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Immigration Status and Family Court Jurisdiction^{1,2}

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Public policy favors granting all persons who live in the United States access to family courts that can resolve contentious and emotionally charged family matters in order to ensure the best interests of children, and to protect victims of domestic violence and child abuse from ongoing abuse. Immigrants and immigrant victims of domestic violence thus must be granted full access to family court in all matters involving protection orders, divorce, legal separation, child support, custody, domestic violence, and child abuse.³ Despite the various public policy reasons to ensure the courthouse doors remain open, many immigrant victims either do not attempt to access family court relief, or are turned away. Advocates and attorneys need to be prepared to

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² In this Manual, the term “victim” has been chosen over the term “survivor” because it is the term used in the criminal justice system and in most civil settings that provide aid and assistance to those who suffer from domestic violence and sexual assault. Because this Manual is a guide for attorneys and advocates who are negotiating in these systems with their clients, using the term “victim” allows for easier and consistent language during justice system interactions. Likewise, The Violence Against Women Act’s (VAWA) protections and help for victims, including the immigration protections are open to all victims without regard to the victim’s gender identity. Although men, women, and people who do not identify as either men or women can all be victims of domestic violence and sexual assault, in the overwhelming majority of cases the perpetrator identifies as a man and the victim identifies as a woman. Therefore we use “he” in this Manual to refer to the perpetrator and “she” is used to refer to the victim. Lastly, VAWA 2013 expanded the definition of underserved populations to include sexual orientation and gender identity and added non-discrimination protections that bar discrimination based on sex, sexual orientation and gender identity. The definition of gender identity used by VAWA is the same definition as applies for federal hate crimes – “actual or perceived gender-related characteristics.” On June 26, 2013, the U.S. Supreme Court struck down a provision of the Defense of Marriage Act (DOMA) (*United States v. Windsor*, 12-307 WL 3196928). The impact of this decision is that, as a matter of federal law, all marriages performed in the United States will be valid without regard to whether the marriage is between a man and a woman, two men, or two women. Following the Supreme Court decision, federal government agencies, including the U.S. Department of Homeland Security (DHS), have begun the implementation of this ruling as it applies to each federal agency. DHS has begun granting immigration visa petitions filed by same-sex married couples in the same manner as ones filed by heterosexual married couples (<http://www.dhs.gov/topic/implementation-supreme-court-ruling-defense-marriage-act>). As a result of these laws VAWA self-petitioning is now available to same-sex married couples (this includes protections for all spouses without regard to their gender, gender identity - including transgender individuals – or sexual orientation) including particularly:

- victims of battering or extreme cruelty perpetrated by a U.S. citizen or lawful permanent resident spouse against a same sex partner in the marriage is eligible to file a VAWA self-petition; and
- an immigrant child who is a victim of child abuse perpetrated by their U.S. citizen or lawful permanent resident step-parent is also eligible when the child’s immigrant parent is married to a U.S. citizen or lawful permanent resident spouse without regard to the spouse’s gender.

³ For more information on this topic, visit <http://niwaplibrary.wcl.american.edu/family-law-for-immigrants>.

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counter abusers' attempts to inflict further abuse through the family court process, and to educate the courts on access to programs for all victims, including immigrants.

After making a finding of abuse, courts should presume by law that an abusive partner is unfit to be a custodial parent.⁴ State statutes,⁵ court rulings,⁶ research findings,⁷ and policy recommendations by experts⁸ charge state family courts with the obligation to intervene in emotionally charged, family court cases in order to resolve these disputes in a manner that justly determines custody disputes, so as to protect children and victims of abuse. In order to keep children safe, domestic violence must be taken into account for purposes of custody, visitation, and child support determinations. Family courts are the primary forum able to address child security and stability during custody, civil protection orders, and divorce or separation proceedings. Therefore, it is imperative that these courts take advantage of custody proceedings to shield those who are vulnerable from further violence or harmful contact.

Serious consequences can arise from the failure to consider domestic violence issues when making a custody determination. Despite the fact that placing a child in the custody of an abuser could ultimately result in the death of that child,⁹ states such as Connecticut, Mississippi and Utah do not even consider domestic violence a factor when determining custody.¹⁰ It is undisputed that children raised in abusive households can suffer a range of serious emotional and physical harms. Given the nature of the risks involved, there is no justification for treating custody cases involving non-citizens parties and children differently from all other custody cases.¹¹

For these reasons, courts must not base family court jurisdiction on the immigration status of the parties. This notion is clearest in domestic violence and child abuse cases. If domestic violence victims seeking court protection or their non-abusive custodial parents in child abuse cases were asked about immigration status in these family court proceedings, it would have the effect of ensuring abusers of immigrant spouses, girlfriends, and children that they would not be held accountable by the justice system for their criminal acts. Victims would not seek protection and, as a result, abusers would not be prosecuted since victims could not secure the safety needed to be cooperative witnesses in criminal prosecutions and/or obtain the protection orders and custody awards needed to keep themselves and their children safe from their abusers. Similarly, in child abuse cases, non-abusive immigrant parents would not be able to come forward and cooperate with state authorities in child abuse investigations for fear that the perpetrators of the child abuse would reveal their immigration status to the courts and have them deported.

⁴ Howard Davidson, *The Impact of Domestic Violence on Children: A Report to the President of the American Bar Association* 13 (ABA 1994).

⁵ See The Child Safety Act; Uniform Child Custody Jurisdiction Act; Family Violence Prevention and Services Act U.S.C. §§ 10401-10410 (1994).

⁶ See e.g., *In re James R.*, 663 N.Y.S.2d 760, 763 (1997); *In re Charise B.*, 533 N.Y.S.2d 595, 598-99 (1990); *In re Maria F.*, 428 N.Y.S.2d 425, 427 (1980); *In re Fred S.*, 322 N.Y.S. 2d 170, 173 (1971); *In re Violet Walsh*, 315 N.Y.S.2d 59, 61 (1970). See also, *Smith v. Org. of Foster Families for Equal, & Reform*, 431 U.S. 816, 828 (1977) (granting family court authority to intervene in situations of child abuse and neglect); *Marks v. Marks*, 315 S.E.2d 158, 162 (S.C. 1984) (denying intervention by a family court unless the welfare of the child is at stake).

⁷ Judith S. Wallerstein & Sandra Blakeslee, *SECOND CHANCES: MEN, WOMEN AND CHILDREN A DECADE AFTER DIVORCE* 272 (1989) ("A study of court-ordered joint custody arrangements found that children present during fighting parents is detrimental to the well being of the child, because they "seem to fare much worse than children raised in traditional sole custody families also torn in bitter fighting" and they "look more depressed, more withdrawn or aggressive, and more depressed, more withdrawn or aggressive, and disturbed."). See Howard Davidson, *The Impact of Domestic Violence on Children: A Report to the President of the American Bar Association* (ABA 1994).

⁸ Mary A. Duryee, *Guidelines for Family Court Services Intervention When There Are Allegations of Domestic Violence*, 33 *FAM. & CONCILIATION CTS. REV.* 79, 82 (1995); James Herbie DiFonzo, *Parental Responsibility for Juvenile Crimes*, 80 *OR. L. REV.* 1, 94 (2001); Ramsay Laing Klaff, *The Tender Years Doctrine: A Defense*, 70 *CAL. L. REV.* 335, 357 (1982); Gender Equality Advisory Board, *Trial Court of Massachusetts, Achieving Equity-Recommendations for Dispute Intervention Practice in the Probate & Family Court* 29 (1995) (declaring it the business of family courts to determine responsibility and not put domestic violence behind closed doors).

⁹ See Leslye E. Orloff & Catherine F. Klein, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 *HOFSTRA L. REV.* 801, 900 n.601, 924-25, 943, 1129, 1142 (1993).

¹⁰ See *CONN. GEN. STAT.* §§ 46b, -56a; *MISS. CODE ANN.*, §§ 93-5-23, -24; *UTAH CODE ANN.* §§§ 30-3-10, -10.2, -34.

¹¹ See 42 USC § 1981(a) (2002). (mandating equal rights under the law: all persons within the jurisdiction of the U.S. have the same right in every state and territory to sue and be a party to a suit).

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If questions regarding immigration status of parents are wrongly allowed to become part of child abuse proceedings, immigrant parents of child abuse victims will risk being separated from their children, despite being fully capable of caring for their children and protecting their children's safety. Immigration status remains a factor in the level of abuse in domestic violence situations. In a report issued by the American Bar Association (ABA) in 1994, the ABA found that immigration status exacerbates the level of violence in abusive relationships when batterers control information about legal status and the legal system and use the threat of deportation to lock their spouses and children in violent relationships.¹² Further findings note that batterers whose victims are immigrant parents use threats of deportation to avoid criminal prosecution, and to shift the focus of family court proceedings away from their violent acts.¹³ In addition, undocumented immigrants frequently remain undocumented because their abusers refuse to file immigration papers on their behalf.¹⁴ Thus, inquiring about immigration status in family court proceedings effectively closes the doors of the courthouse to a significant proportion of families in any jurisdiction, greatly increasing the danger towards immigrant victims of domestic violence and child abuse, and jeopardizing the economic security of unabused immigrant spouses and children.¹⁵

Eighty-five percent of all immigrant families contain within the nuclear at least one non-citizen and one child that is a citizen.¹⁶ In March of 2000, 28.4 million persons in the United States population were foreign-born.¹⁷ The national average of foreign-born persons is 10.4 percent of the U.S. population. Nine states in the United States had a foreign-born population above the national average of 10.4 percent.¹⁸ In 2000, one in six children (11.5 million) lived in a household with at least one foreign-born parent,¹⁹ and 2.6 million of these children were foreign-born.²⁰ Over the next 40 years, approximately 27 percent of the U.S. population will either be immigrants themselves, or the second-generation children of immigrants.²¹ Thus, at least 10.4 to 15 percent of families who could turn to family courts to resolve important matters, potentially having a material impact on the safety and economic security of family members, have at least one party who is an immigrant.

Across the country, trial courts are correctly ruling that immigration status is irrelevant to family court jurisdiction and are assuring that family courts remain open to all families without regard to the immigration status of any family members.²² Such rulings ensure that all children and immigrant victims of domestic violence and child abuse can receive the family court protection essential to their safety without regard to immigration status.

¹² Howard Davidson, *The Impact of Domestic Violence on Children: A Report to the President of the American Bar Association* (ABA 1994)

¹³ *Id.*

¹⁴ In a survey of 279 Latina immigrants, 72.3% of their abusers never filed legal immigration papers for them, and if the papers were filed, the delay was approximately 3.97 years. NOW Legal Defense and Education Fund, Domestic Violence Needs and Assessment Survey Among Immigrant Women (unpublished data collected between 1992 and 1995) (on file with Legal Momentum).

¹⁵ MICHAEL E. FIX, WENDY ZIMMERMANN, & JEFFREY S. PASSEL, IMMIGRATION STUDIES: THE INTEGRATION OF IMMIGRANT FAMILIES IN THE UNITED STATES (The Urban Institute 2001), available at <http://www.urban.org/url.cfm?ID=410227>. In March of 2000, 28.4 million persons in the United States population were foreign-born. Lisa Lollock, *The Foreign-Born Population in the United States: March 2000*, CURRENT POPULATION REPORTS (U.S. Census Bureau), Jan. 2001, at 1 available at <http://www.census.gov/population/www/socdemo/foreign/cps2000.html>.

¹⁶ Fix, ZIMMERMANN, & PASSEL, *supra* note 13, at 15.

¹⁷ Lollock, *supra* note 13, at 1.

¹⁸ CA (25.9 percent), NY (19.6 percent), FL (18.4 percent), HI (16.1 percent), NV (15.2 percent), NJ (14.9 percent), AZ (12.9 percent), MA (12.4 percent), TX (12.2 percent) *Id.* at

¹⁹ This includes only children under the age of 18.

²⁰ *Id.* at 2.

²¹ MICHAEL FIX & JEFFREY S. PASSEL, IMMIGRATION AND IMMIGRANTS: SETTING THE RECORD STRAIGHT 40 (The Urban Institute 1994), available at <http://www.urban.org/url.cfm?ID=305184>.

²² This is particularly important because lack of legal immigration status does not mean that a person does not intend to reside permanently in the United States. In fact, fully one third of all legal permanent residents at one point lived illegally in the United States. Fix & Passel *supra* note 19. Since many immigrants gain legal immigration status through family based immigration, and victims of domestic violence and child abuse have access to special form of immigration benefits, there is a significant likelihood that a family member who may not be documented when they first encounter the family courts will gain legal immigration status at some point in the future. Thus, courts should be encouraged to keep inquiries into immigration status of parties out of family court proceedings, except when relevant to demonstrate that an abuser has used threats of deportation to keep his spouse, intimate partner, or child from seeking help in domestic violence and child abuse cases.

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This chapter will provide an overview of statutory and case law that support access to family courts for divorce, custody, child support, protection order, and child abuse cases for all persons, without regard to their immigration status.

I. Divorce and Jurisdiction

Prior to the commencement of the court action, jurisdiction over family matters can be established when: (1) the child has substantial connections with the state with respect to custody cases;²³ (2) the child, parent, or spouse required by law to pay or receive support reside in the state in cases of child support and alimony;²⁴ (3) the commission of illegal acts in the state when the victim or perpetrator of the illegal acts resides in the state with respect to domestic violence, child abuse and criminal cases; or physical residence of one or more parties in the state.²⁵

In divorce cases, the majority of jurisdictions require the party seeking a divorce to satisfy a threshold residency requirement before their courts will adjudicate a divorce action.²⁶ Some states require their courts to have jurisdiction over the party seeking the divorce,²⁷ while other states only require jurisdiction over either one of the parties in the divorce.²⁸ At least one jurisdiction does not have a residency requirement at all.²⁹

With respect to divorces, threshold residency requirements do not serve as barriers for immigrants. The immigration status of a legal or undocumented immigrant does not preclude that individual from formulating the intent necessary to establish domicile or residency for purposes of divorce actions.³⁰

A. DOMICILE VERSUS RESIDENCE

Court jurisdiction over a party in a divorce action principally depends upon whether the party is domiciled in, or is a resident of, a particular jurisdiction. The meaning of the terms “domicile” and “residence” may differ from one jurisdiction to the next. A review of case law demonstrates that these terms essentially have the

²³ UCCJEA § 201(a)(2)(A); UCCJA § 75-d(b)(i-ii); 28 U.S.C. § 1738A(c).

²⁴ *Porter v. Porter*, 684 A.2d 259, 261-62 (R.I. 1996) (holding the court had exclusive jurisdiction over the non-paying parent because that jurisdiction was the child's state or residence of contestant); N.C. GEN. STAT. § 50-13.5(f) (child support orders must be made in divorce proceedings and jurisdiction is found where the child resides or is physically present or where the parent resides.). See also *Bass v. Bass*, 258 S.E.2d 391 (N.C. Ct. App. 1979).

²⁵ NATIONAL COUNCIL OF JUVENILE & FAMILY COURT JUDGES [hereinafter NCJFCJ], FAMILY VIOLENCE: A MODEL STATE CODE, § 303 (1994), available at <http://www.ncjfcj.org>.

²⁶ Without establishing this threshold residency requirement, the state courts do not have subject matter jurisdiction in divorce cases. See, e.g., *Blair v. Blair*, 643 N.E.2d 933, 935 (Ind. Ct. App. 1994). Parties cannot agree to confer subject matter jurisdiction on a court that does not have it. *Gosa v. Mayden*, 413 U.S. 665, 707 (1973). See also, *Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17-18 (1951); *Indus. Addition Ass'n v. Comm'r*, 323 U.S. 310, 313 (1945); *People's Bank v. Calhoun*, 102 U.S. 256, 260-61 (1880); *Cutler v. Rae*, 7 How. L.J. 729, 731 (1849).

²⁷ See IDAHO CODE § 32-701 (2004); IOWA CODE § 598.6 (2004); MASS. GEN. LAWS ch. 208, § 5 (2004); N.H. REV. STAT. ANN. § 458:5 (2003); N.C. GEN. STAT. § 50-8 (2004); N.D. CENT. CODE § 14-05-17 (2003); OHIO REV. CODE ANN. § 3105.03 (2004); S.C. CODE ANN. § 20-3-30 (2003); S.D. CODIFIED LAWS § 25-4-30 (2004); 16 V.I.C. § 106 (2004); WYO. STAT. ANN. § 20-2-107 (2003).

²⁸ See ALA. CODE § 30-2-5 (2003); ARIZ. REV. STAT. § 25-312 (2004); ARK. CODE ANN. §9-12-307 (2004); CAL FAM. CODE § 2320 (2004); COLO. REV. STAT. ANN. § 14-10-106 (2004); CONN. GEN. STAT. § 46b-44 (2004); DEL. CODE ANN.tit. 13, § 1504 (2003); D.C. CODE ANN. § 16-902 (2004); FLA. STAT. ANN. § 61.021 (2004); GA. CODE ANN. § 19-5-2 (2004); HAW. REV. STAT. § 580-1 (2003); 750 ILL. COMP. STAT. 5/401 (2004); KAN. STAT. ANN. § 60-1603 (2003); KAN. STAT. ANN. § 403.140 (West 2004); LA. REV. STAT. ANN. § 9:308 (West 2004); *Fletcher v. Fletcher*, 619 A.2d 561 (Md. Ct. Spec. App. 1993); MICH. COMP. LAWS § 552.9 (2004); MISS. CODE ANN. § 93-5-5 (2004); Mo. Rev. Stat. § 452.450 (2004); MONT. CODE ANN. § 40-4-104 (2003); NEB. REV. STAT. § 42-349 (2003); NEV. REV. STAT. ANN. § 125.020 (2004); N.J. STAT. ANN. § 2A:34-10 (2004); N.M. STAT. ANN. § 40-4-5 (2004); N.Y. DOM. REL. LAW § 230 (McKinney 2004); 8 N. MAR. I. CODE § 1332; OKLA. STAT. ANN. tit. 43, § 102 (West 2004); OR. REV. STAT. § 107.075 (2004); 23 PA. CON. STAT. ANN. § 3104 (West 2004); 31 P.R. LAWS ANN. § 331 (2004); R.I. GEN. LAWS § 15-5-12 (2003); TENN. CODE ANN. § 36-4-104 (2004); TEX. FAM. CODE ANN. § 6.301 (Vernon 2004); UTAH CODE ANN. § 30-3-1 (2004); VT. STAT. ANN. TIT. 15, § 592 (2003); VA. CODE ANN. § 20-97 (2004); WASH. REV. CODE § 26.09.030 (2004); W. VA. CODE ANN. § 48-5-105 (Michie 2004); WIS. STAT § 767.05 (2004).

²⁹ *Alaska. State v. Adams*, 522 P.2d 1125, 1132 (Alaska 1974).

³⁰ *Hanano v. Alassar*, No. 169004, 2001 Va. Cir. LEXIS 169, at *10 (Va. Cir. Jan. 23, 2001).

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same meaning. In fact, in many jurisdictions the terms “domicile” and “residence” are interchangeable.³¹ Nevertheless, at least one jurisdiction holds that these terms are not interchangeable.³²

1. Domicile

Generally, in order for a party to establish his or her domicile for maintaining a divorce action in a particular jurisdiction, he or she must be *physically present* in that jurisdiction and must also *intend to remain indefinitely*, or permanently, in that jurisdiction.³³ However, in some jurisdictions, a party may still establish domicile without physical presence in the jurisdiction, as long as that party has the intent to return to that particular jurisdiction to live.³⁴

2. Residency

Likewise, in order for a party of a divorce to demonstrate his or her residence in a particular jurisdiction, he or she must be actually present or must establish an abode in that particular jurisdiction,³⁵ as well as intend to remain in or return to that particular jurisdiction.³⁶ However, some jurisdictions do not require the party to actually be present in order to establish residency. Specifically, some jurisdictions allow a party to leave his or her abode for a period of time and still maintain residency status as long as the intent exists to return to that abode.³⁷

3. Immigration Status and Residency

In determining whether a party intends to establish residency or domicile in a particular state, the court will examine the intent of the party seeking the divorce, rather than any potential adverse action by a third party, such as the U.S. Citizenship and Immigration Services (USCIS).³⁸ Both documented and undocumented immigrants can establish residency for family court purposes.

Many immigrants live and work in the United States and intend to make the United States their permanent home, despite the fact that they may not currently have a legal immigration status and USCIS permission to live and work permanently in the United States.³⁹ This can be especially true for immigrant victims of domestic violence, who have been dependent on their abusers for status and may not have known about the immigrant remedies under VAWA.

³¹ See *Caheen v. Caheen*, 172 So. 618 (Ala. 1937); *Lake v. Bonham*, 716 P.2d 56 (Ariz. Ct. App. 1986); *Ungemach v. Ungemach*, 142 P.2d 99 (Cal. 1943); *McMillion v. McMillion*, 497 P.2d. 331 (Colo. Ct. App. 1972); *Worrell v. Worrell*, 247 S.E.2d 847 (Ga. 1978); *Hampshire v. Hampshire*, 223 P.2d 950 (Idaho 1950); *Kleinrock v. Nantex Mfg. Co.*, 201 A.D. 236 (N.Y. App. Div. 1999); *Andris v. Andris*, 309 S.E.2d 570 (N.C. Ct. App. 1983); *Smith v. Smith*, 75 N.W. 783 (N.D. 1898); *Zimmerman v. Zimmerman*, 155 P.2d 293 (Or. 1945); *Brown v. Brown*, 261 S.W. 959 (Tenn. 1923); *Duval v. Duval*, 546 A.2d 1357 (Vt. 1988); *Howe v. Howe*, 18 S.E.2d 294 (Va. 1942); *Marcus v. Marcus*, 475 P.2d 571 (Wash. Ct. App. 1970); *State ex rel. Lynn v. Eddy*, 163 S.E.2d 472 (W. Va. 1968).

³² *Garrison v. Garrison*, 246 N.E.2d 9, 11 (Ill. App. Ct. 1946) (holding that “residence” does not mean “domicile” but instead denotes permanent abode).

³³ See *Perito v. Perito*, 756 P.2d 895 (Alaska 1988); *J.F.V. v. O.W.V.*, 402 A.2d 1202 (Del. 1979); *Abou-Issa v. Abou-Issa*, 189 S.E.2d 443 (Ga. 1972); *Blackburn v. Blackburn*, 41 Haw. 37 (Haw. 1955); *Hampshire v. Hampshire*, 223 P.2d 950 (Idaho 1959); *Andris v. Andris*, 309 S.E.2d 570 (N.C. Ct. App. 1983); *Marcus v. Marcus*, 475 P.2d 571 (Wash. Ct. App. 1970).

³⁴ *Abou-Issa v. Abou-Issa*, 189 S.E.2d 443 (Ga. 1972); *Gasque v. Gasque*, 143 S.E.2d 811 (S.C. 1965).

³⁵ *Williams v. Williams*, 328 F. Supp. 1380, 1383 (V.I. 1971). See also *Hanano v. Alassar*, No. 169004, 2001 Va. Cir. LEXIS 169, at *10 (Va. Cir. Jan. 23, 2001) (quoting *Williams v. Williams*, 328 F. Supp. 1380, 1383 (V.I. 1971)).

³⁶ See ARK. CODE ANN. § 9-12-307(b) (2004). See also *Ungemach v. Ungemach*, 142 P.2d 99 (Cal. 1943); *Hampshire v. Hampshire*, 223 P.2d 950 (Idaho 1950); *Garrison v. Garrison*, 246 N.E.2d 9 (Ill. App. Ct. 1946); *Leader v. Leader*, 251 N.W.2d 288 (Mich. Ct. App. 1977); *Smith v. Smith*, 12 So. 2d 428 (Miss. 1943).

³⁷ *Abou-Issa v. Abou-Issa*, 189 S.E.2d 443 (Ga. 1972); *Means v. Means*, 17 N.W.2d 1 (Neb. 1945); *Gasque v. Gasque*, 143 S.E.2d 811 (S.C. 1965); *Duval v. Duval*, 546 A.2d 1357 (Vt. 1988).

³⁸ The agency formerly known as Immigration and Naturalization Services (INS) and later as the Bureau of Citizenship and Immigration Services (BCIS) under the administration of the Department of Homeland Security was recently renamed the U.S. Citizenship and Immigration Services (USCIS). See *Hanano v. Alassar*, No. 169004, 2001 Va. Cir. LEXIS 169, at *10 (Va. Cir. Jan. 23, 2001) (holding that domicile depends upon the intent of the party rather than the potential action of a third party such as the Immigration and Naturalization Service).

³⁹ Almost one-third of the 8.8 million U.S. legal permanent residents currently residing in the U.S. (approximately 2.8 million persons) were formerly undocumented immigrants in the United States. Fix & Passel, *supra* note 19.

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Courts consistently have held that immigration status or lack thereof does not preclude an individual from establishing domicile or residency for purposes of maintaining an action in family court.⁴⁰ In *Hanano v. Alassar*, the Court found that, despite the plaintiff's current immigration status as a non-immigrant authorized to live and work in the United States in an international organization, she was not precluded from establishing that she was an actual *bona fide* resident and domiciliary in order to establish a divorce action.⁴¹ The court held that, in determining whether a party intends to establish residency, courts must look to the intent of the party, rather than any potential adverse action by a third party, such as USCIS.⁴²

Similarly, in *Williams v. Williams*, the court held that non-residents are not precluded from obtaining domicile, noting that individuals "need not intend to remain in a place unto death to acquire domicile."⁴³ This court found that the fact that non-residents admitted temporarily to the United States had declared their intent to return to their home country as part of their immigration visas did not preclude a finding of domicile. Instead, even an individual who contemplates staying for only a brief period of time may acquire domicile.⁴⁴ The only necessary element to finding domicile is the intent to make a home somewhere until some reason unrelated to the divorce makes it desirable or necessary to leave.⁴⁵

The fact that an immigrant requesting family court assistance may not be in the United States legally or does not have permanent legal immigration status in the United States is not indicative of whether he or she qualifies for legal immigration status, will qualify in the future, or is likely to be deported now or any time in the future. This is an important point to note, especially if the immigrant victim is eligible for relief under VAWA. Immigration status or non-citizen status does not preclude an immigrant from gaining access to divorce courts because the court's focus of inquiry is on his or her intent to establish residence in that state, not immigration status.⁴⁶

Immigration laws are interpreted separately from divorce laws and jurisdiction requirements.⁴⁷ Therefore, a court determination of jurisdiction for divorce purposes has no effect on decisions of the USCIS in any immigration case.⁴⁸ Family court judges should be assured that finding residence, domicile, or any other jurisdictional finding in a family court case will not help an immigrant attain any form or immigration status for which they would not otherwise qualify.

B. DUE PROCESS & EQUAL PROTECTION

All permanent legal⁴⁹ or undocumented immigrants⁵⁰ within the jurisdiction of the United States have the same rights in every state and territory to sue, be parties, give evidence, and have the full and equal benefit of all state federal laws.⁵¹ To deny these rights is to deny the fundamental right to due process and equal protection, under the Constitution of the United States.

⁴⁰ Dick v. Dick, 18 Cal. Rptr. 2d 743 (Cal. Ct. App. 1993); Rzeszotarski v. Rzeszotarski, 296 A.2d 431 (D.C. 1972); Nicholas v. Nicholas, 444 So. 2d 1118 (Fla. Dist. Ct. App. 1984); Gosschalk v. Gosschalk, 138 A.2d 774 (N.J. Super. Ct. App. Div. 1958); Das v. Das, 603 A.2d 139 (N.J. Super. Ct. Ch. Div. 1992); Cocron v. Cocron, 373 N.Y.S.2d 797 (N.Y. Sup. Ct. 1975); *In re Marriage of Pirouzkar*, 626 P.2d 380, (Or. Ct. App. 1981); Sinha v. Sinha, 491 A.2d 899 (Pa. Super. Ct. 1985); Bustamante v. Bustamante, 645 P.2d 40 (Utah 1982); *Hanano*, 2001 Va. Cir. LEXIS 169, at *10.; *Williams*, 328 F. Supp. 1380.

⁴¹ *Hanano*, 2001 Va. Cir. LEXIS 169, at *10.

⁴² *Id.*

⁴³ *Williams*, 328 F. Supp. 1380 at 1384.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ However, non-citizens residing in the United States on special non-immigrant visas for foreign nationals (G-4 visa) and working for international organizations must take additional steps to establish residency. Under the special non-immigrant visas for foreign nationals, non-citizens deny residency in order to avail themselves the special financial benefits offered to World Bank employees who are non-resident foreign nationals on temporary visas. Therefore, these individuals cannot claim residency for family court purposes. *See id.*

⁴⁷ Rajapaksha v. Jayaweera, 5 N. Mar. I. 87, 89 (N. Mar. I. 1997).

⁴⁸ *See id.*

⁴⁹ Graham v. Richardson, 403 U.S. 365 (1971).

⁵⁰ Martinez v. Fox Valley Bus Lines, 17 F. Supp. 576 (N.D. Ill. 1936).

⁵¹ 42 USCS § 1981(a) (2002).

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In *Plyer v. Doe*, the Supreme Court reaffirmed that, regardless of immigration status, individuals are entitled to the protections of the Due Process and Equal Protection Clauses.⁵² The Court examined the constitutionality of a Texas statute that withheld state education funds from children who were not “legally admitted” in the United States, and authorized local school districts to deny enrollment to these children. The Court held that this statute violated the Equal Protection Clause of the Fourteenth Amendment.⁵³ The Court rejected the argument that undocumented immigrants did not qualify as “persons within the jurisdiction” of the State of Texas, and thus did not have the right to equal protection of the law.⁵⁴ Under this precedent, immigrants whose presence in this country is unlawful are still recognized as “persons” in the ordinary sense of the term, thus, guaranteeing them the Fifth and Fourteenth Amendment rights to due process of the law.⁵⁵

In *Williams v. Williams*, the court held that a denial of access to divorce courts based solely upon the possibility of an immigration violation was a denial of due process and equal protection.⁵⁶ Denial of these fundamental rights would attach civil disability to some aliens without granting them the benefit of the procedures used to enforce immigration laws. The court further stated that exclusion from courts for violation of immigration laws, and not for violations of any other types of laws, was unduly discriminatory without a “compelling” reason or justification.⁵⁷ Yet again, the court found immigration status was not only entirely irrelevant to divorce proceedings, but that the use of immigration status would be a violation of due process and equal protection.

II. Child Custody and Jurisdiction

As in divorce cases, immigrants and their children should be granted full access to the courts to secure child custody determinations without consideration of the parent’s or child’s immigration or citizenship status. Without full, unfettered access to family courts, 10.4 to 15 percent of families in the United States would be unable to utilize the family courts for child custody determinations, due to their immigration status.⁵⁸

Full access to family courts is essential to immigrant women and their children, who face numerous distinct barriers in breaking out of the cycle of domestic violence, many relating to child custody.⁵⁹ Batterers use threats that limit the likelihood that their partners will fight them in custody disputes,⁶⁰ as well as to keep battered immigrants and their children in abusive relationships under their control.⁶¹ These threats are even more effective against immigrant victims forced to stay in abusive relationships out of fear that separation will-by-law leave the children in the hands of the abuser, or will lead the abuser to sequester the children and have her deported so that she will never see her children again.⁶² Denying immigrant victims’ access to family law courts due to a party or a child’s immigration status undermines the courts’ obligation under state

⁵² *Plyer v. Doe*, 457 U.S. 202 (1982).

⁵³ U.S. Const., Amend XIV. The Fourteenth Amendment provides that no State shall deprive any person of life, liberty, or protection, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

⁵⁴ *Id.* at 210.

⁵⁵ *Id.* (stating “aliens, whose presence is unlawful, have long been recognized as persons guaranteed due process of law by the Fifth and Fourteenth Amendment.”)

⁵⁶ *Williams v. Williams*, 328 F. Supp. 1380, 1383 V.I. (1971); See also *Rzeszotarski v. Rzeszotarski*, (D.C. App. 1972); *Alves v. Alves* 262 A.(D.C. App. 1970); *Nicholas v. Nicola*,s 444 So. 2d 1118 (Fla. Dist. Ct. App. 1984); *Abou-Issa v. Abou-Issa*, 229 Ga. 77 (1972); *Cocron v. Cocron*, 84 Misc.2d 335 (1975); *Pirouzkar v. Pirouzkar* 51 Ore. App. 519 (1981); *Bustamante v. Bustamante* 645 P.2d 40 (Utah 1982); *In Re the Marriage of Elisabeth L. and John W. Dick*, 15 Cal. App. 4th 144 (1993).

⁵⁷ *Id.*

⁵⁸ Howard Davidson, *The Impact of Domestic Violence on Children: A Report to the President of the American Bar Association* (ABA 1994), available at <http://www.abanet.org/domviol/pubs.html>.

⁵⁹ Howard Davidson, *The Impact of Domestic Violence on Children: A Report to the President of the American Bar Association* (ABA 1994).

⁶⁰ See *Id.* at 270; Leti Volpp, *Working with Battered Immigrant Women: A Handbook to Make Services Accessible*, 33 (Leni Marin ed., 1995) published by the Family Violence Prevention Fund, 415-252-8089; Leslye Orloff, Remarks at the National Conference on Family Violence: Health and Justice (March 11-13, 1994).

⁶¹ Leti Volpp, *Working with Battered Immigrant Women: A Handbook to Make Services Accessible* 4 (Leni Marin ed., 1995) (cited from the Power and Control wheel developed by the Domestic Abuse Intervention Project in Duluth, Minnesota).

⁶² See *Countering Abuser’s Attempts To Raise Immigration Status of the Victim in Custody Cases in NEW OPTIONS FROM IMMIGRANT CRIME SURVIVORS: AN INTERDISCIPLINARY TRAINING*, National Network to End Violence Against Women (May 6, 2003) available at <http://www.nationalimmigrationproject.org>.

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family laws to resolve custody disputes in the best interests of children⁶³ and to consider domestic violence as part of that determination.⁶⁴ Courts make custody decisions based upon the “the best interest of the child” standard, taking into account any history of abuse against an adult and/or child as a key factor in determining the “best interest of the child.”⁶⁵

With respect to child custody determinations, most states either follow the model of the Uniform Child Custody Jurisdiction and Enforcement Act [hereinafter UCCJEA]⁶⁶ or the Uniform Child Custody Jurisdiction Act [hereinafter UCCJA].⁶⁷ In 1997, the UCCJA was revised by a new act called the UCCJEA, which updated the UCCJA and added enforcement provisions for custody orders.⁶⁸ While most states follow the UCCJEA, a few states have developed their own adaptations of either the UCCJA or UCCJEA, which govern those states’ child custody determinations.⁶⁹

All state statutes follow the same basic scheme for determining which court has subject matter jurisdiction in a child custody case. Additionally, all state custody jurisdiction statutes must be read in conjunction with the Federal Parental Kidnapping Prevention Act (PKPA),⁷⁰ which establishes a federal preference for home-state jurisdiction,⁷¹ if there are competing jurisdictions.⁷² Neither the home state definition in the PKPA, nor any state’s UCCJA or UCCJEA requires an analysis of residency or domicile as in the divorce context. Furthermore, neither the PKPA, state statutes, nor case law make the immigration status of any party a relevant factor to any jurisdictional decision of child custody cases.⁷³

⁶³ Nancy K. D. Lemon, *The Legal System’s Response to Children Exposed to Domestic Violence*, in *THE FUTURE OF CHILDREN: DOMESTIC VIOLENCE AND CHILDREN* 69 (Richard E. Behram ed., 1999).

⁶⁴ Howard Davidson, *The Impact of Domestic Violence on Children: A Report to the President of the American Bar Association* (ABA 1994), available at <http://www.abanet.org/domviol/pubs.html>. See AL 30-3-131, 30-3-132, 30-3-152; AK 25.24.150, 25.20.090; AZ 25-403; AR 9-13-101; CA Fam. Code 3011, 3044; CO 14-10-124; DE 13 § 722, § 705A, § 706A; DC 16-911, 16-914; FL 61.13; GA 19-9-1, 19-9-3; HI 571-46; ID 32-717, 32-717B; IL 750 § 5/602; IA 598.41; IN 31-17-2-8, 31-1-11.5-21 (added 5-22-02, BL); KS 60-1610; KY 403.270; LA 9:364; ME 19-A § 1653; MD Family Law § 9-101.1; MA 208 § 31, 208 § 31A, 209 § 38, 209C § 10; MI 722.23, 722.27a; MN 257.025, 518.17; MO 452.375, 452.400; MT 40-4-212; NE 42-364; NV 125.480, 125C.220, 125C. 230, 125A.050 (added 5-22-02, BL); NH 458:17; NJ 9:2-4; NM 40-4-9.1; NY DRL 240; NC 50-13.2; ND 14-09-06.2; OH 3109.04, 3109.051; OK 10 § 21.1, 43 § 112.2; OR 107.137; PA 23 C.S.A. § 5303; RI 15-5-16; SC 20-7-1530, 20-7-1557; SD 25-4-45.5, 25-4-45.6; TN 36-6-106, 36-6-411, 36-3-106 (added 5-22-05, BL); TX Family Code 153.004, 153.131; VT 15 § 665; VA 20-124.3; WA 26.09.191, 26.10.160; W.VA 48-11-207, 48-11-209; WI 767.24; WY 20-2-112, 20-2-113, 20-2-201

⁶⁵ Howard Davidson, *The Impact of Domestic Violence on Children: A Report to the President of the American Bar Association* (ABA 1994) at 13, available at <http://www.abanet.org/domviol/pubs.html>. See also, Leslye E. Orloff & Catherine F. Klein, *Providing Legal Protection for Battered Women: An Analysis of state Statutes and Case Law*, 21 HOFSTRA L. REV. 801 (1993).*supra*

⁶⁶ See Alabama, CODE OF ALA. §30-3B-201 (2001); Alaska, ALASKA STAT. §25.30.300 (2001); Arizona, A.R.S. §25-1031 (2001); Arkansas, A.C.A. §9-19-201 (2001); California, CAL. FAM. CODE §3421 (2001); Colorado, C.R.S. §14-13-201 (2001); Connecticut, Conn. Gen. Stat. §466-115k (2001); Delaware, 13 DEL. C. §1903 (2001); D.C. CODE ANN. §16-4602.1 (2001); Florida, FLA. STAT. §16.1308 (2001); Georgia, O.C.G.A. §19-9-61 (2001); Hawaii, HRS § 583-3 (2001); Idaho, IDAHO CODE §32-11-201 (2001); Illinois, 754 ILCS 35/4 (2001); Indiana, BURNS IND. CODE ANN. §31-17-3-3 (2001); Iowa, IOWA CODE §598B.201 (2002); Kansas, K.S.A. §38-1348 (2001); Louisiana, LA. R.S. §13:1702 (2002); Maine, 19-A M.R.S. §1745 (2001); Massachusetts, MASS. ANN. LAWS CH. 209B, §2 (2001); Michigan, MCLS §722.1201 (2001); Minnesota, MINN. STAT. §518D.201 (2001); Montana, MONT. CODE ANN. §40-7-201(2001); New York, NY CLS DOM. REL. §76 (2002); North Carolina, N.C. GEN. STAT. §50A-201 (2000); North Dakota, N.D. CENT. CODE, §14-14.1-12 (2001); Oklahoma, 43 OKLA. ST. §551-201 (2000); Oregon, OR. REV. STAT. §109.741 (2001); Rhode Island, R.I. GEN. LAWS §15-14-4 (2001); Tennessee, TENN. CODE ANN. §36-6-216 (2001); Texas, TEX. FAM. CODE §152.201 (2002); Utah, UTAH CODE ANN. §79-45c-201 (2001); Virginia, VA. CODE ANN. §20-146.12 (2001); Washington, WASH. REV. CODE §26.27.201 (2002); West Virginia, W. Va. Code §48-20-201 (2001).

⁶⁷ See Kentucky, KRS §403.420 (2001); Mississippi, MISS. CODE ANN. §93-23-5 (2001); Missouri, §452.450 R.S. Mo. (2001); Nevada, NEV. REV. STAT. ANN. §125A.050 (2001); New Hampshire, RSA 458-A:3 (2000); New Jersey, N.J. STAT. §2A:34-31 (2001); South Carolina, S.C. CODE ANN. §20-7-788 (2001); South Dakota, S.D. CODIFIED LAWS §26-5A-3 (2001); Vermont, 15 V.S.A. §1032 (2001); Virgin Islands, 16 V.I.C. §117 (2001); Wisconsin, WIS. STAT. §822.03 (2001).

⁶⁸ Uniform Law Commissioners, *The National Conference of Commissioners on Uniform State Laws: Why Should States Adopt the UCCJA* (2001), at http://www.nccusl.org/nccusl/uniformact_why/uniformacts-why-uccja.asp

⁶⁹ See Maryland, MD. FAMILY LAW CODE ANN. §9-204 (2001); Nebraska, NEB. REV. STAT. §43-1203 (2001); New Mexico, N.M. STAT. ANN. §40-10A-201 (2001); Ohio, OHIO REV. CODE ANN. §3109.22 (Anderson 2001), Pennsylvania, 23 PA. CONS. STAT. §5344 (2001); Wyoming, WYO. STAT. §20-5-104 (2001).

⁷⁰ Parental Kidnapping Prevention Act [hereinafter PKPA], 28 U.S.C. § 1738A (2001).

⁷¹ *Id.* at 28 U.S.C. § 1738A (c)(2)(A).

⁷² *Id.* at 28 U.S.C. § 1738A (c)(2)(B).

⁷³ Additionally, under Article 26 of the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition and Cooperation in Respect of Parent Responsibility and Measures for the Protection of Children, a State which ratifies or accedes to the Convention is required to enforce registered child support orders from other State parties according to the procedures of the latter State.⁷³ Furthermore, a resident immigrant of that jurisdiction can request a domestic, interstate, or international child

A. THE UCCJA

States following the UCCJA model have initial jurisdiction over a child custody proceeding if one of four situations arises: (1) the state is the home state of the child;⁷⁴ (2) the state has a significant connection with the child;⁷⁵ (3) an emergency situation arises which effects the child's welfare while the child is residing in the state;⁷⁶ or (4) no other state has jurisdiction over the child or a state having jurisdiction over the child declines to exercise jurisdiction because another jurisdiction would be a more appropriate forum for determining the custody of the child.⁷⁷ All of these jurisdictional options focus on the physical location of the child, the child's contact and connections in the state, and the child's welfare. Immigration status of the child or parents is not a factor in this determination. No state statute or court case has found that the immigration status of the child or either parent is relevant to establishing jurisdiction in child custody cases.

1. Home State

Under the UCCJA model, a state can exercise initial jurisdiction over a child in order to make a child custody determination if that state is the home state of that child. The UCCJA declares that a state is the home state of a child (1) if the child resides in the state at the time the custody proceeding is initiated⁷⁸ or (2) if the child resided in that state six consecutive months prior to the commencement of the custody proceeding, the child is absent due to his removal or retention from that state by a person claiming custody or for other reasons, and a parent or person acting as a parent continues to live in that state.⁷⁹ However, for a child that is less than six months old, a state is presumed the home state of the child if, for a majority of time since birth the child lived with his or her parents, a parent, or a person acting as a parent in that state.⁸⁰ This form of home state jurisdiction is favored in interstate custody disputes under the federal PKPA.⁸¹

As in the divorce context, child custody cases typically focus on where the child is living, has lived or is residing, and where the parents of the child continue to reside. The purpose of the home state preference is to deter parental kidnapping.⁸² Preventing families with non-citizen members from accessing family courts denies children in mixed-status families the important parental kidnapping prevention protections of the UCCJA and the PKPA. This lack of access to family courts in custody cases undermines the safety and security of children living in families with mixed forms of immigration status, as non-citizens would be inhibited from accessing the family courts in custody cases. In order to avoid these consequences, the immigration status of any party or child must not be a factor in custody cases.

2. Significant Connection

A state can exercise initial jurisdiction for child custody proceedings if it is in the best interest of the child for the state to assume jurisdiction because the child, and one or both of the child's parents have significant connection with the state, and the state court has access to considerable evidence regarding the child's present or future case, protection, training, and personal relationships.⁸³ Ideally, states exercising jurisdiction under the significant connections prong of the UCCJA communicate with the home state and request that the home

custody order. The immigration status of either party involved is unrelated to court jurisdiction over child support or custody orders.

⁷⁴ UCCJA §75-d (a).

⁷⁵ UCCJA §75-d (b).

⁷⁶ UCCJA §75-d (c).

⁷⁷ UCCJA §75-d (d).

⁷⁸ UCCJA § 75-d (a)(i).

⁷⁹ UCCJA § 75-d (a)(ii).

⁸⁰ UCCJA § 75-c (5).

⁸¹ 28 U.S.C. § 1738A.

⁸² Jennifer Marston, *Yesterday, Today, & Tomorrow's Approaches to Resolving Child Custody Jurisdiction in Oregon*, 80 OR. L. REV. 301, 301 (2001); Jerry A. Behnke, *Pawns or People? Protecting the Best Interests of Children in Interstate Custody Disputes*, 28 LOY. L.A. L. REV. 699, 723 (1995); Rhonda Wasserman, *Parents, Partners, and Personal Jurisdiction*, 1995 U. ILL. L. REV. 813, 818 (1995).

⁸³ UCCJA § 75-d (b)(i-ii); 28 U.S.C. § 1738A(c).

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state decline jurisdiction.⁸⁴ In this sense, the custody jurisdiction assumed or based on significant connections would be enforceable under the PKPA.⁸⁵ Immigration status does not affect the establishment of significant connections.

3. Emergency

A state can exercise initial jurisdiction to determine a child custody proceeding if the child is physically present in the state and (1) the child has been abandoned or (2) it is necessary for the state to protect the child.⁸⁶ The emphasis of the statute is on physical presence and the need for protection.

4. Default

Under the UCCJA, a state can exercise initial jurisdiction for child custody determinations if no other state would have jurisdiction over the child, or if another state declined to assert jurisdiction based on the belief that the former state is a more appropriate forum for custody determination.⁸⁷ Additionally, the UCCJA requires that it be in the best interest of the child for that state to assume jurisdiction.⁸⁸ However, many individuals have lived outside of the United States for significant periods of time, particularly those in immigrant or military-based families. As a result, there are many cases in which there may be no readily ascertainable U.S. court to exercise jurisdiction because a child may not have a “home state,” and there may not be a state that has significant connections with the child. In such situations, jurisdiction can be founded upon the default ground, or in domestic violence cases upon emergency jurisdiction ground.⁸⁹ However, if courts of other countries issue child custody determinations, the Hague Convention may control where jurisdiction can be asserted.⁹⁰

B. UCCJEA

The UCCJEA has been adopted by 34 states,⁹¹ updating the UCCJA’s approach to child custody jurisdiction. The act was drafted in 1997 to “revise the law on child custody jurisdiction in light of federal [legislation] and approximately thirty years of inconsistent case law.”⁹² Unlike the UCCJA, the UCCJEA model provides a remedial process to enforce interstate child custody and visitation determinations.⁹³ Another significant

⁸⁴ Marcia McIvor, *Jurisdiction Counts in Custody Matters*, 37 FALL ARK. LAW. 14, 15 (2002); Richard E. Crouch, *An Intricate Maze of Child-Snatching Statutes*, 23 SPG FAM. ADVOC. 29, 32 (2001); Linda Silberman, *The 1996 Hague Convention on the Protection of Children: Should the United States Join?*, 34 FAM. L.Q. 239, 256 (2000); Richard Friedling, *Navigating the Murky Waters of Interstate Child Custody Disputes*, 18 NO. 2 MATRIM. STRATEGIST 1 (2001). See also, Juliet A. Cox, *Judicial Wandering Through a Legislative Maze: Application of the Uniform Child Custody Jurisdiction Act & the Parental Kidnapping Prevention Act to Child Custody Determinations*, 58 MO. L. REV. 427, 447 (1993) (remarking on the Missouri court’s implied home state preference when the home state does not decline jurisdiction).

⁸⁵ 28 U.S.C. § 1738A

⁸⁶ UCCJA § 75-d (c)(i-ii).

⁸⁷ UCCJA § 75-d (d)(i-ii).

⁸⁸ UCCJA § 75-d (d)(i-ii).

⁸⁹ UCCJA § 3(a)(3), (4); PKPA, 28 U.S.C.A. § 1738A(c)(2)(D). See also, David Carl Minneman, *Default Jurisdiction of Court under § 3(a)(4) of the Uniform Child Custody Jurisdiction Act or the Parental Kidnapping Prevention Act*, 28 U.S.C.A. 1738A(c)(2)(D), 6 A.L.R. 5th 69, (1992).

⁹⁰ For a full discussion of the Hague Convention, see BREAKING BARRIERS, Implications of the Hague International Child Abduction Convention: Cases and Practice Chapter 8.

⁹¹ See Alabama, CODE OF ALA. §30-3B-201 (2001); Alaska, ALASKA STAT. §25.30.300 (2001); Arizona, A.R.S. §25-1031 (2001); Arkansas, A.C.A. §9-19-201 (2001); California, CAL. FAM. CODE §3421 (2001); Colorado, C.R.S. §14-13-201 (2001); Connecticut, Conn. Gen. Stat. §466-115k (2001); Delaware, 13 DEL. C. §1903 (2001); D.C. CODE ANN. §16-4602.1 (2001); Florida, FLA. STAT. §16.1308 (2001); Georgia, O.C.G.A. §19-9-61 (2001); Hawaii, HRS § 583-3 (2001); Idaho, IDAHO CODE §32-11-201 (2001); Illinois, 754 ILCS 35/4 (2001); Indiana, BURNS IND. CODE ANN. §31-17-3-3 (2001); Iowa, IOWA CODE §598B.201 (2002); Kansas, K.S.A. §38-1348 (2001); Louisiana, LA. R.S. §13:1702 (2002); Maine, 19-A M.R.S. §1745 (2001); Massachusetts, MASS. ANN. LAWS CH. 209B, §2 (2001); Michigan, MCLS §722.1201 (2001); Minnesota, MINN. STAT. §518D.201 (2001); Montana, MONT. CODE ANN, §40-7-201(2001); New York, NY CLS DOM. REL. §76 (2002); North Carolina, N.C. GEN. STAT. §50A-201 (2000); North Dakota, N.D. CENT. CODE, §14-14.1-12 (2001); Oklahoma, 43 OKLA. ST. §551-201 (2000); Oregon, OR. REV. STAT. §109.741 (2001); Rhode Island, R.I. GEN. LAWS §15-14-4 (2001); Tennessee, TENN. CODE ANN. §36-6-216 (2001); Texas, TEX. FAM. CODE §152.201 (2002); Utah, UTAH CODE ANN. §79-45c-201 (2001); Virginia, VA. CODE ANN. §20-146.12 (2001); Washington, WASH. REV. CODE §26.27.201 (2002); West Virginia, W. Va. Code §48-20-201 (2001).

⁹² See Prefatory Note of the UCCJEA.

⁹³ See Prefatory Note of the UCCJEA.

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difference between the two acts is that the UCCJEA gives priority to home state jurisdiction over jurisdiction based on significant connections.

States following the UCCJEA model will have initial jurisdiction to make child custody determinations if one of the following situations arises: 1) the state is home state of the child; 2) the state has significant connection with the child; 3) the state is the most appropriate forum; 4) necessity.⁹⁴ Thus, like the UCCJA, the UCCJEA determines jurisdiction based on the child's needs, residence, and connections to the jurisdiction.⁹⁵ The immigration status of the child or either of the child's parents is not relevant to the jurisdictional determination under the UCCJEA.

1. Home State

As with the UCCJA, a state can exercise initial jurisdiction to make a child custody determination if that state is the "home state" of the child. For purposes of the UCCJEA, the term home state has two definitions. First, a child's home state may be the state where the child resides at the commencement of the child custody proceeding.⁹⁶ Second, a child's home state may be the state where the child resided with a parent or a person acting as a parent for six consecutive months prior to the commencement of the custody proceeding.⁹⁷ Finally, if the child is less than six months old, a child's home state may be the state where the child resided with a parent or a person acting as a parent from the child's date of birth.⁹⁸ This form of jurisdiction is also favored by the PKPA for interstate enforcement purposes.⁹⁹ Furthermore, the immigration status of the child and/or the parents is irrelevant to this determination.

2. Significant Connection

A state can also exercise initial jurisdiction to determine child custody if the child or one of his or her parents has a "significant connection" with the jurisdiction.¹⁰⁰ This significant connection must consist of more than mere physical presence in the state.¹⁰¹ The state must also have considerable evidence with respect to the child's care, protection, training, and personal relationships.¹⁰²

3. More Appropriate Forum

If all courts having home state jurisdiction or significant connections decline to exercise that jurisdiction because another state is a more appropriate forum, that other state may exercise initial jurisdiction to determine a child custody proceeding.¹⁰³

4. Necessity

A state can exercise initial jurisdiction to determine a child custody proceeding by necessity when no other state would have jurisdiction over the child.¹⁰⁴

C. UCCJA & UCCJEA SUMMARY

Under both the UCCJA and the UCCJEA models, a state can exercise jurisdiction over a child custody proceeding if the child is residing in the state,¹⁰⁵ if the state has significant connections with the child,¹⁰⁶ or if

⁹⁴ See UCCJEA §201. See also Jennifer Marston, Comment, *Yesterday, Today, and Tomorrow's Approaches to Resolving Child Custody Jurisdiction in Oregon*, 80 OR. L. REV. 301, 314-318 (2001).

⁹⁵ UCCJEA § 201.

⁹⁶ UCCJEA § 201 (a)(1).

⁹⁷ UCCJEA § 201 (a)(2).

⁹⁸ UCCJEA § 102 (7). See also, *Lemley v. Miller*, 932 S.W.2d 284 (Tex. App. Austin 1996) (holding that an 11 month absence outside that jurisdiction counted as a part of the "home state" period).

⁹⁹ PKPA, 28 U.S.C. § 1738A (2001).

¹⁰⁰ UCCJEA § 201 (a)(2)(A).

¹⁰¹ *Id.*

¹⁰² UCCJEA § 201 (a)(2)(B).

¹⁰³ UCCJEA § 201 (a)(3).

¹⁰⁴ UCCJEA § 201 (a)(4).

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the child's welfare is at stake, making jurisdiction appropriate under necessity or an emergency.¹⁰⁷ This priority is also consistent with the PKPA, which only allows initial jurisdiction based on significant connections for child custody determinations when there is no home state.¹⁰⁸

Furthermore, the UCCJEA updates the UCCJA by providing a remedial process to enforce interstate child custody.¹⁰⁹

D. DUE PROCESS & EQUAL PROTECTION

In child custody disputes, using the status of either parent as the sole factor in determining custody has also been held to violate due process and equal protection. In the case of *In re Parentage of Antonio Florentino v. Melissa Woods*, the mother argued that the trial court erred in awarding custody of the child to the father based on the fact that he was undocumented.¹¹⁰ The Washington Court of Appeals held that, although immigration status may be considered with respect to the best interest of the child standard, immigration status is not a dispositive factor in determining custody.¹¹¹ Denying custody solely based on the father's immigration status would be a violation of due process and equal protection.¹¹²

Additionally, in *Plyer v. Doe*, the Supreme Court reaffirmed that undocumented immigrants are entitled to the protections of the federal constitution's Due Process and Equal Protection clauses.¹¹³ Therefore, denying an undocumented immigrant custody of his or her child based on immigration status would be a violation of these rights. Thus, immigration status cannot be used as the sole factor in determining custody matters and should not be held so by the courts.

III. Civil Protection Orders and Jurisdiction

Full access to family law courts and civil protection orders (CPO) can be crucial to protect battered immigrants from their abusers.¹¹⁴ A CPO is a court order prohibiting or restricting a person from harassing, threatening, and sometimes even contacting or approaching another specified person.¹¹⁵ CPOs grant immediate relief to victims of domestic violence by enjoining batterers from further violence against a family or household member.¹¹⁶ State statutes allow such orders to include, among others, restraining orders, "no contact" orders, eviction orders, and orders to stay away from a residence.¹¹⁷ Currently, all fifty states, the District of Columbia, Puerto Rico, and U.S. territories make CPOs available to victims of domestic violence.¹¹⁸ These orders are designed to deter batterers from committing further violence and to hold them accountable through both civil and criminal remedies.¹¹⁹ Courts cannot and should not base family court jurisdiction for protection orders on the immigration status of the parties involved. Courts must treat domestic violence as a serious violation of criminal law, independent of the victims' immigration status.¹²⁰

¹⁰⁵ UCCJA §75-d (a); UCCJEA § 201 (a)(1).

¹⁰⁶ UCCJA §75-d (b); UCCJEA § 201 (a)(2)(1)(A).

¹⁰⁷ UCCJA §75-d (c); UCCJEA § 201 (a).

¹⁰⁸ Honorable Jon D. Levy, *Transcending Borders in Child Custody Jurisdiction and Enforcement Act in Maine*, 15 ME. B.J. 78, 79 (2000).

¹⁰⁹ See Prefatory Note regarding the UCCJEA.

¹¹⁰ *In re. Parentage of Antonio; Simon Santos Florentino v. Melissa Woods*, No. 25966-4-II, 2002 Wash. App. LEXIS 1896 (Wash. Ct. App. 2002).

¹¹¹ *Id.* at 18

¹¹² *Id.*

¹¹³ *Plyer v. Doe*, 457 U.S. 202, 210-13 (1982).

¹¹⁴ NCJFCJ, *supra* note 25 (discussing that courts should not issue mutual protection orders).

¹¹⁵ BLACK'S LAW DICTIONARY (7th ed. 1999).

¹¹⁶ Judge Michael J. Voris, *The Domestic Violence Civil Protection Order and the Role of the Court*, 24 AKRON L. REV. 423, 425-426 (1990).

¹¹⁷ For a full discussion of civil protection orders, see BREAKING BARRIERS, Civil Protection Orders and Their Practical Application chapter.

¹¹⁸ Klein & Orloff, *supra* note, at 810.

¹¹⁹ Lisa C. Jordan & Bette Garlow, ABA Comm'n on Domestic Violence, *The Domestic Violence Civil Law Manual, Protection Orders and Family Law Cases*, §3 (2001).

¹²⁰ See The Violence Against Women Act, 42 U.S.C.S. § 3796hh (2002) (stating that the federal government should "encourage States, Indian tribal governments, State and local courts [including juvenile courts], tribal courts, and units of

The battered immigrant women provisions of the Violence Against Women Act provides protection to women previously forced to remain in violent relationships due to immigration status issues.¹²¹ Congress specifically intended these provisions to ensure that U.S. citizens and lawful permanent resident batterers could no longer use immigration status to perpetuate physical, mental, emotional, and economic violence against their spouses and children.¹²² The intent of Congress was to provide battered immigrants legal relief without risking deportation.¹²³ Civil courts must follow this intent with respect to civil protection orders by allowing battered immigrant women to access protections of the court system, without fear of deportation.

Any victim of domestic violence can file a petition for a protection order, regardless of immigration status.¹²⁴ A wide range of criminal acts can form the basis for civil protection orders, including physical abuse of the petitioner or child, criminal trespass, kidnapping, burglary, malicious mischief, interference with child custody, and reckless endangerment, as well as many others.¹²⁵ Thus, civil protection statutes provide a civil remedy based on a criminal act, allowing the victim to avoid the criminal prosecution of her batterer and potentially prevent additional violence.

The importance of legal access to battered immigrants is immeasurable. Protection order hearings can provide battered immigrants with the tools necessary to protect themselves and their children from further abuse. Women with legal representation are much more likely to receive civil protection orders than women who appear *pro se*.¹²⁶ Furthermore, CPOs granted to women with legal representation are more likely to include more effective and complete remedies.¹²⁷ Despite the fact that many batterers violate the protection order in some way, most orders deter repeated incidents of physical and psychological abuse.¹²⁸ Previous studies show that civil protection orders can be effective in eliminating or reducing domestic violence when properly drafted and enforced.¹²⁹

A. JURISDICTION AND VENUE

Generally, courts have jurisdiction to provide orders of protection in the state where the acts of abuse or threats occurred or in the state where the victim or perpetrator is currently present.¹³⁰ Thus, jurisdiction may exist regardless of the residency of the battered victim within that judicial jurisdiction.¹³¹ Victims of domestic violence and their children may need to file for an order of protection in a jurisdiction different than the jurisdiction where the abuse occurred, in order to better achieve safety for those abused. The purpose of protection order cases is to respond to, and deter future violence.¹³² For this reason domestic violence victims can file for protection orders in a variety of locations. No state statute or case law includes or supports the consideration of immigration status in protection order cases since these considerations would deny victims the protections of the court. Victims applying for protection orders must, however, establish jurisdiction and venue so that the appropriate court can hear their case.

local government to treat domestic violence as a serious violation of criminal law;" it also should, "strengthen legal advocacy service programs for victims of domestic violence and dating violence, including strengthening assistance to such victims in immigration matters.")

¹²¹ *Id.*

¹²² *Id.* at § 21:6.

¹²³ *Id.* at § 21:11. See also, Orloff & Klein, *supra* note, at 1023.

¹²⁴ Leslye E. Orloff et al., *With No Place To Turn: Improving Legal Advocacy for Battered Women*, 29 FAM. L. Q. 313, 314-315 (1995) (discussing the unique problems domestic violence victims face as immigrants and also discussed is the importance of how a protection order can be the most important remedy for domestic violence victims); NCJFCJ, *supra* note 25.

¹²⁵ Orloff & Klein, *supra* note, at 849 (citing statutes from Delaware, New Jersey, New Mexico, and Washington as examples).

¹²⁶ *Id.* at 812.

¹²⁷ *Id.*

¹²⁸ Susan Keilitz, *Effectiveness of Civil Protection Orders*, National Center for State Courts (1996), available at <http://www.ojp.usdoj.gov/nij/vawprog/comp18.htm>.

¹²⁹ *Id.* at 813.

¹³⁰ NCJFCJ, *supra* note 25. See also Orloff & Klein, *supra* note, at 876-77.

¹³¹ NCJFCJ, *supra* note 25. See also Orloff & Klein, *supra* note, at 877.

¹³² Lisae C. Jordan & Bette Garlow, ABA Comm'n on Domestic Violence, *The Domestic Violence Civil Law Manual, Protection Orders and Family Law Cases*, §3 (2001) available at <http://www.abanet.org/domviol/pubs.html>.

1. *Subject Matter and Personal Jurisdiction*

Domestic violence victims may file a petition for an order of protection in one of three places: (1) where they are currently or temporarily residing, (2) where the acts of domestic violence took place, or (3) where the abuser resides.¹³³ Battered immigrants are not required to have been residing in the state where the petition for the order of protection was filed.¹³⁴

When domestic violence victims raise claims in the state where the abuse occurred, that state's courts have subject matter jurisdiction over the tortious acts and may issue a protection order.¹³⁵ Family courts are given subject matter jurisdiction over petitions for protection orders so that these specialized courts can address the safety of victims, even if they remain with their abusers. Furthermore, family courts are best able to address important child custody issues in situations of domestic violence.¹³⁶ Across the country, jurisdiction and venue in protection order cases are generally established in one of several alternate locations: the petitioner's residence,¹³⁷ the petitioner's temporarily location¹³⁸ or shelter,¹³⁹ the respondent's residence,¹⁴⁰ either party's residence,¹⁴¹ or the location where the abuse occurred.¹⁴²

Some jurisdictions explicitly do not have specific residency requirements.¹⁴³ Thirty-one jurisdictions authorize the petitioner to file for a civil protection order in any general jurisdiction district court;¹⁴⁴ nine authorize filing in circuit court;¹⁴⁵ nine authorize filing in family court;¹⁴⁶ and one authorizes filing in juvenile or district court.¹⁴⁷

As with divorce, immigration status is irrelevant to whether an immigrant can obtain a protection order in a given jurisdiction. If the order is filed where the abuse occurred, residence is not relevant to the court's jurisdiction.¹⁴⁸ Likewise, when the victim is filing for a protection order in the jurisdiction where the abuser

¹³³ NCJFCJ, *supra* note 25. See also Orloff & Klein, *supra* note at 876-77.

¹³⁴ Orloff & Klein, *supra* note, at 876-77.

¹³⁵ *Id.*

¹³⁶ See *id.* at 24.

¹³⁷ Al. St. § 30-5-3, Al. St. § 9-15-201; DE ST TI 10 § 1042; DC CODE § 16-1001; GA St 19-13-2; HI ST § 585-2; ID ST § 39-6304; IL ST CH 750 § 60/209; IN ST § 12-10-328; KS LEGIS 142 (2002); KY ST § 403.725; LA. REV. STAT. ANN. § 46:2133 (West1993); MA ST 209A § 2; MI ST 600.2950; MO ST §455.503; MT ST § 40-15-301; NV ST § 3.223; N.J. STAT. ANN § 2C:25-28; NY FAM CT § 154; OK ST T.22 § 60.2; TX FAMILY § 83.003; VT ST T. 15 § 1002; WA ST 26.50.020; WI ST § 801.50 (1993).

¹³⁸ Al. St. § 30-5-3, Al. St. § 9-15-201; DE ST TI 10 § 1042; ID ST § 39-6304; IL ST CH 750 § 60/209; KY ST § 403.725; MT ST § 40-15-301; N.J. STAT. ANN § 2C:25-28; VT ST T. 15 § 1002; WA ST 26.50.020.

¹³⁹ Residence also includes the domestic violence victim's temporary residence in shelters. Orloff & Klein, *supra* note, 893.

¹⁴⁰ DE ST TI 10 § 1042; GA St 19-13-2; ID ST § 39-6304; LA. REV. STAT. ANN. § 46:2133 (West 1993); ME ST T. § 211; MO ST §455.503; MT ST § 40-15-301; N.J. STAT. ANN § 2C:25-28; OK ST T.22 § 60.2; SC. ST § 20-4-40; TN ST § 36-3-602; TX FAMILY § 83.003; WI ST § 801.50 (1993).

¹⁴¹ AZ ST § 13-3602, IA ST § 236.6; MN ST § 518B.01; NH ST § 17-b:3; N.J. STAT. ANN § 2C:25-28; SD ST § 25-10-2; UT ST § 30-6-3.

¹⁴² DE ST TI 10 § 1042; DC CODE § 16-1001; GA St 19-13-2; LA. REV. STAT. ANN. § 46:2133 (West 1993); MN ST § 518B.01; MO ST §455.503; MT ST § 40-15-301; NY FAM CT § 154; OK ST T.22 § 60.2; TN ST § 36-3-602; UT ST § 30-6-3.

¹⁴³ Ak. St. § 18.66.100; FL ST § 741.30; MD FAMILY § 4-501-6; MS ST § 97-3-107; NE ST §25-2740; NM 45-5-402; NC ST § 50B-2; ND ST 14-07.1-02.1; OH ST § 3133.31; OR ST § 107-710; PA ST 18 Pa. C.S.A. § 4954; RI ST § 15-15-3; VA ST §16.1-253.1; WV ST § 48-27-301; WY ST 35-21-103.

¹⁴⁴ Al. St. § 30-5-3, Al St. § 9-15-201; Ak. St. § 18.66.100; CA FAM App. § 547; CO ST § 15-14-402; DE ST TI 10 § 1042; ID ST § 39-6304; IN ST § 12-10-328; KS LEGIS 142 (2002); KY ST § 403.725; MD FAMILY § 4-501-6; MN ST § 518B.01; MS ST § 97-3-107; MO ST §455.503; MT ST § 40-15-301; NE ST §25-2740; NH ST § 17-b:3; NM 45-5-405; NY FAM CT § 154; NC ST § 50B-2; ND ST 14-07.1-02.1; OH ST § 3133.31; OK ST T.22 § 60.2; PA ST 18 Pa. C.S.A. § 4954; SC. ST § 20-4-40; TN ST § 36-3-602; TX FAMILY § 83.003; UT ST § 30-6-3; VA ST § 16.1-253.1; WA ST 26.50.020; WI ST § 801.50 (1993).

¹⁴⁵ AR ST § 9-15-201; FL ST § 741.30; GA St 19-13-2; ME ST T. § 211; MA ST 209A § 2; OR ST § 107-710; SD ST § 25-10-2 WV ST § 48-27-301; WY ST 35-21-103.

¹⁴⁶ CT ST § 46B-15 amended by 2002 Conn. Legis Serv. P.A. 02-127; DC CODE § 16-1001; HI ST § 585-2; LA. REV. STAT. ANN. § 46:2133 (West1993); MI ST 600.2950; NV ST § 3.223; N.J. STAT. ANN § 2C:25-28; RI ST § 15-15-3; VT ST T. 15 § 1102.

¹⁴⁷ UT ST § 30-6-3

¹⁴⁸ NCJFCJ, *supra* note 25 See also, Orloff & Klein, *supra* note, at 876-77.

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resides, the residence of the victim is irrelevant for jurisdictional purposes.¹⁴⁹ Additionally, the residence of the victim has been interpreted to include temporary locations in order to accommodate victims living at shelters or other locations. This definition allows victims to obtain the protection they need without the risk of traveling back to a location where the abuser may be more likely to harm them. Since the victim is physically present in the temporary jurisdiction, she now requires protection in that jurisdiction and thus has been held eligible to access local courts. Victims should also not be compelled to list their present address on the forms served on the abuser.

Although subject matter jurisdiction can be found where the abuse occurred, where the victim is physically present, or where the abuser resides, securing personal jurisdiction over the abuser is easiest when protection orders are initiated either where the violence occurred or where the abuser resides.

Personal jurisdiction is jurisdiction over the person who commits acts of domestic abuse and can be established in the state where the acts of violence were committed.¹⁵⁰ Personal jurisdiction can also be found where the violence occurred, regardless of whether the victim or the batterer resides in that jurisdiction.¹⁵¹ Most importantly, civil protection orders can be issued in jurisdictions where no actual violence occurred.¹⁵² However, obtaining personal jurisdiction through service of process in a jurisdiction to which a domestic violence victim has fled can be difficult. Additionally, serving an abuser with notice of the victim's new residence may increase the risk of violence to the victim. Otherwise, the victim would be required to travel to the jurisdiction where the violence occurred or where the defendant lives. Finally, once the victim obtains a protection order from one jurisdiction, that order will be granted full faith and credit in other jurisdictions and can be enforced wherever the victim moves in the United States.¹⁵³ Full faith and credit is granted as long as it complies with VAWA's due process requirement. This enforceability grants the victim access to family courts in the jurisdiction providing the most protection for the victim.¹⁵⁴

2. Venue

If jurisdiction can be established in a particular state, "venue" determines the location of the court within that state that is most convenient for deciding a protection order matter.¹⁵⁵ The correct court is usually the court located where the victim currently resides or the "home state."¹⁵⁶ Nevertheless, venue can also be established where the victim permanently or temporarily resides, where the batterer resides, where either the victim or batterer resides at the time of the protection order petition or violation, or where the abuse occurred.¹⁵⁷ Most importantly, victims cannot be denied the legal safeguards of protection orders simply because the abuse did not occur in the jurisdiction where the victim is filing the protection order petition.¹⁵⁸ Courts in the home state can decline jurisdiction in domestic violence cases where the victim has fled across state lines and sought refuge in another state.¹⁵⁹ By applying an inconvenient forum analysis, any court with the power to exercise jurisdiction may choose to decline their jurisdiction over the case.¹⁶⁰ This would allow the victim to

¹⁴⁹ National Council of Juvenile & Family Court Judges, *Family Violence: A Model State Code*, § 303 (1994). See also, Orloff & Klein, *supra* note, at 876-77.

¹⁵⁰ Orloff & Klein, *supra* note, at 876-77.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ Violence Against Women Act of 1994, 42 U.S.C. § 13981 (1994). See also, Violence Against Women Online Resources, *Increasing Your Safety: Full Faith and Credit for Protection Orders*, Developed and Distributed by National Center on Full Faith and Credit, Pennsylvania Coalition Against Domestic Violence, available at <http://www.vaw.umn.edu/FinalDocuments/survivorbrochure.asp>.

¹⁵⁴ NCJFCJ, *supra* note 25.

¹⁵⁵ BLACK'S LAW DICTIONARY (7th ed. 1999).

¹⁵⁶ Orloff & Klein, *supra* note, at 893-894.

¹⁵⁷ This includes permanent and temporary protection orders NCJFCJ, *supra* note 25; Orloff & Klein, *supra* note, at 893-894.

¹⁵⁸ National Council of Juvenile & Family Court Judges [hereinafter NCJFCJ], *Family Violence: A Model State Code*, § 303 (1994), available at <http://www.ncjfcj.org>.

¹⁵⁹ Several jurisdictional statutes provide for the inconvenient forum analysis, including the Uniform Child Custody Jurisdiction Act (UCCJA) (drafted by NCCUSL in 1968) and the Uniform Child Custody Jurisdiction and Enforcement Act (UUCJEA) (drafted by NCCUSL in 1997). For a fuller discussion of these and other jurisdictional statutes, see Deborah Goelman, *Shelter from the Storm: Using Jurisdictional Statutes to Protect Victims of Domestic Violence after the Violence Against Women Act of 2000*, 13 Colum. J. Gender & L. 101, 115-16, 123-25, 134-35 (2004).

¹⁶⁰ See UCCJA § 7(c) (1968); UUCJEA § 207(b) (1997). For example, courts have considered safety issues when declining jurisdiction. See *Swain v. Vogt*, 206 A.D.2d 703 (N.Y. App. Div. 1994) (finding that where a mother left the child's home

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remain in the refuge state, instead of forcing her to return to her home state, which could potentially protect her and her children from further abuse. Just as with subject matter jurisdiction, immigration status is not relevant to establishing venue in a protection order cases.

B. DUE PROCESS & EQUAL PROTECTION

Like divorce and child custody issues, civil protection order hearings also entitle all permanent legal¹⁶¹ or undocumented immigrants¹⁶² to the right to sue, be parties, give evidence, and have the full and equal benefit of all state and federal laws.¹⁶³ These rights encompass the fundamental right to Due Process and Equal Protection provided by the Constitution. Civil protection orders satisfy the state action requirement of the Due Process clause and therefore implicate these fundamental constitutional rights.¹⁶⁴ Thus, denying individuals due process and equal protection of the courts based on their immigration status is a violation of their constitutional rights.¹⁶⁵

IV. Child Support and Jurisdiction

Isolation, intimidation, fear of losing custody of their children, and economic abuse are all contributing factors to the inability of domestic violence victims to leave their batterers. Furthermore, when an immigrant victim and her batterer have children, issues of child support, custody, and alimony also come into play.¹⁶⁶ According to the U.S. Census Bureau, children living with a single mother have a one-in-three chance of living in poverty.¹⁶⁷ Many victims of domestic violence do not pursue such claims out of fear that the violence will escalate.¹⁶⁸

A. ECONOMIC ABUSE

Aside from fear, economic dependence is possibly the single most common reason why abuse victims remain with or return to their batterers.¹⁶⁹ For immigrant victims, economic abuse is a common form of power and control exerted by abusers.¹⁷⁰ Without legal authorization to work, many immigrant victims are prevented from gaining stable employment. Rather, in order to make a living, many are forced to accept employment through informal employment arrangements.¹⁷¹ Working at these jobs, usually for cash, immigrant women

state and relocated with her son to escape abuse that the court was entitled to decline jurisdiction upon finding that the refuge state was a more appropriate forum); *Van Norman v. Upperman*, 436 N.W.2d 834, 835 (Neb. 1989) (declining jurisdiction on inconvenient forum grounds, based on the fact that the children were receiving counseling in Kansas and had relatives in Kansas, and that the mother's limited income would make coming to the home state for court appearances an extreme hardship); *Cronin v. Camilleri* (declining jurisdiction based on inconvenient forum because the children had relatives in the refuge state, and the mother could earn a living there).

¹⁶¹ *Graham v. Richardson*, 403 U.S. 365 (1971).

¹⁶² *Martinez v. Fox Valley Bus Lines*, 17 F. Supp. 576 (N.D. Ill. 1936).

¹⁶³ 42 USCS § 1981(a) (2002).

¹⁶⁴ *Clouterbuck v. Clouterbuck*, 556 A.2d 1082, 1085 n.3 (D.C. 1989).

¹⁶⁵ Similarly, immigration status has even less relevance in child abuse situations. While civil protection orders create a civil remedy based on a criminal act, child abuse cases constitute a criminal charge brought by the state against the perpetrator. As the state is the initiator of this criminal case, immigration status of the parties involved plays no role in the prosecution of the defendant. Refer to Part I (B) and Part II (D) for a discussion of these rights in case law.

¹⁶⁶ Leila Rothwell, *VAWA 2000's Retention of the "Extreme Hardship" Standard for Battered Women in Cancellation of Removal Cases: Not your Typical Deportation Case*, 23 U. HAW. L. REV. 555, 607-8 (2001).

¹⁶⁷ U.S. Comm'n on Interstate Child Support, *Supporting Our Children: A Blueprint for Reform*, 2 Washington, D.C.: U.S. Government Printing Office (1992).

¹⁶⁸ Symposium, *Women, Children, & Domestic Violence: Current Tensions & Emerging Issues*, 27 *FORDHAM URB. L.J.* 567, 743 (2000).

¹⁶⁹ Orloff & Klein, *supra* note, at 990.

¹⁷⁰ See Leila Rothwell, *VAWA 2000's Retention of the "Extreme Hardship Standard" for Battered Women in Cancellation of Removal Cases: Not Your Typical Deportation Case*, 23 U. HAW. L. REV. 555, 567 (2001).

¹⁷¹ It is important to note that when advocates and attorneys discover that undocumented immigrant battered women are working they should advise these clients that there are two things related to work that immigrant clients without work authorization from USCIS must not do. First, they must not hold themselves out as a U.S. citizen for purposes of obtaining employment. If they do this, even if they qualify for immigration benefits under VAWA, they will not be able to attain lawful permanent residency under VAWA. Second, they should be advised not to buy or use false papers (work permits, green card, social security numbers) Although, if they have done this they might be able with the assistance of a trained

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have little job security, are often underpaid, have no health insurance, and are at increased risk for abuse and exploitation by employers.¹⁷² The inability to work legally often is manipulated as a source of power and control by abusers. Immigrant victims married to citizen or lawful permanent resident abusers may not file immigration papers for their immigrant spouses, thus preventing them from seeking legal employment.¹⁷³ All of these factors make it more difficult for many immigrant victims of domestic violence to support themselves and their children if they separate from their abusers.

These circumstances leave many battered immigrants in a position where they lack the means to independently support themselves and their children. This inability to sufficiently support themselves separately from their abusive spouse or partners leaves them economically dependent on the very individual that abuses them.¹⁷⁴ Generally, the severity of the abuse increases by the degree of economic dependence.¹⁷⁵ In light of these economic limitations, the basic legal right to seek court-ordered child support is essential to a victim's ability to provide for her child and live independently from her abuser. Immigration status plays no role in determining court jurisdiction over child support proceedings. By the same token, regardless of immigration status, all parents have a duty to support their children. There are no state statutes that require the individual seeking child support to be a citizen or lawful permanent resident of the United States.

B. PERSONAL JURISDICTION

Child support payments can be addressed during divorce, civil protection orders, custody, or independent child support proceedings without inquiring into the immigration status of the parents or child. In child support proceedings, jurisdiction is established where the child resides, or where the court can obtain jurisdiction over the non-paying parent.¹⁷⁶ Essentially, the court has valid jurisdiction over child support proceedings involving an immigrant custodial parent and his or her child wherever the child or non-paying parent resides.

The Due Process clause of the U.S. Constitution limits the ability of state courts to assert personal jurisdiction over a defendant who does not reside in the state.¹⁷⁷ In *International Shoe Co. v. Washington*, the Supreme Court ruled that in order for personal jurisdiction to be established over a non-resident defendant, the defendant must have "certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" ¹⁷⁸ In *Kulko v. Superior Court*, the Supreme Court held that the parent-child relationship was insufficient to establish the minimum contacts required between a nonresident parent and the state in which the child resides for purposes of child support benefits.¹⁷⁹

After the parent-child relationship was held to be insufficient to assert personal jurisdiction, state legislatures have enacted new "long-arm" statutes incorporating acts of purposeful availment relevant to child support actions.¹⁸⁰ Many state long arm statutes allow personal jurisdiction over non-resident defendants under any basis that is constitutionally permissible; other states allow jurisdiction to be asserted based on specific acts or

immigration attorney to overcome bars from attaining lawful permanent residence under VAWA, there is not guarantee and it is difficult. Thus clients should be advised not to do these things. Clients who have used or are using false papers should be advised to stop doing so. *Id.*

¹⁷² *Id.*

¹⁷³ Mary Ann Dutton, *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latina: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL'Y 245, 250-51 (2000).

¹⁷⁴ Leslye Orloff, *Lifesaving Welfare Safety Net Access For Battered Immigrant Women and Children: Accomplishments and Next Steps*, 7 WM & MARY J. WOMEN & L. 597, 656-657 (2001).

¹⁷⁵ Michael J. Strube & Linda S. Barbour, *The Decision to Leave an Abusive Relationship: Economic Dependence and Psychological Commitment*, 45 J. MARRIAGE & FAM. 789, 790-92 (1983).

¹⁷⁶ *Porter v. Porter*, 684 A. 2d 259 (Supreme Court of Rhode Island 1996) (court ruled it had exclusive jurisdiction over the non-paying parent because that jurisdiction was the child's state or residence of contestant). North Carolina Gen Stat. § 50-13.5(f) (child support orders must be made in divorce proceedings and jurisdiction is found where the child resides or is physically present or where the parent resides.) See *Bass v. Bass*, 43 N.C. App.212.

¹⁷⁷ *Kulko v. Superior Court of California in and for City and County of San Francisco*, 436 U.S. 84, 91 (1978)

¹⁷⁸ *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945).

¹⁷⁹ *Kulko*, 436 U.S. 84, at 101.

¹⁸⁰ Susan Weinstein, *Reaching Nonresident Defendants in Child Support Actions: A Survey of State Long Arm Statutes*, 9 PROB. L.J. 81, 103-114 (1989).

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circumstances, such as tortious conduct by non-resident defendants causing injury within the state.¹⁸¹ Though the statutes based on specific acts or tortious circumstances generally apply to a non-resident's business transactions or tortious conduct, many courts extended these circumstances to apply to child support orders.¹⁸² This form of jurisdiction is based on a separation or divorce agreement with a "substantial connection" to the forum state.¹⁸³

The Uniform Interstate Family Support Act [UIFSA] was established to create uniformity amongst child support guidelines and enforcement throughout the nation.¹⁸⁴ All states have enacted the UIFSA¹⁸⁵ to ensure that there is one controlling child support order to be enforced in courts around the country.¹⁸⁶ Under Section 201 of the UIFSA, a petitioner for child support has three options. The first option is the use the state long arm statute to obtain personal jurisdiction over the respondent.¹⁸⁷ As a second option, the petitioner can initiate a two-state action under the UIFSA, to establish a support under in the respondent's state of residence applying the law of the respondent's state.¹⁸⁸ Finally, the petitioner may file a suit in the respondent's state of residence in order to settle support issues within a single proceeding.¹⁸⁹

Under the UIFSA, personal jurisdiction can be established over a nonresident if the individual: (1) is personally served with a citation, summons, or notice within the forum state, (2) submits to the jurisdiction of the forum state by consent, by entering a general appearance, or filing a responsive document which has the effect of waiving consent to the jurisdiction, (3) resided with the child in the forum state, (4) resided in the forum state and provided pre-natal expenses or support to the child, (5) engaged in sexual intercourse in the state during which the child may have been conceived, or (6) asserted parentage in the putative father registry maintained in the state by the appropriate agency.¹⁹⁰ Additionally, personal jurisdiction can be established if the child resides in the state as a result of the acts or directives of the individual over which jurisdiction is being asserted, or if there is any other basis consistent with the constitutions of the state and the United States for the assertion of personal jurisdiction.¹⁹¹

This section of the UIFSA creates a long-arm jurisdiction that is as broad as constitutionally permitted.¹⁹² It must be noted that a child support order sought under the UIFSA submits to the jurisdiction only for child support issues and not for issues of child custody or visitation.¹⁹³ However, if the non-custodial parent moves outside the state where the custody order was issued, that parent is still subject to the state's jurisdiction for enforcement of child support if the child or an individual obligee continues to reside there.¹⁹⁴ Finally, jurisdiction granted under the UIFSA or other state law continues as long as the state with jurisdiction has continuing exclusive jurisdiction to modify and enforce its order under Sections 205, 106, and 211 of UIFSA.¹⁹⁵

¹⁸¹ Rosemarie T. Ring, *Personal Jurisdiction and Child Support: Establishing the Parent-Child Relationship as Minimum Contacts*, 89 CAL. L. REV. 1125, 1139 (2001).

¹⁸² *Id.* at 1140. See, e.g. *In re Custody of Miller*, 548 P.2d 542, 718 (Wash. 1976) (holding that "the failure of a parent to support his or her children constitutes a tort" within the meaning of the long-arm statute); see also *Poindexter v. Willis*, 231 N.E.2d 1, 3 (Ill. App. Ct. 1967) (stating that "the word 'tortious' ...is not restricted to the technical definition of a tort, but includes any act committed in this state which involves a breach of duty to another and makes the one committing the act liable to respondent in damages"). Nevertheless, most courts require an existing support order before finding that the nonresident defendant is in violation of a duty or has engaged in tortious conduct.

¹⁸³ Ring at 1140.

¹⁸⁴ Uniform Interstate Family Support Act [hereinafter UIFSA], 42 U.S.C. 666 Prefatory Note (1996).

¹⁸⁵ Personal Responsibility & Work Opportunity Reconciliation Act [hereinafter PRWORA], 42 U.S.C. § 666(f) (2000).

¹⁸⁶ Stacy L. Brustin, *The Intersection Between Welfare Reform & Child Support Enforcement: D.C.'s Weak Link*, 52 CATH. U. L. REV. 621, 630 (2003).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ UIFSA at § 201 (1996).

¹⁹¹ *Id.*

¹⁹² *Id.* at § 201, Comment.

¹⁹³ Barry J. Brooks & John J. Sampson, *Uniform Interstate Family Support Act (2001) with Prefatory Notes & Comments*, 36 FAM. L.Q. 329, 356 (2002).

¹⁹⁴ UIFSA at § 205.

¹⁹⁵ UIFSA at § 202.

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Furthermore, under the Uniform Reciprocal Enforcement of Support Act, child support orders are enforceable, even if issued through a divorce proceeding in another state.¹⁹⁶ Thus, when a parent is delinquent on child support payments, a state court may seek child support payments from a non-paying parent, even if he resides outside that state. In other words, the non-paying parent is still subject to the issuing state's jurisdiction for enforcement of child support, until such time that the court's jurisdiction is terminated through a specific long arm jurisdiction provision.¹⁹⁷ Under Uniform Reciprocal Enforcement of Support Act, all states must recommend and give full faith and credit to child custody orders from foreign states.¹⁹⁸

However, once a child support order has been issued, neither party can attempt to receive a new child support order in a new jurisdiction.¹⁹⁹ Instead, the provisions of the UIFSA must be applied in order to enforce and modify the existing child support order, to enforce and modify previous orders. For example, where neither party lives in the original state issuing the child support order, the long arm provision of the UIFSA can be invoked to assert personal jurisdiction in order to modify the order. Under Section 611, personal jurisdiction cannot be asserted in the new state where the petitioner resides, even if a basis for long-arm jurisdiction exists.²⁰⁰ However, jurisdiction may be asserted in the state issuing the controlling child support order, or in the respondent's new state of residence if other U.S. jurisdictions do not have a connection to the respondent.²⁰¹ None of these provisions or restrictions considers immigration status relevant to child support determinations, thus, making such inquiries irrelevant.

C. DUE PROCESS & EQUAL PROTECTION

Like divorce, child custody, and civil protection orders, child support issues also entitle all permanent legal²⁰² or undocumented immigrants²⁰³ to the right to sue, be parties, give evidence, and have the full and equal benefit of all state and federal laws.²⁰⁴ These rights encompass the fundamental right to due process and equal protection of the courts, and denial of these rights based on immigration status is a violation of those constitutional rights.

¹⁹⁶ Uniform Reciprocal Enforcement of Support Act [hereinafter URESA], § 2(m) (1968) ("State" includes a state, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any foreign jurisdiction in which this or a substantially similar reciprocal law is in effect").

¹⁹⁷ Shannon Braden, *Battling Deadbeat Parents: The Constitutionality of the Child Support Recovery Act in Light of the United States v. Lopez*, 7 SPG KAN. J.L. & PUB. POL'Y 161, 166 (1998).

¹⁹⁸ Uniform Reciprocal Enforcement of Support Act.

¹⁹⁹ Brooks & Sampson, *supra* note 193, at 355.

²⁰⁰ UIFSA at § 611. This restriction holds true even if the non-resident appears in the state to enforce visitation of the custody order. See *Kulko v. Superior Court*, 436 U.S. 84 (1978).

²⁰¹ *Phillips v. Phillips*, 826 S.W.2d 747 (Tex. App. 1992). However, the jurisdiction of the original issuing state must be used with extreme restraint in order to comply with Section 611. UIFSA at §611.

²⁰² *Graham v. Richardson*, 403 U.S. 365 (1971).

²⁰³ *Martinez v. Fox Valley Bus Lines*, 17 F. Supp. 576 (N.D. Ill. 1936).

²⁰⁴ 42 USCS § 1981(a) (2002).

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