

ACHIEVING EQUAL JUSTICE FOR IMMIGRANT VICTIMS OF DOMESTIC VIOLENCE IN FAMILY COURTS

MICHIGAN SUPREME COURT VIRTUAL
JUDICIAL CONFERENCE
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Learning Objectives



- Understand immigration law impact on family law proceedings to ensure just and fair outcomes in state courts
- Recognize facts that indicate that a party qualifies for abuse or crime victim related immigration relief
- Understand the state court judicial role in making factual determinations related to immigration issues

Immigration Issues in Family Court



With so many families in which immigration status is an important issue or factor in home life, it is not surprising to see immigration issues in family courts

Immigration Issues in Family Court



On a fundamental level, immigration law and family both deal with where people can live and who can live with whom

Family law and immigration law constantly and inevitably interact

Family Law as Immigration Law



- ▣ Family laws create and enforce relationships that have great relevance in immigration and nationality law
- ▣ Family laws often are determinative of immigration and nationality rights
- ▣ Importantly, this interaction can happen **without regard to intention**

Immigration Law As Family Law



- Immigration law can have tremendous impact on family integrity as it intrudes into, and sometimes conflicts with, family or family court decisions
- In determining which family members can live together, immigration law functions as a form of family law

Conflicting Values



- Immigration law and family law have fundamentally different conceptions of “child” and “family”
- Immigration law and family law attach vastly different importance to the best interests of the child

Conflicting Values



- Though immigration and family laws serve different functions and values, they inevitably interact
- Understanding the interaction of immigration and family law can help ensure that agencies and courts working with immigrant families preserve and honor important family law values

Knowledge of immigration issues is important in family matters

- Understanding and resolution of immigration status issues early can have important consequences in planning for custody, family reunification or independent living
- Understanding of family dynamics may turn on knowing about family immigration issues

State Judicial Role



- Family court involvement may provide a basis for obtaining immigration status that should not be missed
- Immigration laws are complex and special protections exist for immigrant crime victims that often include a specific role for state court judges.

Immigration Status and Race



- As anti-immigrant bias has grown, courts see greater numbers of cases in which parties seek to raise immigration status of another party, child or parent to gain advantage in state family court proceedings.
- Parties often seek to conflate immigration status, inappropriately, with race and with appeals to bias.

Sunshine as Protection Against Misinformation and Bias



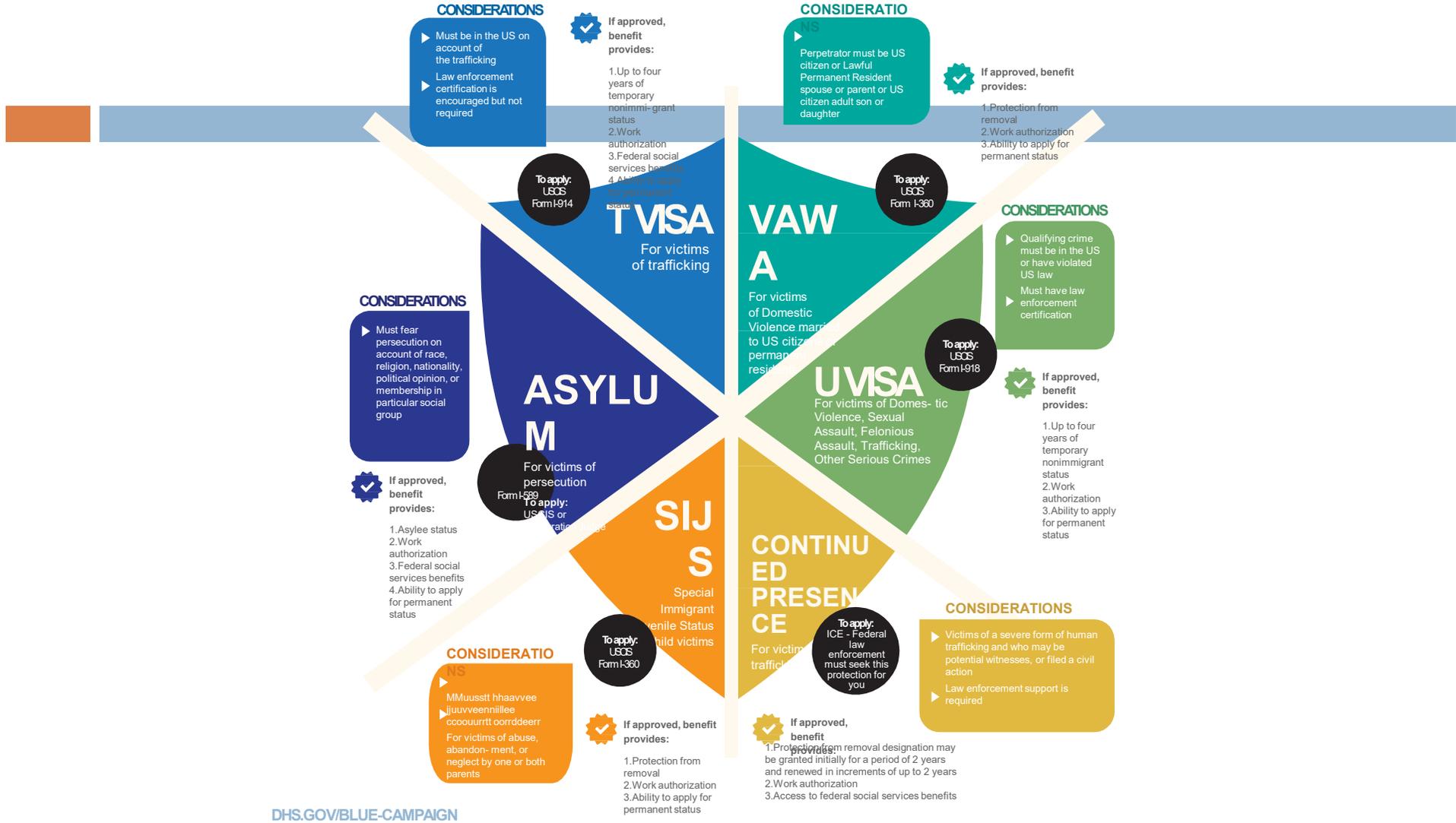
- Litigants often seek to raise immigration issues despite lack of relevancy
- Veiled and not so veiled appeals to bias are common
- Many immigrants are wrongly convinced they have no rights and are scared to appear and assert rights in court

Purpose of Crime Victim Protections

Congress enacted VAWA self-petitioning (1994), the U and T visas (2000) & Special Immigrant Juvenile Status (SIJS) (1990, 2008) to:

- Improve community policing and community relationships
- Increase prosecution of perpetrators of crimes against immigrant victims
- Allow victims to report crimes and seek help from police, prosecutors, and courts without fear of deportation
- Improve access to justice in family/criminal/civil courts for immigrant victims of domestic and sexual violence, stalking, human trafficking, and child/elder abuse
- Enhance victim safety
- Keep communities safe

Protections For Immigrant Victims



U Visas for Immigrant Victims

- A victim of qualifying criminal activity is eligible for a U Visa when:
 - The victim has suffered substantial physical or mental abuse as a result of the victimization
 - The victim possesses information about the crime;
 - The victim has been, is being, or is likely to be helpful in the detection, investigation, prosecution, conviction or sentencing of the offense; and
 - The criminal activity occurred in the U.S. or violated U.S. law;

U Visa Criminal Activity

the criminal activity referred to in this clause is that involving **one or more of the following or any similar activity in violation of Federal, State, or local criminal law:**

rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; stalking; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes;

8 U.S.C § 1101(a)(15)(U)(iii):

Which Judicial Officers Can Certify?

- Federal, state, & local
 - ▣ **Judges, Magistrates, Commissioners, Judicial Referees, Masters, Alderman, ALJs, Surrogates, Chancellors**
 - ▣ Others with delegated decision-making authority
- Judge will need to amend the form
- Certification based on helpfulness to courts
 - ▣ Detection(family/juvenile/civil/criminal)
 - Pleadings
 - Testimony
 - Attending court
 - Seeking orders
 - Working with police/prosecutors
 - ▣ Conviction/Sentencing (criminal)

Why Congress Made Judges Certifiers



- Cases where only justice system contact is the protection order, custody or child welfare case
- Instances where no crime scene language access when victim called for help
- Judge observes victim's participation in court cases criminal, civil, family
- Builds trust in the justice system

According to DHS, a U/T Visa Certification Tells USCIS Only the Following Things:

- Certifier believes the applicant is a victim of a qualifying criminal activity
- Victim had knowledge of the criminal activity
- U visa: Victim was, is, or is likely to be helpful in the detection, investigation, prosecution, conviction or sentencing
- T visa: Victim complied with reasonable requests for assistance from law enforcement or prosecutors unless exempt
 - ▣ Under 18 or physical or psychological trauma

Judges detect “Criminal Activities” and “Helpfulness” In Wide Range of Court Cases

- Family

- Civil Protection

- Custody

- Divorce

- Paternity

- Adoption

- Juvenile

- Child Abuse, Neglect, or Termination of Parental Rights

- Delinquency

- Criminal

- Probate

- Elder / Dependent Adult Abuse

- Guardianship

- Conservatorship

- Civil

- Employment

- Tort damages against a perpetrator

Criminal Case Examples: Evidence of Helpfulness

- Evidence in case that the victim:
 - Called 911
 - Participated in a criminal investigation
 - Identified perpetrator at line up
 - Testified before a grand jury or at trial
 - Appearance in a case
 - Attended criminal court hearings in the case
 - Victim impact statement
 - Testimony at sentencing

Family/Civil Case Examples: Evidence of Helpfulness

- Filed and/or appeared at hearing for full protection order
- Plead and or testified about abuse or sexual assault in a court case (i.e., protection order, divorce, custody, small claims, housing, employment)
- Evidence in case that victim called the police, made a police report, cooperated in a criminal or EEOC investigation
- Serving the perpetrator with notice of a
 - ▣ temporary protection order
 - ▣ A case in which the pleadings contain allegations of facts that constitute domestic violence, sexual assault or other U visa criminal activities

Part 6. Certification

I am the head of the agency listed in **Part 2**, or I am the person in the agency who was specifically designated by the head of the agency to issue a U Nonimmigrant Status Certification on behalf of the agency. ~~Based upon investigation of the facts, I~~ certify, under penalty of perjury, that the individual identified in **Part 1** is or was a victim of one or more of the crimes listed in **Part 3**. I certify that the above information is complete, true, and correct to the best of my knowledge, and that I have made and will make no promises regarding the above victim's ability to obtain a visa from U.S. Citizenship and Immigration Services (USCIS), based upon this certification. I further certify that if the victim unreasonably refuses to assist in the investigation or prosecution of the qualifying criminal activity of which he or she is a victim, I will notify USCIS.

1. Signature of Certifying Official (sign in ink)

→

2. Date of Signature (mm/dd/yyyy)

3. Daytime Telephone Number

4. Fax Number

Judges can amend the form

Examples: Based upon ...

- My findings of fact or ruling in [name type of proceeding]
- Probable cause
- My issuance of a protection order
- My sentencing of the defendant
- My having presided over a criminal case

REMEMBER: This is a certification that you believe the applicant was a victim of a crime.

Certification provides evidence to DHS.

DHS adjudicates and decides whether to grant the victim immigration relief.

After Immigration Case is Filed

Immigrant Victim's Justice System Use

- Protection orders – VAWA 47.6%, U visa 43.7%
- Filed a police report - VAWA 36.2%, U visa 50.3%
- Helped in a criminal case - VAWA 33.4%, U visa 73.1%
- Divorce – VAWA 32.1%, U visa 19.5%
- Child custody – VAWA 20.1%, U visa 17.9%
- Child support – VAWA 26.1%, U visa 10.7%

Krisztina E. Szabo, David Stauffer, Benish Anver, Leslye E. Orloff *Work Authorization For VAWA Self-Petitioners and U Visa Applicants*, NIWAP (Feb. 12, 2014)

Why is VAWA Confidentiality Important for State Courts?

- Promotes access to justice and just and fair outcomes in state courts
- Perpetrators may attempt to use state court discovery to obtain federal VAWA confidentiality protected information
- Prohibited immigration enforcement locations include courthouses

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 (and their family members) –
- **Location Prohibitions:** Enforcement locational 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
- *DHS notifies staff through “384” computer system*

DHS VAWA Confidentiality Computer System

- Directs to check for “384” computer system flag that identifies victims who have already filed for or have been granted victim-based immigration relief
- Reminds immigration officers, agents, and attorneys about immigration law protections for
 - ▣ Survivors of domestic violence
 - ▣ Crime victim survivors
 - ▣ Human trafficking survivor

State and Federal VAWA Confidentiality and Discovery Case Law

- Family law - VAWA and U visa case information not discoverable
- Criminal law – only U visa case certification discoverable
 - ▣ File not in prosecutors' custody or control
- Civil cases not discoverable except potentially as needed to prove damages to a specific individual
 - ▣ In chambers review judge can redact

Sensitive Locations Protected From Immigration Enforcement

VAWA Confidentiality

- Victims protected at courthouses in connection with civil/family/criminal cases related to
 - ▣ Domestic violence, sexual assault, trafficking, stalking
- Shelters, rape crisis centers
- Supervised visitation centers
- Family Justice Centers
- Programs serving victims

DHS Policies (ICE & CBP)

- Schools
- Medical treatment & health care facilities
- Places of worship
- Religious or civil ceremonies i.e., weddings and funerals
- Public demonstrations i.e., march, rally, parade

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
- No immigration enforcement against other persons including
 - Victims
 - Witnesses
 - Family members
 - People accompanying others to court

Steps Courts Are Taking

- ❑ Restrict activities that interfere with courtroom operations
- ❑ Enforcement restricted to non-public areas of the courthouse*
- ❑ Courts ask ICE to coordinate with court security staff and use of non-public entrances & exits*
- ❑ Some courts do not allow ICE into courtrooms
- ❑ No enforcement in civil and family proceedings absent written authorization from ICE Field Office Director or Special Agent in Charge*
- ❑ No interruptions during court proceedings or until case is completed
- ❑ No enforcement against victims, witnesses, family members, people accompanying others to court*
- ❑ Call courthouse security if ICE fails to comply with court orders

DHS Prosecutorial Discretion Not to Initiate Removal Against Crime Victims and Witnesses (June 17, 2011)

- Continues in effect
- To minimize the effect that immigration enforcement may have on the willingness and ability to make calls to police and pursue justice:
 - ▣ Victims of crime
 - ▣ Witnesses to crime
 - ▣ Individuals pursuing legitimate civil rights complaints

Prosecutorial Discretion in Civil Immigration Enforcement (January 20, 2021 & June 17, 2011)

Immigration Enforcement Priorities (1/20/21)

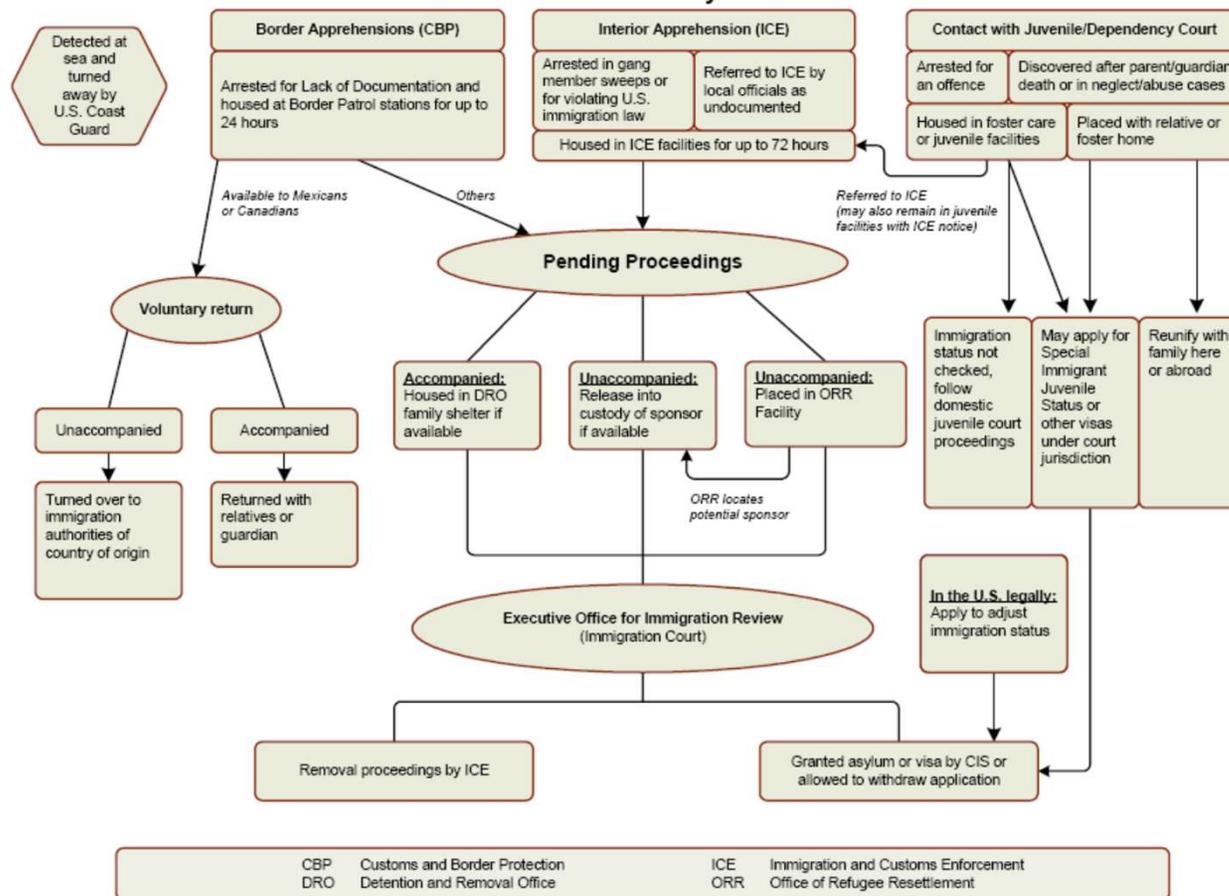
- National security
- Border crossers caught *while attempting to unlawfully enter*
- Undocumented immigrants not physically present in the U.S. before 11/1/20
- Persons in/released from jail
 - ▣ For aggravated felony *and*
 - ▣ Pose a threat to public safety

Prosecutorial Discretion for no immigration enforcement

- Crime victim or witness
- Caretakers of children, seriously ill parent, physically/mentally disabled
- Children, elderly or disabled
- Family relationships and status of family members
- Length of time in the U.S.
- Pursuit of education
 - ▣ US high school graduates, college students

Special Immigrant Juvenile Status

Figure 1. General Process for Juvenile Aliens Involved with the Immigration and Juvenile Justice System



Source: CRS Presentation of chart from National Juvenile Justice Network, "Undocumented Immigrant Youth: Guide for Advocates and Service Providers," Policy Brief No. 2, November 2006.

SIJS Findings in Juvenile Court



- Child is dependent on a juvenile court
- Reunification with one or both parents is not viable due to abuse, neglect, abandonment, or a similar basis under state law
- Child's best interest would not be served by being returned to his or her country of origin

8 U.S.C. § 1101(a)(27)(J)

SIJS Findings in Juvenile Court



- ▣ The state court that uses state laws to make a child custody or placement decision and memorializes these as SIJS findings
- ▣ The state court order reflects judge's expertise and application of state law – it does **not** provide immigration status
- ▣ The order is just one required piece of evidence in a federal adjudication process

State Court Jurisdiction to Make SIJS Findings



- The state court has jurisdiction to issue orders regarding special immigrant juvenile status. *In re L.F.O.C.*, 319 Mich.App. 476, 489 (2017) (“We reverse the trial court’s determination that it lacked authority to make the predicate factual findings pertinent to the issue of SIJ status...”)

Apply Same Jurisdiction and Procedural Rules as All Other Cases

- Include a statement of the court's jurisdiction citing the state statute, court rule, or other authority under which the court is exercising jurisdiction.
- Follow your state court procedures and note that you do so to demonstrate that the court made an informed decision.

SIJS and USCIS



- The requisite findings in a juvenile court permit application to USCIS to become a special immigrant juvenile and adjust status to lawful permanent resident
- SIJ and permanent resident status are not automatic
- Many grounds of inadmissibility may still be applied by USCIS

“Juvenile Court”

- According to DHS the “title and the type of court that may meet the definition of a juvenile court will vary from state to state. Examples of state courts that may meet this definition include: juvenile, family, dependency, orphans, guardianship, probate, and delinquency courts.”

Decisions about care and custody of children arise in family court proceedings

- Dependency/Delinquency
- Civil protection order cases
- Custody cases
- Divorce cases
- Paternity and child support cases
- Adoption cases
- DHS states: All are of the above = *Juvenile courts*
 - ▣ Juveniles = all children
- Bench Book chapters on each case type

SIJS Terminology “Dependent”

- The mere acceptance of jurisdiction over the custody of a child by a juvenile court makes the child dependent upon the state court.
- Where the child is placed is not controlling
- Placement examples:
 - ▣ foster care, guardianship, custody with a non-abusive parent, kinship care

See, *In re Menjivar*, 29 Immig. Rptr. B2-37 (1994)

Finding: Reunification Not Viable

- Does not require termination of parental rights
- Viability of reunification does not necessitate no contact with parent – Visitation can occur
- Order must include the finding that reunification with the parent is not viable
 - ▣ Explain reasons in court order
- Use state law

SIJS Terminology “Similar Basis”

□ Legitimate underlying child welfare reason for state court jurisdiction to issue child custody/placement order – in Michigan:

▣ A child who is “without proper custody or guardianship” in Michigan

MICH. COMP. LAWS § 712A.2(4)(b)(1)

Return to home country not in child's best interests

- Identify each potential custodian in U.S. and home country
- Apply state best interest factors to each placement
- States in court order the factual findings that support chosen placement
- Make findings that illustrate why under state best interest factors court is not choosing placements in child's home country
- Compare the supports, help, services child needs U.S vs. home country

Is Immigration Status Relevant to Custody?

- Relevant: 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:
 - Core primary caretaker determination
 - Evaluation of parenting abilities
 - Best interests of the child
 - Requirements regarding custody awards to non-abusive parent

Myth vs. Fact:

Parents without Legal Immigration Status

Myth	Fact
Deportation is imminent	DHS policies prevent detention/removal of immigrant parents who are crime victims
Parent is likely to flee U.S. with child	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.
The parent has no livelihood	Abused immigrant parents in family court have a path to immigration relief, work authorization & some benefits
Legally present parent must have custody in order to file for benefits for child	Custody does not affect parent's ability to file for or gain immigration benefits for his children

Ongoing Challenges



- Don't allow immigration issues to undermine critical values and principles
- Creatively use the flexibility and equitable powers of family law
- Question assumptions
- Guard against bias and misinformation

Technical Assistance and Materials

- Power Point presentations and materials for this conference at <http://niwaplibrary.wcl.american.edu/MJI2021/>
- Judicial Training Manual at <http://niwaplibrary.wcl.american.edu/sji-jtn-materials/>
 - NIWAP Technical Assistance
 - Call (202) 274-4457
 - E-mail info@niwap.org
- Web Library: www.niwaplibrary.wcl.american.edu

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