

When Immigration Issues Arise in Custody Cases Involving Immigrant Survivors Strategies Roadmap for Family Lawyers - Handout

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Immigrant Parents' Constitutional Right to Custody of Their Children

- Constitutional right to custody absent unfitness
- Overriding presumption that:
 - Parent-child relationship is constitutionally protected
 - In children's best interest to stay with/be reunited with their parent(s)
- Applies to all families without regard to:
 - Undocumented immigration status
 - Immigration detention
 - Deportation
- **Child's best interests is most important**
 - In re Interest of Angelica L., 277 Neb. 984 (2009)

"Best Interest" Factors

Uniform Marriage and Divorce Act

- The wishes of the parents
- The wishes of the child
- The interaction/interrelationship of the child with parents, siblings, other significant persons
- The child's adjustment to home, school, community;
- The mental and physical health of all individuals involved.

Best Interests and Immigration

- No state family code lists immigration status or English language competency as a factor
- All states have provisions that encourage courts not to award custody to batterers
- As a general rule immigration status is NOT relevant to
 - Core primary caretaker determination
 - Evaluation of parenting skills

Recommended Strategies

- Don't let immigration information distract the judge from statutorily required best interest factors, try to limine reference to status out
- Many immigrant victims involved in custody cases will qualify for VAWA, T or U visa immigration relief but do not know it.
- Courts should be encouraged to think about which party is raising the immigration issue, for what purpose and why?

When Immigration Status is Raised in Custody Proceedings

- Parent raises the other parent's undocumented or temporary immigration status
 - to prejudice the decision maker
- Courts should not rely on immigration status as a stand-alone factor
- Courts must decide child's best interests:
 - Who has been primary caretaker? What has been status quo?

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- Who has been primarily responsible for child’s education and health care?
- History of abuse (or sexual assault) perpetrated by 1 parent against the other

Getting Information Into the Court Record

- When representing an immigrant victim plan how you will get evidence into the custody case regarding
 - ABA report and recommendations
 - Immigration related abuse
 - Materials explaining VAWA, T and U visa immigration options
 - Articles on dynamics of domestic violence experienced by immigrant victims
- Ask the court to take judicial notice
- Prepare bench brief for the court on the issue citing and including copies of appropriate resources
- Expert testimony

Rule 11 Sanctions

- Designed to deter malicious behavior, abuses and bad faith acts by
 - Attorneys and pro se parties
- Striking pleadings, written motions or other papers and
- Disciplinary sanctions
- When the claims, defenses or legal contentions are meant to
 - Harass
 - Cause unnecessary delay or
 - Increase the cost of litigation

Threats of Deportation are Like Threats of Criminal Prosecution

- An attorney who threatens criminal prosecution to a person involved in the same civil case commits moral turpitude, and the attorney’s belief in the person’s guilt is no defense, and not even a mitigating factor
- Threatening criminal prosecution in order to force a settlement of a civil action is illegal, improper and unprofessional

File Motion In Limine

- Based on Rule 11 when
 - Threats of deportation or
 - To stop discovery of a VAWA immigration case

Make your Record

- If immigration status is raised by perpetrator – object as to relevance, get ruling
- Make court aware of case law and memos
- Establish what the status quo was
- Establish that awarding your client custody is in child’s best interest
- If not granted, ask for specific findings and conclusions of law from Court

Go on the Offensive

- Cross examine the perpetrator on issue, i.e.:
 - You knew where your wife (the mother of your children) was from.
 - You didn’t do anything to remedy your so called “problem” with her status did you?
 - You could have, yet you chose not to for how many years?

Your Client's Plan

- Establish that your client has been the primary caretaker
- Establish how decisions regarding child were made
- Establish what your client's plan is for her future and the future of the children

When the abuser argues that the victim's lack of legal immigration status undermines children's stability by alleging that the victim will be imminently deported because of undocumented status...

- If eligible, help client apply for VAWA self-petition, VAWA cancellation of removal, U-visa, T-visa, or immigration case filed by perpetrator spouse or employer
- Call immigration expert as witness to educate court about DV related immigration protections; deportation and removal priorities at DHS; and how civil violations of immigration law are not crimes
- Provide court with copies of an overview of DHS policies protecting immigrant victims and parents in process of filing for immigration relief
- Discuss steps perpetrator could have taken to apply for immigration status for victim
- Discuss hypothetical case similar to client's, provide opinion about victim's possibility of receiving immigration benefits

Myths and Facts

- Lack of legal immigration status does not mean
 - Deportation is imminent
 - Parent is likely to flee U.S.
 - Victim parent does not qualify for immigration relief
- Make sure focus remains on best interest
 - Primary caretaker
 - History of domestic violence and presumptions this raises

When the abuser chooses not to file immigration papers for victim...

- Present evidence of immigration related abuse – demonstrate that the reason the victim does not have legal immigration status is that abuser never filed immigration papers on her behalf
 - Corroborates evidence of DV to support finding that children should not be placed in custody of abusive parent
- Present documentation of lawful presence and prima facie determination by DHS that victim has valid VAWA or U-visa case

Myths and Facts

- Need to be awarded custody to give child immigration benefits and citizenship
 - Parent can apply for child to have immigration benefits whether or not they have custody

When the abuser misrepresents to the court that only a parent with custody can sponsor the child for legal immigration status...

- Call expert witness immigration lawyer to testify that a custody award plays no role in a citizen or lawful permanent resident parent's ability to confer legal immigration status on an immigrant child. Unless
 - Immigrant child adopted before age of 16 has lived less than 2 years with the sponsoring adoptive parent or
- Divorce should have no effect on natural or adoptive parent's ability to confer status
- Except divorce prior to time a step child receives lawful permanent residency will result in denial of step child's application
- Unless citizen step parent has filed family-based petition for the child

Myths and Facts

- Undocumented parent cannot financially support child
 - Could the parent making claim have filed immigration papers for the immigrant parent?
 - Immigrant victim parents are likely eligible for immigration benefits that include:
 - legal work authorization
 - some access to benefits
 - Child support (and spousal support, if married) can and should be ordered

When the abuser says immigration status impact's victim's ability to work, support children, get public benefits...

- Apply for VAWA, T or U visa as soon as possible
- Victim would have had legal work authorization if the perpetrator had filed a case for her
- Present evidence of pending VAWA self-petition or U-visa application to show client is on path to receiving legal work authorization
- Seek child support from perpetrator
- Submit brief to court or present expert explaining issue of access to public benefits for children in immigrant families

Myths and Facts

- Undocumented parent cannot receive public benefits for the child
 - Incorrect, they can apply for “child only” benefits

When abuser threatens or takes steps to have victim deported...

- Help victim file VAWA, T or U case as soon as possible
- Have victim memorize her A# from receipt notice
- Collect evidence of battering, extreme cruelty or criminal activity to show DHS enforcement officials if she is stopped
- If victim has filed a VAWA, T or U case before you go to court take with you
 - Victim's receipt notice A#
 - DHS Broadcast on VAWA confidentiality computer system
 - DHS VAWA confidentiality policies
 - All available at iwp.legalmomentum.org

When the abuser alleges that the victim's immigration status places the children at risk of parental kidnapping by alleging victim will flee...

- Parent alleging the other parent will flee must prove that flight is imminent by showing:
 - Possession/purchase of airline tickets
 - Plans to move to another location
 - Proof of contacts, family, or job in other location
 - Economic capacity to relocate
 - Other evidence that the other parent is planning to leave with the children

Myths and Facts

- Legal immigrants/naturalized citizens are more likely to flee with children
 - When there have been threats of kidnapping children
 - When they are dual nationals
 - Because they can travel freely to and from U.S.

When potential kidnapping is alleged

- Court should treat as in any other case
- Evidence court should examine includes evidence of the victim's:
 - Connections to the US
 - Connections to the home country
 - Plans to leave
 - History of traveling to and from the home country
 - Whether she has purchased airline tickets
- Immigration status may be relevant to determine
 - Whether her deportation is imminent
 - Whether the parent making allegations could have filed immigration papers for the abused immigrant parent and did not
 - The history of immigration related abuse in the relationship
 - Expert testimony on these issues useful to the court

Dangers of International and Interstate Parental Kidnapping

- Behavioral indicators for parental abduction include when foreign-born parent:
 - Threatens to take the child;
 - Has no financial or emotional ties to U.S. and/or community in which the children live;
 - Has resources to survive in hiding;
 - Rejects or dismisses child's mixed heritage;
 - Feels separation/divorce constitute severe loss or humiliation; and
 - Has family and social support in country of origin