

How to Get a Detained or Removed Person to Court for Family Court Cases Involving Children or Incapacitated Adults

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This publication will provide best practices for judges, court staff, attorneys and advocates on how to secure the attendance, in court proceedings, of immigrants who are being detained by the U.S. Department of Homeland Security (DHS) so that immigrant parents and guardians can participate in family court proceedings involving their children, the children they care for, and incapacitated adults for whom they are legal guardians and in criminal court proceedings. Also discussed are DHS requirement regarding the role that status as a custodial parent or guardian plays in DHS enforcement decisions about whether, when, and how DHS will pursue an immigration enforcement action against or will detain a noncitizen who is a caretaker parent or guardian of children or incapacitated adults.

I. Noncitizens Protected Under the Parent-Guardian Interests Directive

When children of an immigrant parent, who is a party to a court case impacting their parental rights, are involved in a family court case, the U.S. Immigration and Customs Enforcement (ICE) Directive: *Interests of Noncitizen Parents and Legal Guardians of Minor Children or Incapacitated Adults* applies.² The ICE Parental-Guardian Interests Directive pays particular attention to parents or legal guardians who are considered “Covered Individuals”, which includes those who are:³

- Primary caretakers or have custody of a minor child(ren) or incapacitated adults in the United States, without regard to the dependent’s citizenship or immigration status; and/or
- Who have a direct interest in family or probate court, guardianship, or child welfare proceeding involving a minor child or incapacitated adult, without regard to the dependent’s citizenship or immigration status.

The ICE Parental-Guardian Interests Directive governs both the decision about whether or not to detain a parent or guardian of a minor child or incapacitated adult and ICE’s obligations regarding the

“preservation of the parental and/or guardianship rights of noncitizen parents and legal guardians”⁴ and to

“ensure that the agency’s civil immigration enforcement activities do not unnecessarily disrupt or infringe upon the parental or guardianship rights of noncitizen parents or legal guardians of minor children and incapacitated adults...”⁵

Under this policy, ICE is required to inquire at their first encounter with a noncitizen about the noncitizen’s status as a parent or legal guardian of a minor child or incapacitated adult. ICE is also required to continue to make

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² See U.S. Immigration and Customs Enforcement, 11064.3: Interests of Noncitizen Parents and Legal Guardians of Minor Children or Incapacitated Adults (Jul. 14, 2022) (hereinafter “ICE Parental-Guardian Interests Directive”), available at <https://www.ice.gov/news/releases/ice-extends-preservation-parental-guardianship-rights-minor-children-incapacitated> (superseding ICE Directive 11064.2: Detention and Removal of Alien Parents or Legal Guardians).

³ ICE PARENTAL-GUARDIAN INTERESTS DIRECTIVE at 1. The information contained in this publication also applies to cases involving child victims of human trafficking, including commercial sex trafficking of children when the trafficked child has a parent who is an immigrant who is in ICE detention.

⁴ ICE PARENTAL-GUARDIAN INTERESTS DIRECTIVE at 1.

⁵ ICE PARENTAL-GUARDIAN INTERESTS DIRECTIVE at 1.

these inquiries during all future encounters with the individual.⁶ When a parent or guardian is identified as a primary caretaker or custodian of a child or incapacitated adult or a person with a direct interest in a state court proceeding regarding the child or incapacitated adult, that information must be recorded in the noncitizen’s case file. This information must also be reported to up the chain of command at ICE to the highest ranking official in the field office.⁷

These requirements help ICE personnel identify and consider a noncitizen’s status as a primary caregiver for children or incapacitated adult in exercising ICE’s prosecutorial discretion. There are many scenarios where parents or legal guardians of children and incapacitated adults, particularly those who are or have been involved in family court proceedings may be noncitizens, but will not be at risk of detention because they are not an ICE enforcement priority. Under DHS policies, primary caregiver noncitizens are generally considered a low priority for removal.⁸

The ICE Parental Directive applies to noncitizen parents and guardians only in the “limited circumstances in which detention is appropriate,” which are cases that fall under one of the Department of Homeland Security’s three civil immigration enforcement priorities when the noncitizen is a:⁹

- 1) Threat to national security,
- 2) Threat to public safety, or
- 3) Threat to border security.

To understand whether a party in a case is an enforcement priority and therefore at risk of detention, this publication should be read in conjunction with the NIWAP publication on enforcement priorities.¹⁰

In some circumstances in criminal cases, a conviction may result in a defendant becoming an immigration enforcement priority where they may not have been prior to the conviction. Additionally, certain convictions may not impact immigration status and other convictions result in a defendant losing access to an immigration benefit or losing their legal immigration status in the U.S.¹¹ It is important to note that the ICE Parental-Guardian Interests Directive does not generally apply to criminal cases including involving domestic violence, sexual assault, stalking, dating violence or human trafficking in which there are no custodial issues or children involved.¹²

II. What the Directive Means for Judges

Judges sitting in family courts will encounter cases in which the judge or court staff will be the first to identify the fact that a parent, legal guardian, or other person with a direct interest in a case before the court involving custody or the welfare of children is in immigration detention or has been the subject of civil immigration enforcement.¹³

The following are a list of some of the primary types of family court cases in which custody of children is a key issue and the court may need to be involved in helping bring a noncitizen parent or guardian to court for a proceeding involving minor children or incapacitated adults:

- Divorce;
- Legal separation;

⁶ ICE PARENTAL-GUARDIAN INTERESTS DIRECTIVE at 5.

⁷ ICE PARENTAL-GUARDIAN INTERESTS DIRECTIVE at 2.

⁸ See Memorandum from Alejandro N. Mayorkas, *Guidelines for the Enforcement of Civil Immigration Law* (Sept. 30, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/mayorkas-civil-imm-guide-sept-21>.

⁹ See *id.*

¹⁰ See Leslye E. Orloff et. al, *DHS Enforcement Priorities, Courthouse Enforcement and Sensitive Location Policies and Memoranda Information for State Court Judges*, NIWAP (Dec. 27, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/dhsenforcementpriorities-benchmark>.

¹¹ For more information about how certain convictions impact eligibility for immigration benefits, see Limayli Huguet et. al, *Comparing Inadmissibility Waivers Available to Immigrant Victims in VAWA Self-Petitioning, U Visa, T Visa and Special Immigrant Juvenile Status Cases*, NIWAP (Jan. 28, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/inadmissibility-chart-va-wa-t-u-sijs>.

¹² Some of these criminal court cases may involve determinations regarding the child(ren) as part of the terms of a criminal defendant’s release, bond order, or criminal sentence. For questions regarding criminal cases regarding such issues, please contact NIWAP for technical assistance by calling our technical assistance line at (202) 274-4457 or emailing NIWAP at info@niwap.org. We provide technical assistance directly to judges, court staff, advocates and attorneys.

¹³ To determine whether an immigrant parent is in ICE detention and to locate where the immigrant is detained, use the ICE detainee locator <https://locator.ice.gov/odls/homePage.do>. It is important to note that if the person you are trying to locate is an immigrant crime victim, the victim may not appear in the detainee locator system although they are detained, because they may have opted out of the locator system for safety reasons or to prevent stalking. Immigrant victims who opt out can use the ICE telephone system to contact family members or their advocates and attorneys. DHS Informational Brochure on Detainees Calls Home available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/tools/DCH-brochure-calls-home.pdf/view>.

- Annulment;
- Custody;
- Child support;
- Civil protection order;
- Child abuse and neglect;
- Dependency;
- termination of parental rights;
- Guardianship; and/or
- Adoption.

When a party who appears before the court is in immigration detention, the court can take the following steps to have the detained immigrant brought to court to participate in court proceedings involving children, using the ICE Parental-Guardian Interests Directive. The ICE Parental-Guardian Interests Directive creates a main point of contact who serves as a liaison between ICE and courts in order to preserve detained noncitizens' parental or guardianship rights. In a case where a party is detained, the ICE Parental Interest Field POC will serve as the ICE point of contact for courts.¹⁴

Including the following types of provisions in the court's order will help ensure that the ICE Parental Interest Field POC will work with detention center personnel to arrange transportation of the detained parent or guardian to the court for appearances and hearings involving children over which the court is presiding.

- Issue a court order requiring the detained parent or legal guardian to be physically present at any proceedings related to the case.
- Include in the court order a description about the:
 - Relationship between the child(ren)/incapacitated adult and the detained immigrant; and
 - Direct interest the detained immigrant has in the court proceeding involving the children or incapacitated adult.
- Direct counsel for the detained immigrant to send a copy of the court order to the local ICE Parental Interest Field POC, to provide them reasonable notice of the request to transport the detained immigrant parent to court for a court case involving the immigrant's child(ren) or the incapacitated adult for whom the immigrant is the guardian.
 - If the detained immigrant parent is unrepresented, the judge's court staff can provide a copy of the court's order to the ICE POC.
- If the court is "located within a reasonable driving location of the detention facility" and "transportation and escort of the detained" parent/legal guardian does not pose "any security and/or public safety concerns," the Field Office Director of the detention facility should arrange for the defendant to attend in-court proceedings. If in-person, non-virtual appearance of the defendant is required and transport and escort of the defendant does not "negatively impact or hinder the mission needs," the Field Office Director should arrange for the defendant to attend the in-court proceedings.¹⁵
- If transportation to the court is not feasible due to security or public safety concerns, and the court has video or standard teleconferencing technology available, the court can work with the POC to secure the detained immigrant's attendance via "video or standard teleconferencing"¹⁶

a. What to do if one of the parties to the case is detained and *pro se*

If a party to the case before the court is detained and is appearing *pro se* in the state court case and, therefore, does not have an attorney or an advocate to request an order requiring physical presence, the court

¹⁴ ICE PARENTAL-GUARDIAN INTERESTS DIRECTIVE at 4.

¹⁵ ICE PARENTAL-GUARDIAN INTERESTS DIRECTIVE at 7.

¹⁶ Check with the court before contacting the ICE Parental Interest Field POC to see whether video or standard teleconferencing is available and seek approval from the judge to use such technology in future proceedings.

should issue an order requiring the detained immigrant's appearance at proceedings before the court involving children and the order should include the information outlined in the previous section. Court staff or the judge's law clerk should contact the ICE Parental Interest Field POC for the jurisdiction the court is located in and work with the ICE Parental Interest Field POC to arrange for the detained immigrant's appearance either in person or through video and standard teleconferencing, if transportation is not available or is not feasible.

b. What to do if a parent or guardian who is or needs to be a party in a state court proceeding was detained and has already been removed from the United States

- The court should direct the party or their attorney, family member, consular official or other representative to provide verifiable evidence from the court to the appropriate ICE Parental Interest Field POC indicating that a hearing related to a custody, child welfare, termination of their parental rights, guardianship, or other proceeding involving a child or incapacitated adult in whom the noncitizen parent or guardian has an interest is pending or ongoing in the United States.
- The appropriate ICE Field Office Director may then decide to grant parole to facilitate reentry to the United States for the noncitizen parent or guardian to participate in the hearing. This decision will take into account several factors including safety, security, whether the court will permit the respondent to participate through alternative means, such as through video, and whether such participation is feasible.
- If the party is permitted to reenter the United States for the hearing, the party must confirm in writing that:
 - They are not traveling to the United States for the purpose of pursuing immigration benefits or otherwise circumvent orderly visa and immigration processing, and
 - That they intend to promptly depart the United States following the conclusion of the hearing.

c. Criminal Court: What to do if the defendant in a domestic or sexual violence, child abuse, human trafficking or other case is detained and there are no children involved in the case

The ICE Parental Interests Directive does not apply in a criminal case where there are no custody issues or children of the crime victim or the defendant involved. However, courts and judges need to be able to secure attendance of criminal defendants in criminal court proceedings for the criminal case to be adjudicated. Both DHS and the state courts have an interest in adjudication of and sentencing in criminal cases. Noncitizen defendants who are convicted and sentenced are often high priorities for DHS removal after the immigrant criminal defendant has completed serving any jail sentence imposed in the criminal case. DHS will put a detainer on immigrants with criminal convictions to ensure that the convicted immigrant will be released into ICE custody when their jail sentence is completed and ICE can proceed with removal of the noncitizen based on the criminal conviction.

To secure attendance of a criminal defendant, the judge's clerk or court staff should communicate with the ICE Field Office Director in their area. The Director "has broad discretion and legal mechanisms available to him/her that could help facilitate the release of detained [defendants]."¹⁷ These tools include:

- Release the detained defendant to the custody of state or local authorities per a writ of the court or
- Exercise prosecutorial discretion by granting a request for deferred action in the detained defendant's immigration case.¹⁸

When the court seeks to have ICE transport a criminal defendant to court to participate in a criminal court proceeding, the judge should issue a writ. The court can issue a writ on its own or at the request of the prosecutor in the case before the court. The writ is an essential component to any request made to ICE regarding the release and transport of a detained immigrant defendant into the custody of local or state law enforcement for the purposes of a criminal case.

¹⁷ U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, TOOL KIT FOR PROSECUTORS 8 (April 2011), available at: <https://www.ice.gov/doclib/about/offices/osltc/pdf/tool-kit-for-prosecutors.pdf>

¹⁸ *Id.* at 8-9 (detailed information about both options and request procedures are discussed in this section of the tool kit).

It should be noted that ICE is not bound by a writ issued by a state court; however, such writs are “generally honored.”¹⁹ The judge’s law clerk or court staff should contact the Assistant Field Office Director that is assigned as the field liaison at the field office where the defendant is detained to file the writ requesting transfer of the defendant to state or local police custody so that the defendant can be present in the criminal case brought by the state against the defendant.²⁰

The writ should include²¹:

- The specific date(s) of the proceedings for which the defendant must be physically present;
- Exact reasons why the detained defendant has to be physically present for these proceedings; and
- A point of contact at the local or state law enforcement agency that will take custody of the detained defendant for the purposes of the criminal domestic violence case.

III. Attorneys and Advocates

- How to get a detained respondent parent to a family court proceeding
- First, ask the judge to include a requirement that the respondent who is a detained immigrant parent be physically present for all court appearances related to this case in a court order that the judge issues. The court order should include language about:
 - The relationship between the child(ren)/incapacitated adult and the detained immigrant and
 - The direct interest the detained immigrant parent or guardian has in the court proceeding involving the children or incapacitated adult.
- Next, send a copy of the court order to the local ICE Parental Interest Field POC. This provides ICE reasonable notice of the request to transport the respondent detained immigrant parent to court for a court case involving the immigrant’s child(ren) or an incapacitated adult for whom the immigrant is a guardian.
- The ICE Parental Interest Field POC may provide the following options:
 - If the court is “located within a reasonable driving location of the detention facility” and “transportation and escort of the detained” parent/legal guardian does not pose “any security and/or public safety concerns,” the Field Office Director of the detention facility can arrange for the defendant to attend in-court proceedings.
 - If in-person, non-virtual appearance of the defendant is required and transport and escort of the defendant does not “negatively impact or hinder the mission needs,” the Field Office Director may also arrange for the defendant to attend the in-court proceedings.²²
 - If transportation to the court is not feasible due to security or public safety concerns, and the court has video or standard teleconferencing technology available, the court can work with the POC to secure the detained immigrant’s attendance via “video or standard teleconferencing”²³

b. How to get a detained immigrant victim or immigrant parent client to a family court proceeding

If your client is an immigrant victim of domestic violence, sexual assault, stalking, dating violence, human trafficking or other crime²⁴ or is an immigrant parent who has been placed in temporary or long-term detention,

¹⁹ *Id.* at 9.

²⁰ For a list of names and contact information for field liaisons, listed by field office, see U.S. Immigration and Customs Enforcement, Enforcement and Removal Operations Contacts (“Contact Field Offices”), available at: <https://www.ice.gov/contact/ero/>

²¹ For specific instructions and information about legal bars to release in this circumstance, see ICE TOOL KIT at 10-11.

²² ICE PARENTAL-GUARDIAN INTERESTS DIRECTIVE at 7.

²³ Check with the court before contacting the ICE Parental Interest Field POC to see whether video or standard teleconferencing is available and seek approval from the judge to use such technology in future proceedings.

²⁴ If your client is an immigrant crime victim or witness who has been detained, you should also advocate for the client’s release from detention using this DHS policy: Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, U.S. Department of Homeland Security, to All Field

you should:

- Request the judge to include a requirement that your client be physically present at all proceedings related to the case in a court order that the judge issues. The court order should include language about the relationship between the child(ren) and the detained immigrant victim or parent and the direct interest the detained immigrant victim or parent has in the court proceeding.
- Send the order to the ICE Parental Interest Field POC in your area and work with them to secure transport to or virtual participation in court proceedings of your client.
- File an application for a VAWA, U visa, T visa, or other crime victims related form of immigration relief for which your victim client qualifies. Then request that ICE exercise its prosecutorial discretion under DHS enforcement priorities and the Parental-Guardian Interest Directive to release your victim client from detention and administratively close the case while their victim based immigration case is being adjudicated. That best enables the victim client to continue their caregiving for children and incapacitated adults and fully participate in court proceedings.

c. What if the immigrant victim is *pro se*?

If you are an advocate, therapist, social worker, police officer or other non-lawyer professional working with an immigrant victim who is *pro se* in the family court proceedings, you should do the following:

- If the victim/parent is the person who is detained, help the victim/parent obtain legal representation in the family court case.²⁵
- If the victim/parent is detained and is unable to expeditiously obtain counsel, inform the court about the need to issue a court order requiring that the victim be present in court for all proceedings related to the case. The court order should include language about the relationship between the child(ren)/incapacitated adult and the detained immigrant victim or parent and the direct interest the detained immigrant victim or parent has in the court proceeding.
- If the victim/parent is involved in a family court case involving a child or incapacitated adult and the opposing party in the case is in immigration detention, provide the *pro se* victim/parent with the information they will need to ask the judge to include the provision that the detained defendant be physically present at all related proceedings in a court order and tell the *pro se* victim/parent that they will need to send the order to the ICE Parental Interest Field POC in your area.

d. What to do if the respondent parent was detained and has already been removed from the United States

- First, the respondent or their attorney, family member, consular official or other representative must

Office Directors, All Special Agents in Charge, & All Chief Counsel, *Prosecutorial Discretion: Certain Victims, Witnesses and Plaintiffs* (June 17, 2011), available at: <https://niwaplibrary.wcl.american.edu/pubs/dhs-memo-june-17-2011-prosecutorial-discretion-for-victims>. If your client has filed a VAWA, T or U visa immigration case and is detained, you should advocate for release from detention using the DHS Broadcast Message on New 384 Class of Admission Code (December 21, 2010), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/message-to-dhs-384-coa-final-12.21.10.pdf/view>. If your client is the primary caretaker of a child or has a U.S. citizen or lawful permanent resident child you should advocate for your client's release from detention using this DHS Policy: Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, U.S. Department of Homeland Security, to All Field Office Directors, All Special Agents in Charge, & All Chief Counsel, U.S. Immigration and Customs Enforcement, U.S. Department of Homeland Security, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* (June 17, 2011), available at <https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

²⁵ To identify free or low cost legal assistance programs in your state with expertise in working with immigrant crime victims, please visit the National Directory of Programs with Experience Serving Immigrant Victims, available at: <http://niwaplibrary.wcl.american.edu/reference/service-providers-directory>. The detained immigrant victim's or parent's consulate can be an excellent source of legal representation and support for victims in detention and best practices.

provide verifiable evidence from the court to the appropriate ICE Parental Interest Field POC indicating that a hearing related to a custody, child welfare, termination of their parental rights, guardianship, or other proceedings involving a child or incapacitated adult in whom the noncitizen parent or guardian has an interest is pending or ongoing in the United States.

- The appropriate ICE Field Office Director may then decide to grant parole to facilitate reentry to the United States for the respondent to participate in the hearing. This decision will take into account several factors including safety, security, whether the family court or relevant child welfare authority will permit the respondent to participate through alternative means, such as through video, and whether such participation is feasible.
- If the respondent is permitted to reenter the United States for the hearing, the respondent must confirm in writing that:
 - They are not traveling to the United States for the purpose of pursuing immigration benefits or otherwise circumvent orderly visa and immigration processing, and
 - That they intend to promptly depart the United States following the conclusion of the hearing.

IV. Implementation Issues

If you requested assistance from an ICE Parental Interest Field POC, NIWAP is interested in your experience. Please contact our technical assistance line at (202) 274-4457 or email us at info@niwap.org with your stories of successful or unsuccessful implementation of the ICE Parental-Guardian Interests Directive in getting a detained party to court proceedings.