National Immigrant Women’s Advocacy Project, American University Washington College of Law 2013.

³ Pew Hispanic Center, *A Nation of Immigrants: A Portrait of the 40 Million, Including 11 Million Unauthorized* (January 29, 2013) available at http://www.pewhispanic.org/files/2013/01/statistical_portrait_final_jan_29.pdf.

⁴ American Community Survey 2011, U.S. Census Bureau.

⁵ Emma Britz and Jeanne Batalova, *US in Focus: Frequently Requested Statistics on Immigrants and Immigration in the United States* (Migration Policy Institute, January 2013) available at <http://www.migrationinformation.org/USfocus/display.cfm?id=931#7>.

⁶ See generally, Mo Therese Hannah, Ph.D. and Barry Goldstein, J.D., *DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY: LEGAL STRATEGIES AND POLICY ISSUES* (Civic Research Institute, 2010); See also *Best Interest of the Child State by State Maps* (last updated July 7, 2021), NIWAP (Jul. 7, 2021), <https://niwaplibrary.wcl.american.edu/best-interest-of-the-child>.

⁷ See e.g. Evan Stark, *Rethinking Custody Evaluation in Cases Involving Domestic Violence*, *Journal of Child Custody*, 6: 287-321. 2009; Jay G. Silverman, Cynthia M. Mesh, Carrie V. Cuthbert, Kim Slote, and Lundy Bancroft, *Child Custody Determinations in Cases Involving Intimate Partner Violence: a Human Rights Analysis*, *Am J Public Health*. 2004 June; 94(6): 951-957. See also *Coercive Control in Families, the Impact on Children and Extreme Cruelty* (Presentation by Evan Stark), NIWAP (Dec. 17, 2020), <https://niwaplibrary.wcl.american.edu/coercive-control-extreme-cruelty>.

⁸ Daniel G. Saunders, *Child Custody Decisions in Families Experiencing Woman Abuse*, 39 *SOCIAL WORK* 51, 53 (1994); Barbara Hart, *Family Violence and Custody Orders*, 43 *JUV. & FAM. CT. J.* 29, 33-34 (1992).

⁹ Naomi Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 *VAND. L. REV.* 1041, 1072 (1991).

¹⁰ Howard Davidson, *THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN: A REPORT TO THE PRESIDENT OF THE AMERICAN BAR ASSOCIATION* (Aug. 1994), available at <https://niwaplibrary.wcl.american.edu/pubs/impact-dv-children>.

violent acts... When the judicial system condones these tactics, children suffer. Victims of domestic violence who cannot receive relief from the criminal justice system, or who risk losing custody, return to their batterers... In addition, parties should not be able to raise, and courts should not consider, immigration status of domestic violence victims and their children in civil protection order, custody, divorce or child support proceedings. This change will ensure that children of immigrant domestic violence victims will benefit from reforms in the laws (like presumptions against awarding custody or unsupervised visitation to batterers) in the same manner as all other children.”¹¹

Parents have fundamental liberty and privacy interests in the care and custody of their children, a right protected by the U.S. Constitution.¹² These constitutional protections regarding the parent-child relationship apply equally to all parents and children, without regard to immigration status. The Supreme Court of Nebraska addressed this issue in a unanimous decision¹³ stating that there is an

“[o]verriding presumption that the relationship between parent and child is constitutionally protected and that the best interests of a child are served by reuniting the child with his or her parent. This presumption is overcome only when the parent has been proven unfit.”¹⁴

The Nebraska Supreme Court found that an immigrant parent does “not forfeit her parental rights because she was deported.”¹⁵ The right applies to all immigrant parents, without regard to their immigration status, whether or not the parent is deported from the United States. Further, the court stated, “we do not conclude that Maria’s attempt to bring herself and her child into the United States, in the belief that they would have a better life here, shows an appreciable absence of care, concern or judgment.”¹⁶ The Supreme Court confirmed that courts in best interest cases should not engage in “culture clash” comparisons.

“Whether living in Guatemala or the United States is more comfortable for the children is not determinative of the children’s best interests. We reiterate that the best interests of the child standard does not require simply that a determination be made that one environment or set of circumstances is superior to another.”¹⁷

Other courts have correctly recognized that decisions must be based on clear and convincing evidence of parental misconduct or inability, and not speculation of the “vagaries or vicissitudes that beset every family on its journey through the thickets of life.”¹⁸

Immigration Relief Is Available For Domestic Violence and Child Abuse Victims

Although immigration issues can arise in any custody case involving mixed immigration status families, immigration status is more likely to be used by one parent against the other parent in families experiencing domestic violence. Immigration related abuse, which includes threats of deportation, refusal to file or threats to withdraw or revoke immigration cases filed on the immigrant parent’s

¹¹ *Id.* at 19-20.

¹² *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 1212, 31 L.Ed.2d 551 (1972); and *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923).

¹³ *In re Interest of Angelica L.*, 277 Neb. 984 (2009).

¹⁴ *Id.* at 1007.

¹⁵ *Id.* at 1009.

¹⁶ *Id.* at 1007.

¹⁷ *Id.* at 1009.

¹⁸ *In re M.M.*, 587 S.E. 2d 825, 833.

behalf, is 10 times more prevalent in families where physical and sexual violence is also occurring than in emotionally abusive relationships.¹⁹ Abusers of non-citizen parents use threats to obtain custody and cut off access to the children as a form of coercive control that is effective in keeping battered immigrants from leaving abusive relationships and seeking court and police assistance to stop abuse.²⁰

Most battered immigrants only seek help from courts and police because they had learned about justice system help for domestic violence from community based advocates and legal services programs.²¹ However, the courts and police regularly encounter battered immigrants and are the first agencies with interpreters through whom the victim can communicate her experiences with domestic abuse. For that reason, courts should have brochures that provide an overview of immigrant victims legal rights under U.S. immigration laws available for distribution at the courthouse.²²

When courts find in the context of a custody, protection order, child support, divorce, or criminal case that domestic violence is occurring in a family that includes immigrant family members, it is highly likely that immigrant victims of intimate partner violence (same sex or heterosexual), child abuse, or elder abuse will qualify for immigration relief created by the Violence Against Women Act (VAWA), the Trafficking Victims Protection Act (TVPA), and other immigration laws. However, he or she may or may not be aware of this fact at the time of the family court proceedings. The primary forms of immigration relief immigrant victims of domestic violence, child abuse, elder abuse, human trafficking, stalking, sexual assault, dating violence and other violent crimes are eligible for include: VAWA self-petitioning, VAWA cancellation of removal, VAWA suspension of deportation, Battered Spouse Waiver, U visas for crime victims, T visas for human trafficking victims, Special Immigrant Juvenile Status, or Deferred Action for Childhood Survivors.²³

Some immigrant crime victims will come to court without knowing these remedies exist. Others will be in the process of applying for these remedies but may not reveal that fact in the family court proceeding because both the fact that the victim has filed for victim related immigration protections and the contents of the immigration files are protected by VAWA confidentiality under immigration law – a measure designed to ensure that the victim can obtain legal immigration status without the knowledge, cooperation or assistance of the abuser.²⁴ The system is designed to offer protection for victims who continue to reside with the abuser or work for the abusive employer until their immigration application has been approved and the victim obtains employment authorization, which can take an average of 1 year to 18 months.²⁵

¹⁹ Mary Ann Dutton, Leslye E. Orloff, & Giselle Aguilar-Hass, Characteristics of help-seeking behaviors, resources, and service needs of battered immigrant Latinas: Legal and policy implications. 7 GEORGETOWN J. OF POVERTY L. & POL'Y 245, 292 (2000).

²⁰ Id. at 302; Research has found that the four most significant barriers preventing battered immigrants from leaving abusive homes are 1) fear of deportation/immigration as a tool of abuse, 2) severity of the abuse, 3) fear of losing custody, and 4) language access. See, Mary Ann Dutton, Nawal Ammar, Leslye Orloff, and Darci Terrell, Use and Outcomes of Protection Orders by Battered Immigrant Women: REVISED FINAL TECHNICAL REPORT (National Institutes of Justice Grant # 2003-WG-BX-1004)(November 10, 2006) p. 1 available at <https://niwaplibrary.wcl.american.edu/pubs/fam-gov-nijtechnicalreportprotectionorders11-10-06>.

²¹ Nawal H. Ammar, Leslye E. Orloff, Mary Ann Dutton and Giselle A. Hass, *Battered Immigrant Women in the United States and Protection Orders: An Exploratory Research*, CRIM. J. REV. 2012 37: 337, 349-352 (August 2012), <https://niwaplibrary.wcl.american.edu/pubs/battered-women-protection-order-research>.

²² DHS brochures on crime victims legal rights are available in multiple languages at <https://niwaplibrary.wcl.american.edu/pubs/imm-options-victims-of-crimes>.

²³ Leslye E. Orloff, Benish Anver and Abigail Whitmore, *Family Court Bench Card on Immigration Rights of Battered Spouses and Children* (October 29, 2021), <https://niwaplibrary.wcl.american.edu/pubs/bench-card-on-immigration-relief-for-crime-victims>. See also Charles Palladino, *Overview of Types of Immigrant Status* (October 14, 2013), available at <https://niwaplibrary.wcl.american.edu/pubs/bchcrd-immstaturypes>.

²⁴ Benish Anver and Leslye E. Orloff, *Family Court Bench Card on Violence Against Women (VAWA) Confidentiality* (Oct. 11, 2013), available at <https://niwaplibrary.wcl.american.edu/pubs/family-court-bench-card-vawa-confidentiality>.

²⁵ Leslye E. Orloff, National Survey on Timing of Access to Work Authorization by Immigrant Victim VAWA Self-Petitioners and U-Visa Applicants (June 4, 2012) available at <https://niwaplibrary.wcl.american.edu/pubs/imm-qref-timingaccessworkauthoriz9-28-11>.

Common Immigration Status Issues Arising In Custody Cases

In custody cases state statutes require that courts issue custody orders based upon best interest of the child and primary caretaker determinations. The majority of courts that have taken immigration status into consideration have ruled that immigration cannot be the dispositive factor in a custody determination.²⁶ Issues about immigration status are most often raised in custody cases in one of two ways: 1) an opposing party will raise the immigration status of the opposing party to gain advantage in the custody case; or 2) a foreign born litigant will raise immigration status issues about their own status as evidence of immigration related abuse, to explain that they have obtained or are obtaining legal status, or to explain what benefits they can and cannot access and why they need child or spousal support. When courts have correct information about immigration laws, judges are better able to hold hearings and issues rulings in custody cases that reflect an accurate understanding of current immigration laws and policies resulting in the fair administration of justice that are free from bias.

A review of family court decisions nationally reveals that many courts are granting custody to immigrant parents without making the immigration status of the undocumented parent a factor in the custody case.²⁷ However, this review found subsets of reported cases in which the custody determinations were based on incorrect information and assumptions about immigration laws or bias that lead to immigrant parents unjustly losing the custody of children. These trends, followed by correct information about immigration laws and policies, are summarized below.²⁸

Undocumented or Temporary Immigration Status Means that the Immigrant Parent is at Risk of Removal From the United States: In cases involving domestic violence, child abuse, elder abuse and other immigrant crime victims, the Department of Homeland Security has issued a series of policies designed to prevent the deportation or removal of crime victims and witnesses.²⁹ Once an immigrant crime victim has filed an application for immigration relief that DHS has deemed valid, DHS cannot initiate immigration enforcement, detention, or removal actions against the victim and children included in the victim's application.³⁰ ICE officers and agents must also look for indicia or evidence that suggests that a noncitizen is a victim of crime and may be eligible for victim-based immigration benefits, even if they are not the beneficiary of victim-based immigration benefits and do not have

²⁶ See *Florentino v. Woods* (In re parentage of Florentino), No. 25966-4-II, 2002 Wash. App. LEXIS 1896 (Wash. Ct. App. Aug. 9, 2002) (determining that the father's immigration status did not affect the child and awarding him custody); In re Dependency of J.B.S., 123 Wn.2d 1, 12, 863 P.2d 1344 (1993); *Alfred v. Braxton*, 442 Pa.Super. 381, 385 (1995) (holding that immigration status can only be considered in relation to the best interests of the child, or its "effect upon the child's physical, intellectual, moral and spiritual well-being")

²⁷ *Castro v. United States*, 560 F.3d 381, 383-384 (2009). (The father was an unlawful immigrant from Mexico whereas the mother, who abandoned the family, was a U.S. citizen. Since the mother did not seek custody, the local police department and child protective services, as recognized by the court, held that the father had custody of the child); see also *Rory H. v. Mary M.*, 2003 NY Slip Op 51600U (2003) (determining that the best interests of the child was to be with the mother, a native of Ireland even though she could not continue to live in the United States legally. The court determining custody did consider immigration status, stating that it would be preferable for the US citizen child to stay in this country and receive all its benefits. The court ultimately held that the children's mother should receive custody because she can still provide the best opportunities for their child, including nearby family, free medical care, schooling and rent-free living with the mother's parents in Ireland, and support payments from the father.)

²⁸ For more information, see generally Abigail Whitmore and Leslye E. Orloff, *When Family and Immigration Laws Intersect: Case Law and Department of Homeland Security Policy Update* (2021) available at <https://niwaplibrary.wcl.american.edu/pubs/immigration-status-in-custody-cases>. See also Soraya Fata et al., *Custody of Children in Mixed-Status Families: Preventing the Misunderstanding and Misuse of Immigration Status in State-Court Custody Proceedings*, 47.2 FAM. L. Q. 191 (2013), available at <https://niwaplibrary.wcl.american.edu/mixed-status-fams-child-custody>.

²⁹ See Memorandum from Alejandro N. Mayorkas, *Guidelines for the Enforcement of Civil Immigration Law* (Sept. 30, 2021), available at <https://niwaplibrary.wcl.american.edu/wp-content/uploads/guidelines-civilimmigrationlaw.pdf>; ICE Directive No. 11005.3: Using a Victim-Centered Approach with Noncitizen Crime Victims (Aug. 10, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/ice-victim-centered-directive-11005-3>; Memorandum from John Trasvina, *Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities* (May 27, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/trasvina-opla-interim-guidance-civil-enforcement-priorities-5-27-21>; John Morton, Director, Immigration Customs Enforcement, Memorandum to All Officers, Prosecutorial Discretion: Certain victims, Witnesses, and Plaintiffs, June 17, 2011, available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/Morton-CertainVictimsWitnessesandPlaintiffs-Memo-06-17-2011.pdf/view>.

³⁰ U.S. Department of Homeland Security, *DHS Broadcast Message on New 384 Class of Admission Code*, December 21, 2010, available at: <https://niwaplibrary.wcl.american.edu/pubs/dhs-broadcast-class-admission-code>.

pending applications for such benefits, which would ultimately provide protection from removal actions.³¹

The 2021 Department of Homeland Security’s agency-wide immigration enforcement policy memoranda go further making it clear that:

“The fact an individual is a removable noncitizen therefore should not alone be the basis of an enforcement action against them. We will use our discretion and focus our enforcement resources in a more targeted way. Justice and our country's well-being require it.”³²

Parents, children, and other parties appearing in a state court custody proceeding would only be a likely target for immigration enforcement if they were an enforcement priority:

Civil Immigration Enforcement Priorities: ³³

- **Threat to National Security** –
 - A noncitizen who engaged in or is suspected of terrorism or espionage, or terrorism-related or espionage-related activities; or
 - Who otherwise poses a danger to national security, is a priority for apprehension and removal.

- **Border Security** –
 - A noncitizen apprehended at the border or port of entry while attempting to unlawfully enter the United States; or
 - A noncitizen apprehended in the United States after unlawfully entering after November 1, 2020.
 - In cases concerning border security, there could be mitigating or extenuating facts and circumstances that militate in favor of declining enforcement action.

- **Public Safety** – a noncitizen poses a current threat to public safety, typically because of serious criminal conduct.
 - Whether a noncitizen poses a current threat to public safety requires an assessment of the individual and the totality of the facts and circumstances.
 - In reevaluating whether a noncitizen currently “poses a threat to public safety” requires an assessment of the individual and the totality of the facts and circumstances and consideration of both aggravating and mitigating factors.
 - DHS personnel should, to the fullest extent possible, obtain and review the entire criminal and administrative record and other investigative information to learn of the totality of the facts and circumstances of the conduct at issue.

DHS policies include non-exclusive lists of factors and facts that could serve as mitigating, extenuating, or aggravating factors and DHS enforcement officials will use in exercising prosecutorial

³¹ See ICE Directive No. 11005.3: Using a Victim-Centered Approach with Noncitizen Crime Victims (Aug. 10, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/ice-victim-centered-directive-11005-3>.

³² See Memorandum from Alejandro N. Mayorkas, Guidelines for the Enforcement of Civil Immigration Law 2 (Sept. 30, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/civil-immigration-enforcement-guidelines-9-2021>; DHS Press Release: Secretary Mayorkas Announces New Immigration Enforcement Priorities (September 30, 2021) <https://niwaplibrary.wcl.american.edu/pubs/mayorkas-enforcement-priorities-press-release-9-30-21>.

³³ See MAYORKAS ENFORCEMENT GUIDELINES at 3.

discretion and making immigration enforcement decisions. These lists of factors also provide legally correct information about immigration law that will be helpful to state court judges' decision-making responding to allegations by parties about whether, if, and/or how immigration status should play any role in state court custody or other family law cases. Further, when state courts familiar with the fact of the cases before them make findings of fact about the existence of any of these factors and include such findings in state court orders, this can provide useful evidence about the factors that pertain in a particular case to both the immigrant before the court and DHS investigators, adjudicators, and enforcement agents. The following examples of relevant mitigating factors,³⁴ absent serious aggravating factors:³⁵

Mitigating and Extenuating Facts and Circumstances³⁶

- Compelling humanitarian factors
 - Persons with poor health or a serious health conditions³⁷
 - Persons who are minors, pregnant, or elderly³⁸
 - The person is the primary caregiver to a seriously ill relative in the United States,³⁹ including an immediate family or household member who is, known to be suffering from serious physical or mental illness⁴⁰
 - Victims of domestic violence, trafficking, or other serious crimes⁴¹
 - Status as a victim, witness, or plaintiff in civil or criminal proceedings⁴²
 - Persons who came to the U.S. as young children and have since lived in the U.S. continuously⁴³
 - The person is a party to significant collateral civil litigation (e.g., family court proceedings, non-frivolous civil rights or labor claims)⁴⁴
 - The person is otherwise eligible for humanitarian protection⁴⁵
- Veterans (military service members or immediate relatives thereof)⁴⁶
- Persons likely to be granted temporary or permanent immigration relief⁴⁷
- Whether the person has potential immigration relief available⁴⁸
- Significant law enforcement or other governmental interest⁴⁹

³⁴ See MAYORKAS ENFORCEMENT GUIDELINES at 3-4 (noting mitigating factors that mitigate in favor of declining enforcement action in determining whether a noncitizen poses a current threat to public safety); TRASVINA ENFORCEMENT AND REMOVAL POLICIES at 9.

³⁵ See MAYORKAS ENFORCEMENT GUIDELINES at 3 (listing factors that can militate in favor of enforcement action when considering whether a noncitizen poses a current threat to public safety); TRASVINA ENFORCEMENT AND REMOVAL POLICIES at 6. (Relevant aggravating factors include: criminal history, participation in persecution or other human rights violations, extensiveness and seriousness of prior immigration violations (e.g. prior removals by ICE, prior illegal entries, noncompliance with conditions of release), fraud or material misrepresentation).

³⁶ See MAYORKAS ENFORCEMENT GUIDELINES at 2-4.

³⁷ See TRASVINA ENFORCEMENT AND REMOVAL POLICIES at 5, 6, and 9.

³⁸ See MAYORKAS ENFORCEMENT GUIDELINES at 3; TRASVINA ENFORCEMENT AND REMOVAL POLICIES at 6 and 9.

³⁹ See MAYORKAS ENFORCEMENT GUIDELINES at 3 (listing as a mitigating factor how removal would impact family in the United States, such as loss of a caregiver); TRASVINA ENFORCEMENT AND REMOVAL POLICIES at 6.

⁴⁰ See TRASVINA ENFORCEMENT AND REMOVAL POLICIES at 9-10.

⁴¹ See TRASVINA ENFORCEMENT AND REMOVAL POLICIES at 10 (This includes all criminal activities that would qualify for protections under the T and U visa certification programs).

⁴² See MAYORKAS ENFORCEMENT GUIDELINES at 3; TRASVINA ENFORCEMENT AND REMOVAL POLICIES at 6.

⁴³ See TRASVINA ENFORCEMENT AND REMOVAL POLICIES at 10.

⁴⁴ See TRASVINA ENFORCEMENT AND REMOVAL POLICIES at 10.

⁴⁵ See MAYORKAS ENFORCEMENT GUIDELINES at 3.

⁴⁶ See MAYORKAS ENFORCEMENT GUIDELINES at 3; TRASVINA ENFORCEMENT AND REMOVAL POLICIES at 9.

⁴⁷ See MAYORKAS ENFORCEMENT GUIDELINES at 3 (listing as a mitigating factor whether the individual is eligible for humanitarian protection or other immigration relief); TRASVINA ENFORCEMENT AND REMOVAL POLICIES at 9.

⁴⁸ See TRASVINA ENFORCEMENT AND REMOVAL POLICIES at 6.

⁴⁹ See TRASVINA ENFORCEMENT AND REMOVAL POLICIES at 10.

- This includes cooperating witnesses, confidential informant and immigrants otherwise assisting state or federal law enforcement officials, prosecutors, and agencies involved in enforcing labor and civil rights laws
- Long term Lawful Permanent Residents⁵⁰
- Length of residence in the United States⁵¹
- Work history in the United States⁵²
- Pursuit or completion of education in the United States⁵³
- Contributions to the community⁵⁴
- Family or community ties to the United States⁵⁵
- The impact of removal on family in the United States, such as loss of a provider or caretaker⁵⁶
- Where an individual has a criminal history, mitigating factors include:
 - Length of time since a crime or offense was committed and evidence of rehabilitation⁵⁷
 - Convictions that were vacated or expunged⁵⁸
 - A mental condition that may have contributed to criminal conduct, or a physical or mental condition requiring care or treatment⁵⁹

In addition to mitigating factors, the latest DHS guidance on prosecutorial discretion⁶⁰ provides aggravating factors that militate in favor of enforcement action, particularly in considering whether an individual poses a threat to public safety. Addressing these aggravating factors in state court findings and orders can be useful for both immigrant crime victims and DHS officials responsible for making immigration enforcement and prosecutorial discretion determinations. Aggravating factors include:

- The gravity of the offense of conviction and the sentence imposed⁶¹
- The nature and degree of harm caused by the criminal offense⁶²
- The sophistication of the criminal offense⁶³
- Use or threatened use of a firearm or dangerous weapon⁶⁴
- A serious prior criminal record⁶⁵

As the protections for immigrant victims make clear and the categories of immigrants who are both likely and unlikely to be deported augment, many immigrants involved in custody proceedings in state court including those who are undocumented are not likely to be subject to immigration enforcement or deportation. For these reasons, it is especially important that with very limited exceptions⁶⁶ allegations regarding a noncitizen parent's potential removal is not an appropriate

⁵⁰ See TRASVINA ENFORCEMENT AND REMOVAL POLICIES at 10.

⁵¹ See MAYORKAS ENFORCEMENT GUIDELINES at 3; TRASVINA ENFORCEMENT AND REMOVAL POLICIES at 5-6.

⁵² See TRASVINA ENFORCEMENT AND REMOVAL POLICIES at 6.

⁵³ See TRASVINA ENFORCEMENT AND REMOVAL POLICIES at 6.

⁵⁴ See TRASVINA ENFORCEMENT AND REMOVAL POLICIES at 6.

⁵⁵ See TRASVINA ENFORCEMENT AND REMOVAL POLICIES.

⁵⁶ See MAYORKAS ENFORCEMENT GUIDELINES at 3.

⁵⁷ See MAYORKAS ENFORCEMENT GUIDELINES at 4.

⁵⁸ See MAYORKAS ENFORCEMENT GUIDELINES at 4.

⁵⁹ See MAYORKAS ENFORCEMENT GUIDELINES at 3.

⁶⁰ See MAYORKAS ENFORCEMENT GUIDELINES.

⁶¹ See MAYORKAS ENFORCEMENT GUIDELINES at 3.

⁶² See MAYORKAS ENFORCEMENT GUIDELINES at 3.

⁶³ See MAYORKAS ENFORCEMENT GUIDELINES at 3.

⁶⁴ See MAYORKAS ENFORCEMENT GUIDELINES at 3.

⁶⁵ See MAYORKAS ENFORCEMENT GUIDELINES at 3.

⁶⁶ These exceptions are immigrants, including immigrant parents who are immigration enforcement priorities. See MAYORKAS ENFORCEMENT GUIDELINE 3-4. See also Anna Pohl et al., *Battered Immigrants and the Criminal Justice System*, BREAKING BARRIERS: A COMPLETE GUIDE TO LEGAL

consideration when courts conduct an in the best interest of the child analysis in custody or any other state family court proceeding.

A review of statistical data from DHS on actual removals also shows how likely removal is for certain individuals. Updated ICE removal statistics from 2020 state that 90% of administrative immigration arrests by ICE in 2020 were of individuals who had criminal convictions or pending criminal charges at the time of arrest.⁶⁷ Ninety-two percent (92%) of removals of persons who were in the interior of the U.S. were of persons who had criminal convictions or pending criminal charges.⁶⁸ What these numbers show is that parents before the court in a custody case will not be likely to be removed unless they have criminal convictions or have a removal order issued against them by DHS or an immigration judge. Courts have tended to correctly acknowledge that a mere risk of removal is too remote to be taken into consideration in custody proceedings.⁶⁹ While some courts may still consider evidence regarding the likelihood of removal, this has been treated more frequently as a single factor in the analysis rather than determinative of the child's best interest.⁷⁰

Parent Must Be Awarded Custody to Be Able to Confer Immigration Status to Their Children

Throughout immigration law a parent's ability to file an application with the Department of Homeland Security sponsoring a child to attain legal immigration status is governed by the existence of the parent-child relationship. A parent's ability to file an application for immigration relief for their child is not related to whether or not the sponsoring parent has custody of the child.⁷¹ Immigrant crime victims who qualify for immigration relief under VAWA, the T visa or the U visa can include their immigrant children in their applications and the children will attain legal immigration status along with their crime victim parents.⁷² There are ONLY TWO instances when custody has any on an immigration case.

- When a child of a citizen parent is born and resides outside of the United States, to confer citizenship, the child must live in the custody of the citizen parent.⁷³ Since the child and the parent both reside outside the United States, these cases are unlikely to come before state family court judges in custody proceedings.
- When a lawful permanent resident child is living with a citizen parent the child can apply for citizenship after three years of lawful permanent residency.⁷⁴ No legal custody order is required. If the parents of the lawful permanent resident child separate or divorce and legal custody is granted to the non-citizen parent the child will need to wait 5 years before they can

RIGHTS AND RESOURCES FOR BATTERED IMMIGRANTS 8-9 (2013), available at <http://niwap.wpengine.com/pubs/ch7-batteredimmcriminaljusticesystem>. (Providing an overview of how criminal convictions impact immigration relief and immigration enforcement.

⁶⁷ See U.S. DEPARTMENT OF HOMELAND SECURITY, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, ICE ANNUAL REPORT FISCAL YEAR 2020 5 (2020), available at <https://niwaplibrary.wcl.american.edu/pubs/ice-annual-report-2020>.

⁶⁸ See U.S. DEPARTMENT OF HOMELAND SECURITY, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT FISCAL YEAR 2020, Enforcement and Removal Operations Report 4 (2020), available at <https://niwaplibrary.wcl.american.edu/pubs/ice-ero-report-2020> (interior removals are enforcement actions against individuals who were not arrested within 100 miles of a U.S. border or in the process of crossing a border).

⁶⁹ See *Hupp v. Rosales*, 2013 IL App (4th) 130433-U (court stated that the danger of removal is extremely remote).

⁷⁰ See *N.C.T. v. F.T.S.*, No. A-3822-16T3, 2018 WL 891216 (N.J. Super. Ct. App. Div. Feb. 15, 2018) (court found that circumstances weighed in favor of granting custody to the immigrant brother despite the risk of removal); *Ramirez v. Ramirez*, 12-166 (La. App. 5th Cir. Aug. 8, 2013), 124 So. 3d 8 (court noted that being subject to deportation alone is not sufficient to support a finding that custody would result in substantial harm to the child); *M.R.R.J. v. P.F.T.*, No. 13-05045, 2015 WL 9855922 (Del. Fam. Ct. Sept. 4, 2015) (court stated that the totality of the circumstances supported awarding the mother custody despite her being at risk of deportation); see also *In re Margarita T.*, No. A-95-530, 1995 WL 749701 (Neb. Ct. App. Dec. 19, 1995) (court found that the parents of the child were unfit not based on the father's immigration status and risk of removal, but based on his failure to protect the child from the mother's abuse and neglect)

⁷¹ To look up a parent's ability to sponsor a child for legal immigration status by the type of immigration or citizenship status the parent has, see Leslye E. Orloff, Andrea Cavazos Carcamo, and Lucia Macias, *Immigration Status: Work Authorization, Public Benefits, and Ability to Sponsor Children* (April 17, 2013), available at <https://niwaplibrary.wcl.american.edu/pubs/fam-chart-immstatus>.

⁷² INA §204(a)(1)(A)(iii)-(v); INA §101(a)(15)(U)(ii), 8 C.F.R. § 214.14(a)(10),(f).

⁷³ INA §322(a); 8 U.S.C. §1433

⁷⁴ INA §320(a), 8 U.S.C. §1431 (1952)

apply for citizenship.⁷⁵ Exception: If the child attained lawful permanent residency through VAWA either as an abused child or the child of an abused immigrant parent, the child will be able to naturalize in 3 years.⁷⁶

Immigration Status Impacts the Child's Stability and the Parent's Ability to Provide for Their Child: Immigrant victims of domestic violence, child abuse, and other crimes will ultimately receive work authorization through their VAWA, U visa, or T visa immigration case.⁷⁷ When the immigrant parent or their child has been a victim of domestic violence, if the abuser is their citizen or lawful permanent resident spouse or parent, the reason the immigrant parent lacks legal work authorization was because of the abusive spouse or parent's choice not to file an immigration case. Courts can award custody to the immigrant parent and order the citizen or lawful permanent resident parent to pay child support. Lack of immigration status does not mean, as a matter of fact, that the immigrant parent is not working. Many immigrants are in fact working in the United States in the informal economy despite not having work authorization.⁷⁸ Courts have recognized that, while undocumented status may present challenges, undocumented immigrants can enter into employment relationships and are capable of providing for minor children.⁷⁹ Courts deciding child support in cases involving non-citizen parents courts across the country make child support awards based upon the income the non-custodial parent is earning.⁸⁰ Courts have ruled that a custodial parent can obtain child support regardless of the other parent's immigration status.⁸¹

Undocumented Immigration Status Does Not Place the Child at Risk of Parental Kidnapping: Immigrant parents with children in the United States who are undocumented and who are eligible for VAWA, U visa or T visa, or another form of immigration relief are unlikely to leave United States. Amendments to U.S. immigration laws created 3-year, 10-year and permanent bars to reentry that could cut parents off from their children permanently if the parents leave the United States.⁸² In determining the risk of parental kidnapping, courts consider factors other than immigration status.⁸³ Undocumented-immigrant status and immigration proceedings alone are not enough for courts to consider a party a flight risk. U.S. Department of Justice-funded research on the likelihood of

⁷⁵ INA § 316(a)(1), 8 U.S.C. § 1427(a)(1)

⁷⁶ William R. Yates, Clarification of Classes of Applicants Eligible for Naturalization under Section 3 19(a) of the Immigration and Nationality Act (INA), as amended by the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA). Pub. L. 106-386 (January 27, 2005) available at <https://niwaplibrary.wcl.american.edu/pubs/clarification-eligible-applications>.

⁷⁷ INA §106 (2011).

⁷⁸ David B. Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11 Tex. Hisp. J.L. & Pol'y 45, 70 (2005). See also President Barack H. Obama, Remarks at Del Sol High School on Comprehensive Immigration Reform (January 29, 2013), available at: <http://www.whitehouse.gov/the-press-office/2013/01/29/remarks-president-comprehensive-immigration-reform>.

⁷⁹ See Hupp v. Rosales, 2013 IL App. (4th) 130433-U (court stated that the undocumented status of the mother did not imply the mother was unable to provide a stable environment); see also *In re Custody of A.L.R.*, 830 N.W.2d 163 (Minn. Ct. App. 2013) (court found that undocumented-immigrant status is not unusual and many undocumented adults are parents of minor children).

⁸⁰ Establishing what an immigrant parent is earning can be difficult, particularly for parents working in the informal economy. Courts have looked at factors like the ability to make car payments and installment payments non-essential items like home entertainment systems as a means to gauge ability to pay child support. Child support payments should be made through the court and by wage withholding when possible.

⁸¹ *Asal v. Asal*, 960 P.2d 849 (1998).

⁸² INA § 212(a)(6) and 212(a)(9).

⁸³ See *Rory H. v. Mary M.*, 13 A.D.3d 373 (2004) (the court's decision rested upon the fact that the immigrant mother had sent a letter to a family member stating that she was planning to leave the country with her children); *Matter of Welsh v. Lewis*, 292 A.D.2d 536 (N.Y. App. Div. 2002) (court took into consideration many factors, besides immigration status, to determine to grant custody to immigrant mother, who had already relocated to Ireland with her children); and *In Re Ish-Shalom v. Wittman*, 19 A.D.3d 493, 494 (N.Y. App. Div. 2005) (the court decided that the mother was likely to kidnap the children based on the fact that the immigrant mother had transferred her kids to another jurisdiction despite the Judge's instructions indicating not to do so) see also *Huff v. Vallejo*, 347 Ga. App. 127, 817 S.E.2d 696 (2018) (court found that the father's undocumented immigration status did not make him a flight risk).

international child kidnapping found that common characteristics among international child abductors include: ⁸⁴

- strong ties to another country;
- involvement in a marriage or intimate partner relationship with a partner from a different ethnicity, culture and/or country of origin;
- threats to abduct the children or some prior form of actual abduction;
- the parent feels alienated from the U.S. legal system; and
- harboring suspicious beliefs that the child has been abused, or
- the parent has paranoid or delusional tendencies or exhibits psychopathic behavior.

Immigration Status Does Not Impact the Immigrant Parent’s Ability to Obtain Public Benefits on the Child’s Behalf: Any custodial parent can apply for public benefit that their child qualifies to receive based on the citizenship or immigration status of the child.⁸⁵ When the immigrant parent files for benefits on behalf of their child, state and federal benefits granting agencies are only allowed to ask for immigration status information and social security numbers for the immigrant child applying for benefits.⁸⁶ If the immigrant victim of domestic violence qualifies for VAWA immigration relief, the victim and immigrant children included in the application become qualified immigrants eligible to receive some state and federal public benefits.⁸⁷ Once DHS has determined that the battered immigrant has filed a valid case, DHS will issue a prima facie determination that provides access to public benefits, usually within 3 months of filing their VAWA self-petition.⁸⁸

⁸⁴ Janet Chiancone, Linda Girdner & Patricia Hoff, U.S. Department of Justice, *Issues in Resolving Cases of International Child Abduction by Parents*, Juvenile Justice Bulletin, December 2001, available at: <https://www.ncjrs.gov/pdffiles1/ojdp/190105.pdf>.

⁸⁵ DEP’T OF HEALTH & HUMAN SERV. & DEP’T OF AGRIC., POLICY GUIDANCE REGARDING INQUIRIES INTO CITIZENSHIP, IMMIGRATION STATUS AND SOC. SEC. NO. IN STATE APPLICATIONS FOR MEDICAID, STATE CHILDREN’S HEALTH INS. PROGRAM (SCHIP), TEMP. ASSISTANCE FOR NEEDY FAMILIES <https://niwaplibrary.wcl.american.edu/pubs/policy-guidance-regarding-inquiries>. See also Anna Pohl, Hema Sarangapani, Amanda Baran, & Cecilia Olavarria, *Barriers to Accessing Services: The Importance of Advocates Accompanying Battered Immigrants Applying for Public Benefits*, Ch. 4.3 in *BREAKING BARRIERS: A COMPLETE GUIDE TO LEGAL RIGHTS AND RESOURCES FOR BATTERED IMMIGRANTS*, 2004, available at: <https://niwaplibrary.wcl.american.edu/pubs/ch4-3-importance-advocates>.

⁸⁶ U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES (HHS) and the U.S. DEPARTMENT OF AGRICULTURE, Policy Guidance Regarding Inquiries into Citizenship, Immigration Status and Social Security Numbers in State Applications for Medicaid, State Children’s Health Insurance Program (SCHIP), Temporary Assistance for Needy Families (TANF) & Food Stamps (1/21/2003) available at <https://niwaplibrary.wcl.american.edu/pubs/policy-guidance-regarding-inquiries>.

⁸⁷ Jordan Tacher and Leslye E. Orloff, *Family Court Bench Card on Immigrant Crime Victim Access To Public Benefits and Services* (2019), available at <https://niwaplibrary.wcl.american.edu/pubs/pb-bchcrd-pubbenefits>.

⁸⁸ Field Guidance Re: Prima Facie Review of Form I-360 when filed by a Self-Petitioning Battered Spouse/Child (March 27, 1998) available at <https://niwaplibrary.wcl.american.edu/pubs/form1360-filed-self-petitioning-spouse>.