

Custody for Abused Immigrants: Tips, Tools and Best Practices

November 15, 2018

Webinar

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The opinions, findings, conclusions, and recommendations expressed in this program are those of the authors and do not necessarily reflect the views of the Department of Justice, Office on Violence Against Women.



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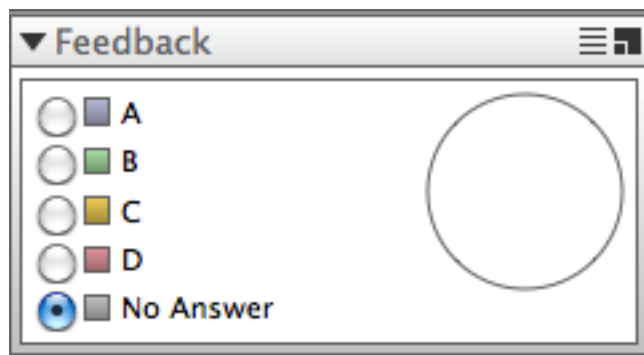
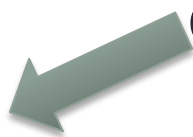
**Judge Rosemary
Collins**
Presiding Judge,
Circuit Court, Winnebago
County, Rockford, Illinois

NIWAP's Technical Assistance: (202) 274-4457

Let's see who is on the call with us. Please check the box that best describes you:

- A. Judge or court staff
- B. Attorney
- C. Domestic violence/sexual assault victim advocate
- D. Other

Answer
on the left



Feedback

A

B

C

D

No Answer

Immigrant Demographics

Data from the U.S. Census, the Migration Policy Institute Data Hub, and the Department of Homeland Security Office of Immigration Statistics

US Demographics (2016)*

- ❖ Total foreign born population – 43,739,345
- ❖ 13.5% of the country's ~323.1 million people are foreign born
 - 48.6% naturalized citizens
 - ~31% legal permanent residents (DHS data)
 - ~4.4% temporary visa holders
 - ~16% undocumented (includes pending VAWA, Us, Ts, SIJS)
 - 40.6% rise in immigrant population from 2000 to 2014
 - 21.6% of U.S. population speak a language other than English at home
- ❖ 25.2% of children under 6 have one or more immigrant parents
- ❖ 25.8% of children under age 18 have one or more immigrant parents
 - 88% of these children are native-born U.S. citizens

*Source: Migration Policy Institute Data Hub (July 2018) and DHS Population Estimates (November 2016)

Children in Immigrant Families

- 85% of immigrant families are “mixed status” (including at least 1 U.S. citizen, often a child)
- 1 in 4 children is the child of an immigrant
- 18% (5 and older) speak a language other than English at home

Immigration Relief: Affect on Family Law Cases

How does filing for immigration relief help immigrant domestic and sexual violence victims in family law cases?



Importance of Immigration Status

- Ability to work legally
- Protection from deportation and removal
- Ability to obtain a driver's license and social security number
- Better access to housing and public services
- Break from isolation/ Gain Independence
- Ability to travel to and from the U.S. (with some exceptions)
- Path to lawful permanent residency and ultimately citizenship

Purpose of Immigration Relief for Survivors

- Improves access to justice
- Helps build community policing and relationships
- Increases prosecution of perpetrators
- Allows victims to report crimes without fear of deportation
- Improves survivors options for stability & economic security
- Keeps communities safe

Immigration Related Abuse

- Refusal to file immigration papers on spouse/child/parent's behalf
- Threats or taking steps to withdraw an immigration case filed on the survivor's behalf
 - Family or work based visas
- Forcing survivor to work with false documents
- Threats/attempts to have her deported
- Calls to DHS to turn her in – have her case denied

Connection Between Abuse and Control Over Immigration Status

- Abuse rates among immigrant women
 - Lifetime as high as 49.8%
 - Those married to citizens and lawful permanent residents – 50.8%
 - U.S. citizen spouse/former spouse abuse rate rises to 59.5%
- Almost three times the national average

*Hass, G. A., Ammar, N., Orloff, L. (2006). Battered Immigrants and U.S. Citizen Spouses

Coercive Control Over Immigration Status

- Among abusive spouses who could have filed legal immigration papers for survivors:
 - 72.3% never file immigration papers
 - The 27.7% who did file had a mean delay of **3.97 years.**

Hass, Dutton and Orloff (2000). "Lifetime prevalence of violence against Latina immigrants: Legal and Policy Implications." *International Review of Victimology* 7 93113

- 65% of immigrant survivors report some form of immigration related abuse (NIJ, 2003)

*Edna Erez and Nawal Ammar, *Violence Against Immigrant Women and Systemic Responses: An Exploratory Study* (2003)

Best Practice: Screen for Immigration Related Abuse

- Immigration Related Abuse
 - 10 times higher in relationships with physical/sexual abuse as opposed to psychological abuse*
 - May predict abuse escalation
 - Corroborates existence of physical and sexual abuse

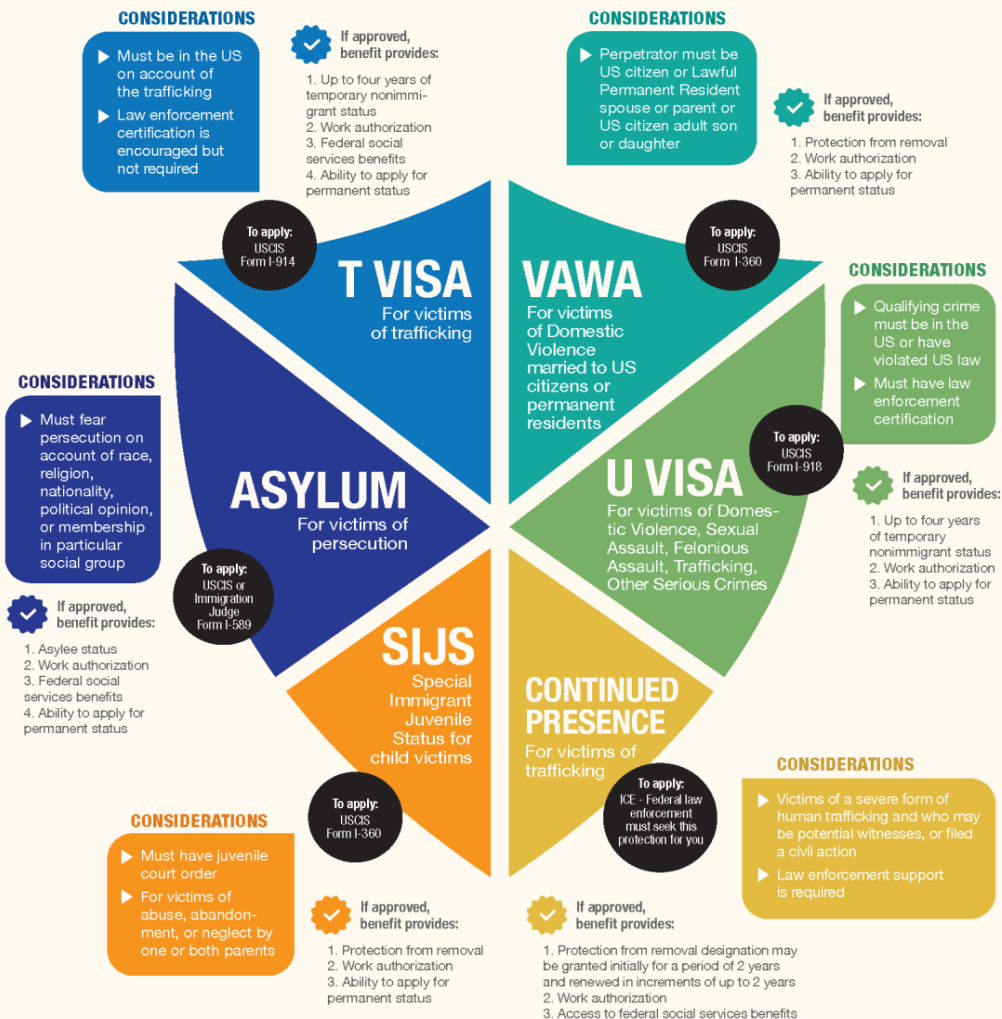
*Mary Ann Dutton, Leslye Orloff, and Giselle Hass, Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications (Summer 2000)

Purpose of Crime Victim Protections

Congress enacted VAWA self-petitioning (1994) and the U and T visas (2000) to:

- Improve community policing and community relationships
- Increase prosecution of perpetrators of crimes against immigrant victims
- Allow victims to report crimes without fear of deportation
- Improve ability of victims to access justice from family, criminal and civil courts
- Enhance victim safety
- Keep communities safe

PROTECTIONS FOR IMMIGRANT VICTIMS



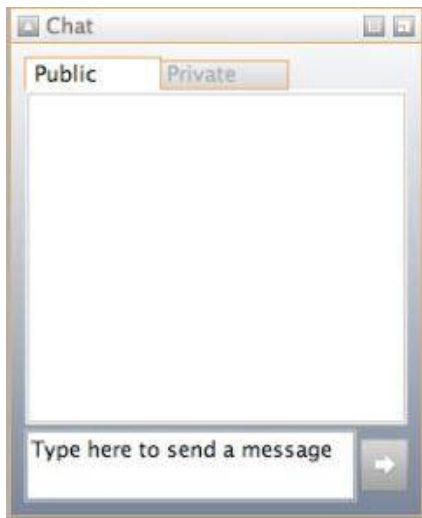
DHS.GOV/BLUE-CAMPAIGN

For victim support call 1-888-373-7888 or text INFO or HELP to BeFree (233733)

VAWA Self-Petitioning Requirements

- Subjected to Battery or Extreme Cruelty
- By a U.S. Citizen or Permanent Resident
 - spouse;
 - parent; or
 - Citizen adult son/daughter (over 21)
- With Whom Self-Petitioner Resided
 - No time period required
- Good Moral Character
- Good Faith Marriage
- VAWA cancellation of removal has similar eligibility requirements

How might you define “extreme cruelty”?



Forms of Extreme Cruelty

- Emotional Abuse
- Economic Abuse
- Sexual Abuse
- Coercion
- Deportation threats
- Immigration related abuse
- Intimidation
- Social Isolation
- Degradation
- Possessiveness
- Harming pets

U Visa Requirements

- Victim of a qualifying criminal activity
- Has been, is being, or is likely to be helpful in
 - Detection, investigation, prosecution, conviction or sentencing
- Suffered substantial physical or mental abuse as a result of the victimization
- Possesses information about the crime
- Crime occurred in the U.S. or violated U.S. law

T Visa for Trafficking Victims

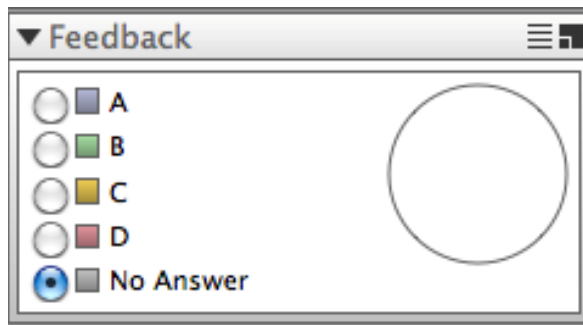
- A victim of a severe form of trafficking in persons
 - Sex or labor trafficking involving victim under 18 or and adult subject to force, fraud or coercion
- Victim is physically present in the U.S. on account of trafficking
- Victim must comply with reasonable requests for helpfulness in investigating or prosecuting trafficking. Exceptions
 - Under age 18
 - Physical or psychological trauma impede helpfulness/cooperation
- Removal from the U.S. would cause extreme hardship

Special Immigrant Juvenile Status (SIJS)

- Immigration relief for unmarried children
- Under the age of majority under state law
- Victims of abuse, abandonment, neglect, or dependency
 - By at least **one parent**
 - In the U.S. or abroad
- To apply must submit required findings from a state court with jurisdiction over
 - the care, custody, or dependency of the child

In what percent of your cases involving immigrant victims is there co-occurring does is your client a mother suffering domestic violence and her child is abused by the child's father?

- A. 10% or under
- B. Between 11% and 25%
- C. From 26% to 50%
- D. Over 50%



The image shows a screenshot of a survey feedback window titled "Feedback". On the left side, there are five radio button options: "A" (blue square), "B" (green square), "C" (yellow square), "D" (red square), and "No Answer" (grey square). The "No Answer" option is selected, indicated by a blue dot in the center of its radio button. To the right of the options is a large empty circle, likely representing a pie chart or a progress indicator.

Poll:
**Have you seen cases of
battered immigrants whose
child's father abandoned the
child?**

A. Yes

B. No

Early Survivor Identification, U-visa Certification & VAWA, U, T-Visa Filing

- Provide victim security & support
- Victim can more safely cooperate in family/custody and criminal case against perpetrator



Safety Planning and Action Steps for Immigrant Survivors

- Timing of immigration and family court cases
- File immigration case early
 - File with sufficient documentation of each element for to meet prima facie test
 - As well documented as possible to avoid denial
 - RFE – can provide additional evidence
- Documentation victim can carry with her
 - Letter from advocate/attorney stating that the victim is in the process of filing a VAWA, T or U visa case
 - Evidence that immigration case has been filed – A number
 - Civil protection order
- Intervene early
 - Any criminal case against the victim that is unresolved
 - Any child welfare system case – consular notification

Immigration and Customs Enforcement (ICE)

June 2018 NTA Policy

- NTA= Notice to Appear
- When an application for immigration relief is denied on its merits = case referred to ICE for removal – Implemented October 1, 2018
- November 19, 2018
 - DHS will issue notices to appear in denied VAWA, T, and U visa cases – prosecutorial discretion available
- Best practice screen for 10 year cancellation of removal
- File strong well documented cases

Case Scenario (Handout)

Clara met Eduardo a naturalized U.S. citizen when he came back to his hometown to visit his family in El Salvador. Eduardo started dating Clara who was raising her 9 year old son Miguel. After Clara became pregnant and gave birth to a baby girl Lupe, Eduardo decided to bring Clara, Miguel and Lupe to the U.S. to live with him. When they arrived in the U.S. Eduardo took Clara, Miguel and Lupe's passports and became physically and sexually abusive of Clara and abusive of Miguel who tried to protect his mother from Eduardo's abuse. Eduardo also physically beat Lupe when he said she "misbehaved". Within a year following their arrival in the U.S. Eduardo forced both Clara and Miguel to work for his family's business and never paid them for their labor. One night when Miguel was 13 and Lupe was 5, Eduardo's rage led to severe beatings with a belt of Miguel and of Lupe. When Clara intervened to protect the children, Eduardo strangled her until she passed out. The neighbors call the police for help, Clara talked to police when they arrived. The police arrested Eduardo for attempted murder and child abuse, took Clara to the hospital and placed the children in the care of the state.

What forms of immigration relief would Clara qualify for?

- A. U visa
- B. VAWA self-petition as the parent of Lupe
- C. T visa
- D. All of the above

Feedback

A

B

C

D

No Answer

What forms of immigration relief would Lupe and Miguel qualify for?

▼ Feedback

A

B

C

D

No Answer

- A. Both can VAWA self-petition
- B. Both qualify for a U visa
- C. Lupe qualifies for a T visa
- D. All of the above

Immigration Status Issues and Family Law Cases



Immigration status not relevant to establishing jurisdiction in family court cases

- Protection order case
 - domestic violence crime committed in state or
 - victim needs protection in state
- Divorce case
 - residency of party in state
 - Legal immigration status not required to establish residency under state family laws
- Custody case
 - (UCCJEA, Federal PKPA, Hague Convention) often the home state of children
- Child support case
 - where child or non-custodial parent lives

Impact of Divorce

- VAWA self-petitioners
 - Must file within two years of final divorce
- Spouses and children of visa holders ends legal immigration status in the United States:
 - Students, Persons with legal work visas, Diplomats
- Divorce cuts off access to lawful permanent residency for spouses and children of people seeking lawful permanent residency based on:
 - Employment based
 - Asylees
 - Family based
 - Cancellation of removal applicants

Annulment Instead of Divorce

- Annulment can lead to a marriage fraud finding that
 - Permanently bars approval of any visa petition
 - Is a ground for deportation
 - Can lead to an unfavorable exercise of discretion by an immigration judge **not** to immigration relief
- Impact on
 - Spousal support
 - Property division

Obtaining Custody of Children for Battered Immigrants



In what types of family court proceedings can courts decide custody of an abused immigrant's children?



Poll:
**In your jurisdiction, do
judges award custody of
children in a protection
order case?**

A. Yes

B. No

Custody in Protection Order Proceedings

Protection Orders

- All are eligible for civil protection orders without regard to the immigration status of any party or child
- Protection order issuance = will not trigger deportation
- A conviction *or finding* of violation of the “*protection against abuse provisions*” of a protection order is a deportable offense
- Protection order issued against a victim can be harmful
 - To good moral character & violation leads to deportation
- Immigrant victims and their children often need creative protection order remedies using the state catch all provisions

Creative Protection Order Remedies

- Catch all provisions in civil protection order statutes opportunity to offer relief designed to help:
 - Curb future abuse, harassment
 - Interfere with abuser/perpetrators ability to exert power and/or coercive control
 - Offer victim remedy-relief for past abuse
 - Help victim overcome victimization and build new post abuse life
- Nexus With Victimization
- Opportunity for courts to counter immigration related abuse and order culturally helpful remedies

Use Creative Remedies to...

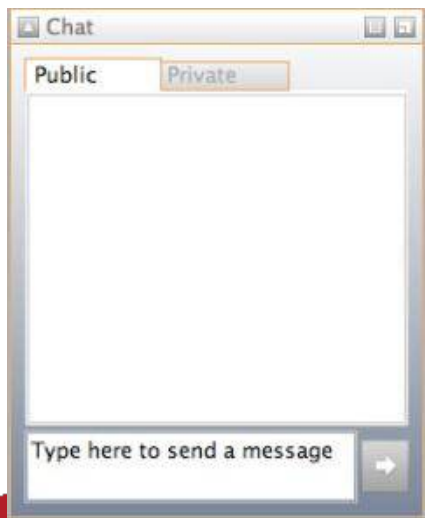
- Stop immigration related abuse
- Protect victims still living with their abusers
- Obtain documents the victim needs for an immigration case or for care of child
- Make finding about age, existence of a marriage, parent child relationship
- Deter parental kidnapping
- Child/Spousal support
 - Affidavit of support
- Health insurance

Judicial Perspective

- How common are custody awards in protection order cases?
- Why are they beneficial?

Custody and Best Interests

What arguments are you seeing used by abusers against might an immigrant victim's in their custody case?



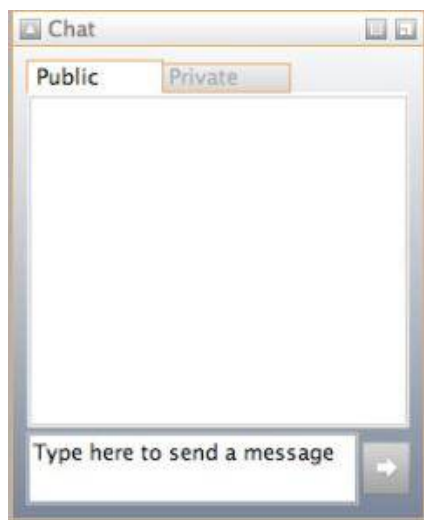
Abuser's Arguments

- Victim will flee or be deported and will take children
- Need custody to confer citizenship benefits
- Undocumented parent less able to financially support child
- Ability to care for child
 - Driver's license
 - Abuser can work, victim cannot
 - Get public benefits for the children
- Child's best interests are to be placed with citizen parent

Is Immigration Status Relevant to Custody?

- Relevant to: Immigrant crime victim presents evidence of immigration related abuse, power and control suffered
 - Either not filing or withdrawing immigration papers
 - Threats to turn victim in for deportation
 - Part of history of violence
- Not relevant to:
 - Core primary caretaker determination
 - Evaluation of parenting skills
 - Best interests of the child determination
 - Requirements regarding custody awards to non-abusive parent

What evidence can be presented to prove that the battered immigrant is the primary caretaker of the children?



Is the abused immigrant parent the primary caretaker of the children?

- Judicial perspective on useful evidence

Is Immigration Status Relevant to Custody?

- May be Relevant in a contested custody case
 - When the court finds that one parent abused the other parent and/or the child and
 - The non-abusive parent has a criminal history
 - When a parent has an outstanding order of removal

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

ABA Center on Children & The Law (1991)

- “Parties should not be able to raise, and courts should not consider, immigration status of domestic violence victims and their children in civil protection order, custody, divorce or child support proceedings...”
- “Batterers whose victims are immigrant parents use threats of deportation to avoid criminal prosecution for battering and to shift the focus of family court proceedings away from their violent acts...”

ABA Center on Children & The Law (1991)

- “When the judicial system condones these tactics, children suffer.”
- “This ... will ensure that children of immigrant domestic violence victims will benefit from ...laws (like presumptions against awarding custody or unsupervised visitation to batterers) in the same manner as all other children.”

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)
 - Must find unfitness to remove a child
- Applies to all families without regard to:
 - Undocumented immigration status
 - Immigration detention
 - Deportation
- In re Interest of Angelica L., 277 Neb. 984 (2009)



Custody: Best Interest Factors

- Family Violence -Q7
- Child's needs -Q4
- Parent's fitness and capacity to be a caregiver -Q10
- Substance abuse and Mental illness -Q12
- Continuity, stability of the child and adjustment to school, home, community-Q6
- Children's Family Relationships -Q3
- Child's Wishes -Q5
- Parental Cooperation and Conflict -Q9
- Joint Custody -Q8

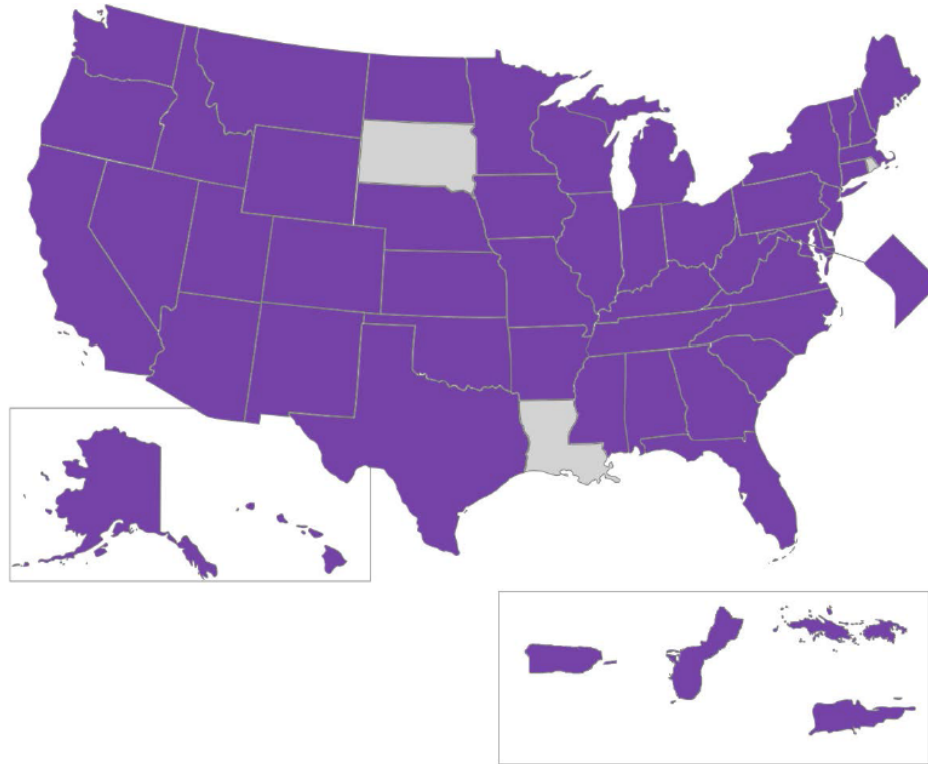
See: NIWAP and State Justice Institute, Special Immigrant Juvenile Status Bench Book: A National Guide To Best Practices For Judges And Courts (2018) Appendices Q-Q11

Best Interests of the Child - Family Violence¹

By Morgan Lewis and Bockius LLP² – December 29, 2017

Disclaimer: The Statute Analysis Map and reports can be powerful resources and training tools, but do not remove the responsibility of each and every lawyer to engage in original analysis and research, including by taking into consideration the facts relevant to a particular client’s circumstances. Reports are labeled with the date of last update. If you reach a conclusion that conflicts with the material herein, you can contribute to our knowledge by sending an email to the Morgan Lewis Knowledge Management and Training Team at knowledgemanagement@morganlewis.com.

Purple states have a relevant factor for determining a child’s best interests in a custody dispute. Please note that many states provide additional or different factors for determining a child’s best interests in other circumstances (e.g., adoption, visitation, or termination of parental rights). See “Factors in State Laws” for comprehensive information on child’s best interests statutes.



No State Best Interests Family Law Code Lists

- As best interests factors
 - Immigration status
 - English language proficiency

Myths and Facts

True or False?

– True or False: When a parent is undocumented their deportation is imminent?

A. True

B. False

DHS Immigration Enforcement Priorities 2017

- Have been convicted of *any* criminal offense
- Charged with a criminal offense that has not been resolved
- Have committed acts which constitute a chargeable criminal offense
- Are subject to a final order of removal and did not leave the U.S.

DHS Immigration Enforcement Priorities 2017

- Have abused a program related to public benefits
- Fraud, willful misrepresentation with any official matter before the government
- Risk to public safety or national security

ICE Removal Data

2013

- Convicted criminals 82%
- Repeat immigration violators 7.8%
- Ordered removed and failed to depart 1.6%
- Other immigrants 7.7%

<https://www.ice.gov/doclib/about/offices/euro/pdf/2013-ice-immigration-removals.pdf>

2017

- Criminal convictions 73.7%
- Pending criminal charges 15.5%
- Outstanding notices to appear in immigration court 5.3%
- Ordered removed and failed to depart + reinstatement 2.8%
- Other immigrants 2.6%

<https://www.ice.gov/removal-statistics/2017>

In what percentage of the your cases involving immigrant crime victims would one of the parents before you be a high priority for removal?

Answer on
the left



Feedback

A

B

C

D

No Answer

- A. Under 10%
- B. 11- 25%
- C. 26- 50%
- D. Over 50%
- E. Other

Other: write
in chat box



Chat

Public Private

Type here to send a message

When abuser argues that victim's immigration status undermines children's stability alleging the victim will be imminently deported...

- When the court makes findings of
 - Domestic violence
 - Extreme cruelty
 - Child abuse
 - Sexual assault
- Victim eligible for
 - VAWA self-petition or VAWA cancellation of removal
 - U visa
 - T visa
 - Special Immigrant Juvenile Status

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

- Under immigration law abusers can sponsor their spouses and children if they are
 - U.S. citizens
 - Lawful permanent residents
 - Work visa holders
- Evidence of immigration related abuse can be useful to explain to the court
 - The abuser knew about & is a cause of the victim's undocumented status
 - Abuser could have but never filed
 - Abuser filed and withdrew victim's immigration case

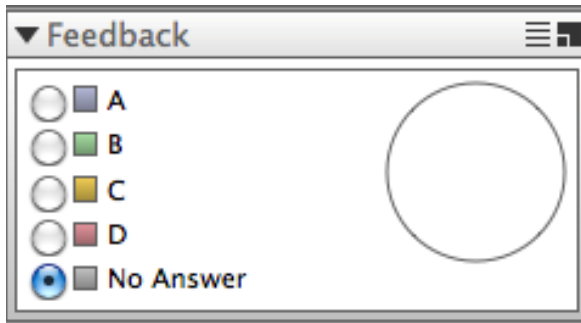
Expert witnesses can assist the court in

- Obtaining legally correct information about immigration law
 - VAWA, T and U visa Protections
 - Current DHS Enforcement Priorities
 - Including how these apply to the victim before the court

Judicial Perspective on the Usefulness of Expert Witnesses on Immigration Law in Custody Cases

Who is the *least* likely to flee with children from the United States?

- A. U.S. citizens
- B. Undocumented immigrant victim mothers
- C. Dual national parents
- D. Multiple entry visa holder parents



Fact: Legal immigrants/naturalized citizens are more likely to flee with children

- **Particularly when**
 - When have been threats of kidnapping children
 - When they are dual nationals
 - Because they can travel freely to and from U.S.
- Research conducted by the U.S. Department of State

True or False?

- True or False: The abusive parent with status must be awarded custody in order to sponsor their child for legal immigration status

A. True

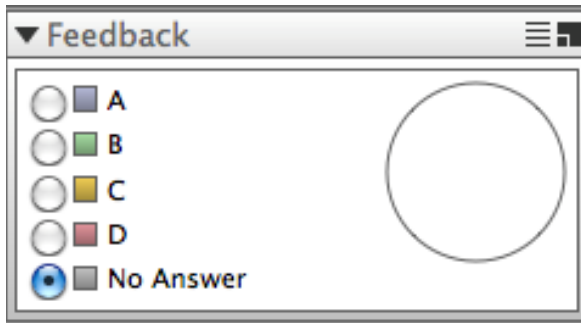
B. False

Custody not legally required for sponsorship

- Custody is not required for parents to file for immigration status for their children
 - Citizens
 - Lawful permanent residents
 - Visa holders
 - Work Visas
 - Student Visas
 - Diplomatic Visas
 - Religious worker and international worker visas

What options might be available to an battered immigrant when the abuser seeks custody claiming that the victim has no livelihood?

- A. Child and/or spousal support
- B. Victim files immigration case and gains legal work authorization
- C. Public benefits available to the child or immigrant parent under state/federal benefits laws
- D. All of the above



Immigrant victims involved in custody cases will qualify for one or more of the following:

- Domestic violence/child abuse= VAWA self-petitioning, VAWA defenses against removal in immigration court, Battered spouse waiver
- U visa = Domestic violence, sexual assault, stalking, human trafficking, other U visa crimes
- T visa and continued presence = human trafficking cases
- DHS victim/witness protections (any crime)

Work Authorization by Immigration Status

- VAWA Self Petitioners
 - Abuser US citizen = 4 months
 - Abuser Lawful permanent resident = 1 year
- U-Visa applicant = 4 years
- T-Visa applicant = 6 to 8 months
- SIJS applicants = 1 to 2 years

Child/Spousal Support Affidavit of Support

- Citizen spouses submit an Affidavit of Support in family based immigration cases
- The Affidavit of Support
 - Promise to support the family member for up to 10 years or until they become a US citizen
 - Includes 3 years of tax information, evidence of current employment including self-employment, and proof of income over 125% of poverty
- Courts have enforced Affidavits of Support
 - Enforce affidavits of support as contracts
 - To set spousal and child support levels
 - No duty to mitigate

How Might You Establish A Non-Custodial Immigrant Parent's Income for Child Support Purposes?

Proof of Non-Custodial Immigrant Parent's Income

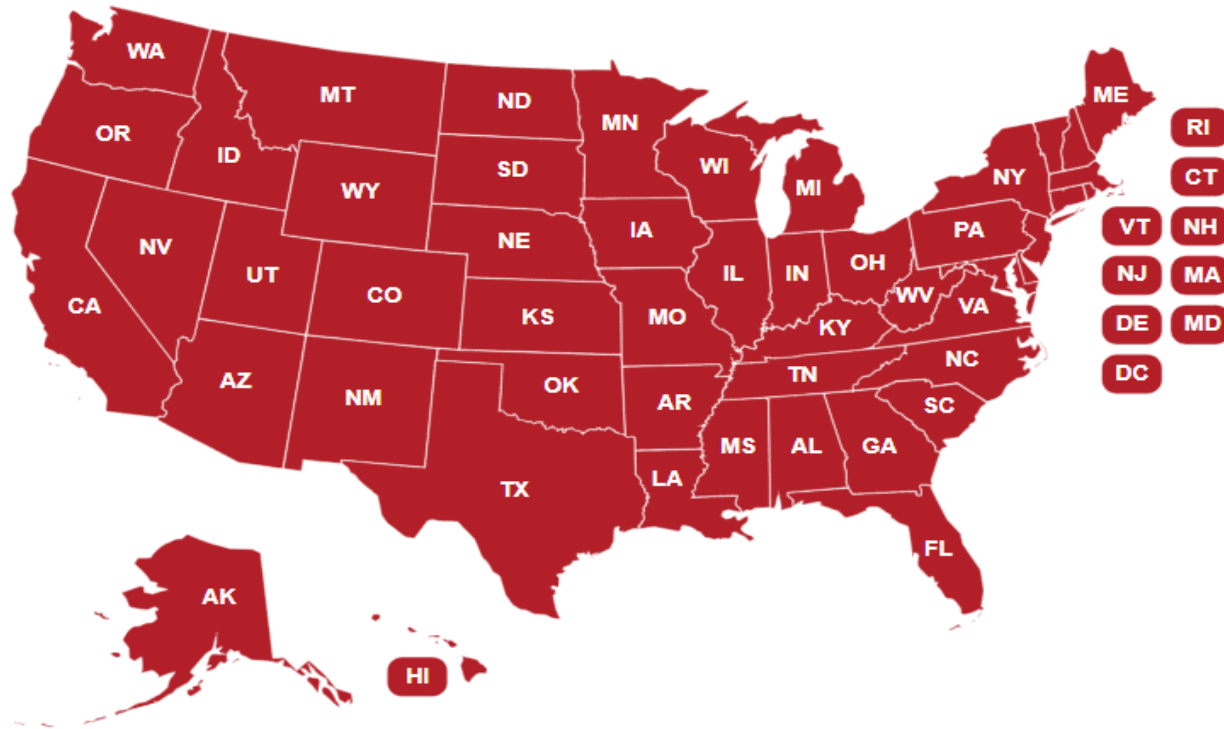
- Undocumented workers can be ordered to pay child support based on
 - Child Support Guidelines
 - Actual earnings
 - Employer's statements
 - Evidence of earning capacity
 - Attributed income (e.g. minimum wage, affidavit of support)
- Undocumented workers can pay state & federal taxes on income earned using an IRS issued
 - Tax ID number (ITIN)

When children qualify and their parents do not:

- If a child qualifies for benefits as a citizen or qualified immigrant the benefits granting agency may only ask questions about the child's eligibility
- No questions may be asked about the immigration status of the child's parent if the parent is not applying for additional benefits for themselves

Child Care

🏠 > Child Care



Child Care services may be provided through public benefits. All immigrants are eligible for the Child Care Development Fund (CCDF) funded child care services when provided through settings subject to public educational standards, and only certain immigration statuses are eligible for TANF-funded child care. Some states have provided their own funding to allow additional immigrant survivors to be eligible for state-funded TANF child care.

Judicial Perspective

- Best practices for getting legally correct information into the record in family court

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



Technical Assistance and Materials

- Training materials for this webinar are available at:
<http://niwaplibrary.wcl.american.edu/custodywbnr11-15-18/>
- NIWAP Technical Assistance:
 - Call (202) 274-4457
 - E-mail niwap@wcl.american.edu
- Web Library:
<http://niwaplibrary.wcl.american.edu>