

Intersection of Immigration Law and Family Law in State Court Cases Involving Immigrant Parties and Their Children

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Introductions

- Commissioner Loretta Young
 - Family Court Commissioner, New Castle County, Delaware
- Adjunct Professor Leslye E. Orloff
 - American University, Washington College of Law Washington, D.C.

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Learning Objectives

By the end of this training you will be better able to:

- Understand how accurate immigration law information affects just and fair outcomes in state family court cases
- Know where to access legally correct information when litigants raise immigration issues in court
- Issue just and fair orders in custody, protection order, divorce and child support cases involving immigrant children and immigrant crime victims
- Understand how VAWA confidentiality impacts rulings on discovery motions in family, civil and criminal court cases and immigration enforcement, including at courthouses

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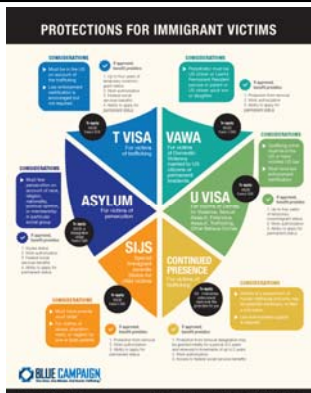
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Large group discussion:

- What questions/issues would you like to be sure to have answered during this workshop?

When litigants and their children learn about and pursue immigration relief legally available to them how might this improve access to justice in family courts?





Immigration Issues that Arise in Family Court: Importance of Accurate Information

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Opportunities to Enhance Just Outcomes for Immigrant Victims, Children and Litigants

- In a range of cases
 - Protection orders
 - Custody
 - Abuse, neglect, abandonment
 - Child support
 - Divorce



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Knowledge of immigration issues is important in family matters

- ▶ Addressing immigration status issues early can
 - ▶ Improve outcomes in family court cases
 - ▶ Prevent or delay issuance of family court orders that cut off a party or child from immigration relief
- ▶ Family court actions can assist with
 - ▶ Helpful evidence for an immigration case
 - ▶ Obtaining from family court judges
 - ▶ SIJS findings for abused immigrant children
 - ▶ Certifications in immigrant crime victim's U visa case
 - ▶ Creative protection order remedies

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Impact of State Court Orders on the Immigration Case

- Specific written orders are helpful to immigration adjudicators and immigrant parties
- Court orders contain evidence of
 - Abuse, abandonment, neglect
 - Family relationships including marriage
- Divorce can result in an immigrant family member being denied immigration relief
 - Tactic used by perpetrators of spouse, child, elder abuse
- Annulment instead of divorce can set up a spouse for a federal marriage fraud prosecution

Custody of Children in Immigrant Families

Tool: Immigrant Victims and Custody Bench Card

Protecting Immigrant Mothers Protects Children

- Immigrant victims who receive help, including immigration relief, child abuse likelihood drops significantly (77% to 23%).
- Children of help seekers 20% less likely to have abuser threaten them
- One third less likely to have abuser threaten to take them away from their mother

Ammar, Orloff, Hass and Dutton, "Children of Battered Immigrant Women: An Assessment of the Cumulative Effects of Violence, Access to Services and Immigrant Status." (September 2004) <http://niwaplibrary.wcl.american.edu/pubs/co-occurencedvchildabuse/>

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



ABA Center on Children & The Law

- “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... 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.”

Myth vs. Fact: Parents without Legal Immigration Status

- | Myth | Fact |
|---|---|
| 1. Deportation is imminent | 1. DHS policies prevent detention/removal of immigrant parents who are crime victims |
| 2. Parent is likely to flee U.S. with child | 2. US citizens and lawful permanent residents are more likely to flee with children, especially when <ul style="list-style-type: none"> – There have been threats of kidnapping children – They are dual nationals – They travel freely to and from U.S. |
| 3. The parent has no livelihood | 3. Abused immigrant parents in family court have a path to immigration relief, work authorization & some benefits |
| 4. Legally present parent must have custody in order to file for benefits for child | 4. Custody does not affect parent’s ability to file for or gain immigration benefits for his children. |

Immigrant Parents and Child Custody

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

- Parents have a constitutional right to custody (absent unfitness)
- Applies to all families without regard to:
 - Undocumented immigration status
 - Immigration detention
 - Deportation
- Overriding presumption that:
 - Parent-child relationship is constitutionally protected
 - In children's best interest to stay with/be reunited with their parent(s)
- Child's best interests is most important
 - A comparison of natural vs. adoptive parent's cultures, countries or financial means is not to be made

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How to Secure a Detained Parent's Participation in Court (Aug 2013)

- Detained Parents Directive
 - Bring parents to family court to participate in cases involving children
 - Alternate: Make parents available to participate by video conference
 - Must facilitate court ordered visitation
- Detainee locator system
<https://locator.ice.gov/odls/#/index>

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Case Study

Duncan is a naturalized citizen who had been married to Rosa for 5 years. They have two children ages 7 and 3. Rosa fled to the local shelter after Duncan held her against her will for weeks, and broke her arm when she tried to flee. The neighbors called police and when Rosa spoke to police, they took her to the shelter. The children were present during the latest incident of violence and are afraid of their father. Rosa is an undocumented immigrant who has been the primary caretaker of the children, particularly when Duncan leaves the country for extended work. Duncan has filed for custody alleging that Rosa is an unfit mother, because she is an "illegal alien" and unable to provide for the children because she is unable to work or obtain a driver's license.

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Large Group Discussion

- What immigration remedy or remedies might Rosa be eligible for?
- What factors should the court consider in the custody case?
- How might having information on immigration relief DHS offers available at the courthouse be helpful to Rosa?

Custody Involving Immigrant Parents and/or Immigrant Children

- Accurate information about immigration status helps judges issue fair rulings in custody cases where immigration status of a parent or child may be raised
- Tools for Judges
 - Help avoid reliance on incorrect information provided by parties about immigration status & likelihood of detention or deportation
 - Provide accurate information when needed
 - www.niwap.org/go/sji
 - Direct technical assistance to state court judges, commissioners, magistrates, court staff
 - Bench cards, charts, training materials and webinars



Child and Spousal Support in Immigrant Families

Immigrant Victims Economic Challenges

- Economic insecurity significantly prolongs dependency on their abusers (Ingram et al., 2010)
- Citizen & lawful permanent resident spouses can decide when and whether to file immigration papers for spouses/children
- Many forms of visas do not allow spouses and children of visa holders to work in the United States
 - Employment visas (H)
 - Student visas (F)
 - Diplomatic visas (A)
 - International organizations G)
 - Investor visas (E)
- Immigrant crime victims have limited access to public benefits

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 relied on the Affidavit of Support
 - To set spousal and child support levels
 - Enforce affidavits of support as contracts
 - No duty to mitigate

Court Ordered Child Support Paid Through the Court

- Provide a non-citizen parent with a history of child support payments with helpful evidence of good moral character in immigration cases
 - Cancellation of removal
 - Naturalization
- Provides a custodial immigrant parent with evidence of child support helpful in
 - lawful permanent residency cases (avoiding public charge)
- Court orders maintaining children on non-custodial parent's health insurance important

Child Support and Immigration

- Criminal convictions for willful failure to pay child support can be deportable theft/fraud related offenses as crimes of moral turpitude
- Lack of legal work authorization is not a valid defense to non-payment of child support
 - Asal v. Asal, 960 P.2d 849, 850 – 851 (Okla. 1998)
- Courts have found employers who willfully violate wage withholding orders liable to the custodial parent for the amount of child support ordered withheld.
 - State v Filipino, Conn. Super. LEXIS 266 (2000)
 - Belcher v Terry, 420 S.E.2d 909 (1992)
 - Child Support Recovery Srvs., Inc. ex rel S.C. v. Inn at the Waterfront, Inc., 7 P3d 63 (Alas. 2000)


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Proof of Non-Custodial Immigrant Parent's Income

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

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PROTECTION ORDERS



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Immigration Law Definition of Domestic Violence

- “Battery or Extreme Cruelty”
- Includes
 - All forms of abuse covered in state civil protection order statute
 - All forms of abuse that constitute domestic violence under states criminal laws
 - Plus – Forms of abuse that are extreme cruelty
 - No physical harm or crime required

Immigration Law’s Domestic Violence Definition “Battering or Extreme Cruelty”

- Any state crime committed against a family member sufficient for issuance of a protection order including sexual abuse, stalking, threats, attempts *and/or*
 - Emotional abuse
 - Economic abuse
 - Using children
 - Deportation threats and immigration-related abuse
 - Intimidation
 - Social isolation
 - Degradation
 - Possessiveness
 - Harming pets
 - Coercive control

Protection Orders

- All persons are eligible to receive civil protection orders without regard to the immigration status of any party or child
- Protection order issuance = does not directly impact perpetrator’s immigration status
- A conviction *or finding* of violation of the “*protection against abuse provisions*” of a protection order =
 - deportable offense
- Immigrant victims and their children benefit from creative protection order remedies using the state catch-all provisions

Issuance of Mutual Protection Orders

New Mexico - §40-13-5(D) NMSA

“A mutual order of protection shall be issued only in cases where both parties have petitioned the court and the court makes detailed findings of fact indicating that both parties acted primarily as aggressors and that neither party acted primarily in self-defense.”

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Effect of Protection Order Issued Against Immigrant Victims

- Can pose serious safety concerns for immigrant victims
- Increases perpetrators power and coercive control
 - Victim is one step away from deportation
 - A violation of a protection order is a deportable offense
 - Findings enough – conviction not required
- Perpetrators who are successful in convincing courts to issue protection orders
 - Often successful in obtaining findings that the victim violated the order

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Effects of “No Findings” Protection Orders

- Can allow the abuser to keep his firearms
- Increase danger to a survivor and her children
- Undermine state laws regarding domestic violence and custody

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Beneficial Findings to Include When Issuing Protection Orders

- In contested cases
 - Findings of physical, sexual and emotional abuse of immigrant, her child or step-child
- In all cases showing an:
 - Existence of parent/child or spousal relationship by checking this box on standard court orders
- Include creative remedies

Group Activity:
What Creative Protection Order Remedies Might Help an Immigrant Victim?



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
- Deter parental kidnapping
- Child/Spousal support
 - Affidavit of support
- Health insurance

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

Victims Who Stay: Full Contact Protection Orders

- No state's protection order statute requires separation of the parties
- In virtually every state victims cannot violate their own protection orders
 - Contrary to statutory intentions; and
 - Against public policy to prosecute abused women for complicity in violating their own orders.
- Provisions
 - No abuse
 - Counseling

Using Catch-all Provisions to Stop Immigration Related Abuse

- Defendant must obtain prior court approval before contacting any government agency (immigration officials, CPS, IRS, Welfare, etc.) concerning the petitioner except
 - Police emergency
 - Subpoena
- Cooperate in and not withdraw any case he has filed for petitioner with immigration authorities (e.g. work visa holders, family based applications)

Remedies That Help a Victim's Immigration Application

- Turn over documents/evidence in abuser's control needed for the victim's immigration case.
- What might some of those documents be?



Helpful Evidence

Evidence of Legal Marriage

- Marriage certificate
- Wedding/family pictures
- Health insurance

Good Faith Marriage

- Children birth certificates
- Love letters, cards, text, emails
- Copies of joint leases/utility bills
- School records
- Letters and other mail addressed to the victim and to the abuser at the same address

Evidence of Abuse or Extreme Cruelty

- Police, medical, court documents about the relationship
- Protection order
- Affidavits of neighbors, relatives, friends

Evidence of Abusers Legal Status

- Abuser's green card or passport
- Copy of I-130 petition
- Social security number

Provisions that Deter Parental Kidnapping

- Not remove the children from the court's jurisdiction
- Turn over passports of parties and/or children
- Sign statement that no visa or passport should be issued to children absent court order
- Supervised visitation
- Bond

Important Economic Provisions

- Maintain medical, car, house insurance, mortgage, rent, utility and/or debt payments
- Child support and spousal support
- Enforce Affidavit of Support
- Injunctions against third party institutions not to respond to acts by the abuser that would harm her (banks, retirement funds, utility companies)

Important Economic Provisions

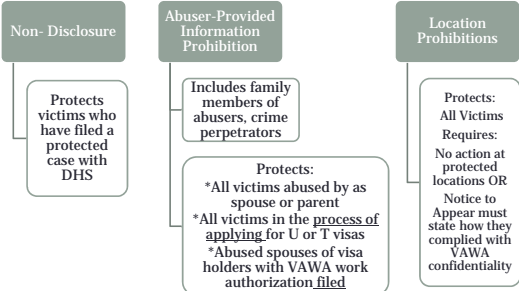
- Maintain and/or pay for health care for victim and children
- Provide one time emergency monetary relief
 - Money to repair locks or broken windows
 - Obtain an unlisted telephone number
 - Relocation assistance
- Pay house insurance, mortgage, rent, utility and/or debt payments
- Taxes
 - Turn over income tax statements
 - Respondent ordered to pay victim 1/2 of refund
 - Victim named trustee for receipt of tax return funds
 - Respondent ordered to sign over check
 - Victim awarded exclusive right to claim children as tax exemptions

VAWA Confidentiality and State Courts

VAWA Confidentiality Prongs

- **Abuser-Provided Information:** DHS, DOJ and the State Department are barred from taking action against a victim based *solely* upon information provided by abusers and crime perpetrators (their family members or associates)
- **Location Prohibitions:** Enforcement of location prohibitions unless comply with specific statutory and policy safeguards
- **Non-Disclosure:** Unless one of the enumerated exceptions apply, DHS, DOJ and the State Department cannot disclose VAWA information to anyone
 - VAWA self-petitioners, VAWA cancellation/suspension, T visa, U visa, Battered Spouse Waiver, Abused Visa Holder Spouses

VAWA Confidentiality Prongs



Why is VAWA Confidentiality Important for State Courts?

- Prohibited enforcement locations include courthouses in connection with any:
 - Protection order case, child custody case, civil or criminal case involving or related to domestic violence, sexual assault, trafficking, stalking
- New ICE courthouse enforcement policy

January 2018 ICE Courthouse Enforcement Policy: Targeted Immigrant Limitation

- Civil immigration enforcement at courthouses will only occur when
 - ICE officers have information that leads them to believe that a targeted immigrant will be present at a courthouse
- To be targeted an immigrant must
 - Have criminal conviction(s)
 - Be gang members
 - Be a threat to national security or public safety
 - Have been ordered removed and failed to depart, or
 - Have re-entered the country illegally after being removed

Why is VAWA Confidentiality Important for State Courts?

- Perpetrators are using state court discovery to obtain federal VAWA confidentiality protected information that
 - DHS will not release
 - Cannot be released under federal law
- Confidentiality protections apply to family, civil and criminal court discovery

Disclosure Limitations

- All DHS instruction 002-02-001
 - Law enforcement exception limited
 - Only “in a manner that protects the confidentiality of such information”
 - “Please note, defense counsel in state cases may sometimes attempt to make the entire A-file discoverable; however the entire file is not discoverable in its entirety under this exception”
- 8 C.F.R. 214.14 (3)(2)
 - “Agencies receiving information under this section, whether governmental or non-governmental, are bound by the confidentiality provisions and other restrictions set out in 8 U.S.C. 1367”

Demaj v Sakaj (D. Conn, 2012) –U Visa Case

- Although relevant to credibility and impeachment
- Family court discovery barred as contrary to VAWA confidentiality purpose --
 - Prevent disclosure of documents & information in a protected case file to alleged criminals
 - Stop perpetrator's actions to interfere with & undermine a victim's immigration case
- Seeking to obtain protected information through discovery in a custody case = interference with the victim's immigration case barred by the federal statute
- VAWA confidentiality applies to protect the case file contents, including in cases when
 - the victim discloses in state court that DHS has approved her protected immigration case

Hawke v. Dep't of Homeland Security (N.D. CA, 2008) – VAWA Self-Petition Case

- VAWA Confidentiality Protects cases:
 - All cases unless denied on the merits
- Judicial exception applies to appeals of victim's immigration case
 - Does not apply to civil or criminal court proceedings
- 6th Amendment right to compulsory process does not permit access to absolutely privileged information
- "primary purposes of the VAWA confidentiality provision, namely to prohibit disclosure of confidential application materials to the accused batterer"

State v. Marroquin-Aldana
2014 ME 47, ¶ 20, 89 A.3d 519, 525

- "insufficient justification" to disclose additional documentation when the defense had the certification form
- Provided defense opportunity to cross-examine victim and call credibility into question
- Court noted the "high level of protection" given to documents filed with immigration

People v. Alvarez Alvarez
No. G047701, 2014 WL 1813302, at *5 (Cal. Ct. App. May 7, 2014),
review denied (July 16, 2014)

- “The visa was a tangential, collateral issue, and allowing evidence about it invited speculation about the legal status ... which was completely irrelevant to this case.”
- The trial court was well within its discretion in excluding reference to the U visa

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Bench Cards

- Immigrants and protection orders
- Public benefits and services
- Immigration rights of crime victims
- Custody issues and immigrants
- Economic options
- VAWA confidentiality

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Resources for Courts

- U Visa Certification Toolkit
- Visa chart by immigration status
 - Who can sponsor children
 - Work authorization
 - Benefits access
- Legal and social science bibliographies

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Technical Assistance and Materials

- Power Point presentations and materials for this conference at www.niwap.org/go/NMConclave
- Judicial Training Manual at www.niwap.org/go/sji
 - **NIWAP Technical Assistance:**
 - Call (202) 274-4457
 - E-mail info@niwap.org
- Web Library: www.niwaplibrarywcl.american.edu



Thank you!