

**Community of Practice for Family Law
Attorneys Representing Immigrant Survivors**

**Immigration Issues That Arise in Family Court
Cases – Tools, Strategies, and TA**

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NIWAP Community of Practice Team



Veronica T. Thronson
Clinical Professor of Law
Director, Immigration
Law Clinic
Michigan State University
College of Law



Leslye Orloff
Director
National Immigrant
Women's Advocacy Project,
American University
Washington College of Law

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The following slides are intended to be a guide to lead our discussion on this topic and to provide substantive material for your future reference.



Learning Objectives

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

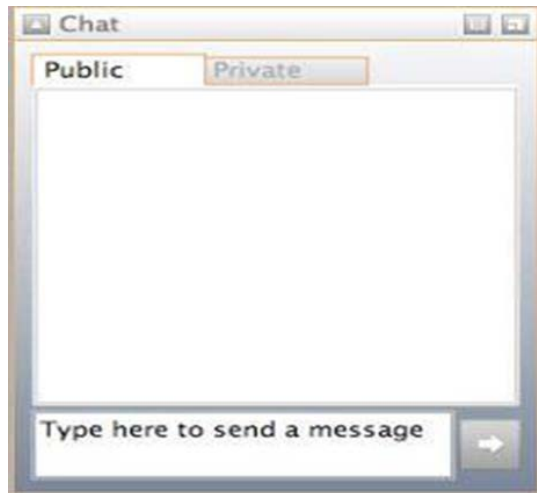
- Anticipate immigration law issues that arise in family court cases, particularly in cases that involve domestic violence, sexual assault, stalking and and/or child maltreatment
- Know where to get up-to-date legally accurate information on immigration law when you need it
- Be able to present evidence and information to the judge in your case so that the judge applies legally correct information about immigration law to the fact of your case
- Develop case strategies in deciding whether to raise your client's immigration status in your case in chief, to file motions in limine, or be prepared for opposing counsel to raise it.

This COP Will

- Learn from you about immigration issues that come up in your family court cases
- Show you how to use the NIWAP web library to access legal research, bench cards, and tools to support your family court cases
- Decide together on which topics you want in future COP sessions

Free Think Exercise

- What are the types of immigration issues you are seeing come up in your family court cases that you want to have tools and strategies to prepare for?

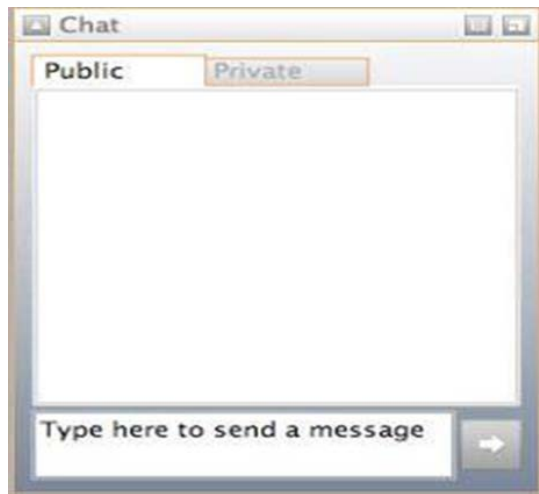


Let's Make a List

- Immigration issues arising in my immigrant survivor's
 - Custody case
 - Protection order case
 - Child support case
 - Divorce case

Custody Cases Involving Domestic Violence and/or Child Abuse

What immigration issues are you seeing in custody cases?



MULTIYEAR CASE LAW REVIEW OF IMMIGRATION AND CUSTODY ISSUES FOUND THE FOLLOWING TRENDS IN COURT RULINGS

Issues and Responses That Lead to
Successful Outcomes for Survivors

Your immigrant survivor client will flee the U.S. if she is granted custody

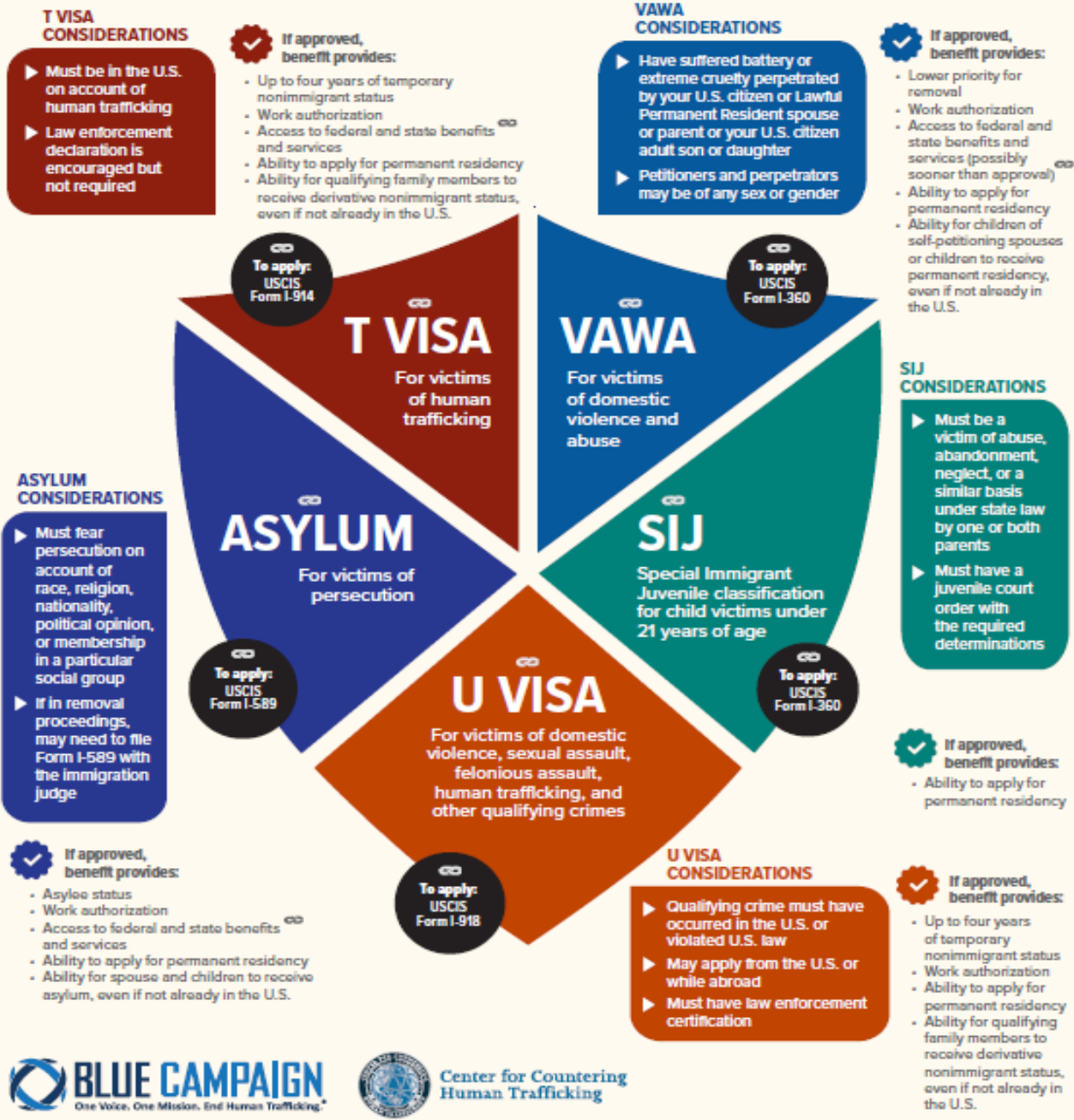
- Response: US State Department research has found that
- US citizens and lawful permanent residents are more likely to flee with children, especially when
 - There have been threats of kidnapping children
 - They are dual nationals
 - They travel freely to and from U.S.

Your immigrant victim client has no livelihood

- Response: Abused immigrant parents when they (or their child or stepchild) are victims of crime or abuse
 - Are eligible for paths to lawful immigration status that include
 - Protection from deportation
 - Work authorization
 - Increased access to public benefits and services

Immigration Protections for Noncitizen Victims of Crime and Abuse

U.S. Immigration Benefits for NONCITIZEN CRIME VICTIMS



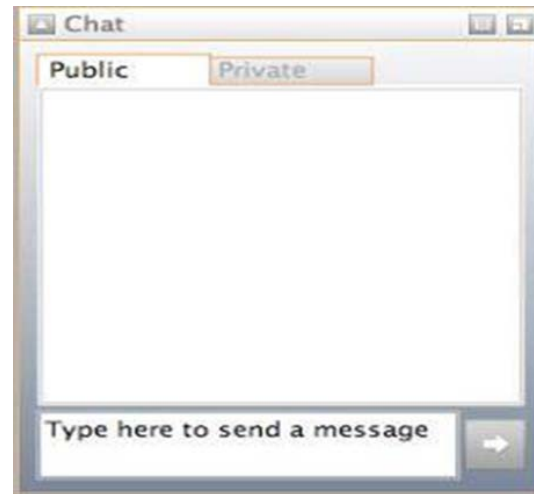
DHS.GOV/BLUECAMPAIGN

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

All U.S. Citizenship and Immigration Services (USCIS) forms can be found at: www.uscis.gov/forms/all-forms

No Livelihood?

- Perpetrator may be the reason victim is undocumented
- Perpetrator can be ordered to provide economic support for victim and any children
- What forms?



Citizen or lawfully present parent must have legal custody to be able under immigration law to file immigration papers for their children

- Custody does not affect a parent's ability to file for or gain immigration benefits for their children.

Poll 1: Which parents are the *most* likely to be removed from the U.S. by DHS?



- A. Immigrants with orders of removal
- B. Undocumented immigrant victim parents
- C. Immigrants with criminal convictions
- D. Immigrants with notices to appear in immigration court

Who Is Likely to be Removed by ICE?

Year

Criminal Convictions and Pending Criminal Charges:

Other Immigration Violations:

- | | | |
|----------------|---------|---------|
| • FY 2016 | • 91.7% | • 8.3% |
| • FY 2017 | • 89.2% | • 10.8% |
| • FY 2018 | • 87.1% | • 12.9% |
| • FY 2020 | • 92% | • 8% |
| • FY 2021-2023 | • 98% | • 2% |

Mitigating Factors In Favor of Declining Enforcement

DHS Enforcement Priorities (Sept. 30, 2021) and OPLA Memos

- *Crime victim, witness, party in legal proceedings*
- *Likely to be granted immigration relief*
- *Impact on family in U.S. of loss of caregiver/provider*
- *Advanced/tender age/pregnancy*
- *Poor health or serious medical condition*
- *Lengthy presence in the U.S*
- *Work history, pursuit/completion education in US*

Examples: Mitigating Factors

- Post Nov. 1, 2020 entrants who are
 - Victim of domestic or sexual violence in the U.S.
 - SIJS eligible child
- Victim arrested for domestic violence
 - Victim called police, no qualified interpreters
 - Victim arrested, to get out of jail plead guilty
- Victim arrested for stealing baby food when fleeing abuser

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



ICE Parental/Guardian Interests Directive July 2022

- Requires affirmative and ongoing inquiries about and identification of parents/legal guardians of minor children and incapacitated adults
- Status as a caregiver parents/legal guardian impacts
 - Decision to detain, initial placements, transfers of parents
 - Rights to family visitation & child welfare services/programs
 - ICE to comply with and facilitate court ordered visitation
 - Unless parent is the abuser, ICE required to accommodate efforts to make arrangements for children
 - If court orders custody or return of child, ICE will in most cases release parent/guardian
 - ICE required to bring parents/guardians to court and establish communication with courts.

Custody Research

- When Family and Immigration Laws Intersect: Case Law and Department of Homeland Security Policy Update (September 30, 2021) <https://niwaplibrary.wcl.american.edu/pubs/immigration-status-in-custody-cases>
- Custody of Children in Mixed Status Families: Preventing the Misunderstanding and Misuse of Immigration Status in State-Court Custody Proceedings (Summer 2013) <https://niwaplibrary.wcl.american.edu/pubs/custody-in-mixed-status-families>
- Flight Risk of Foreign-Born Parents with Children (June 12, 2021) <https://niwaplibrary.wcl.american.edu/pubs/flight-risk-of-parents-with-children>

Provide the Court Legally Correct Immigration Law Information

- Immigration Status, Work Authorization, and Ability to Sponsor Children (December 30, 2021) <http://niwaplibrary.wcl.american.edu/pubs/fam-chart-immstatus>
- Bench Card: DHS Enforcement Priorities Information for State Court Judges (April 24, 2013, Updated December 27, 2021) <http://niwaplibrary.wcl.american.edu/pubs/dhsenforcementpriorities-benchcard/>
- Parental-Guardian Interests Directive: How to Get a Detained or Removed Person to Court for Family Court Cases Involving Children or Incapacitated Adults (July 12, 2022) <https://niwaplibrary.wcl.american.edu/pubs/how-to-get-a-detained-parent-to-court>

Trends in Case Law

- Flight risk:
 - Finding that undocumented immigration status does not make an individual a flight risk. *See Huff v. Vallejo*, 347 Ga. App. 127, 817 S.E.2d 696 (2018).
- Ability to provide financially for children
 - “...illegal aliens suffer disadvantages. For example, they cannot enter into an employment relationship. But plenty of people have worked, and thrived, as independent contractors all their lives.” *See Hupp v. Rosales*, 2013 IL App (4th) 130433-U.

Custody Strategies

- Obtaining Custody of Children for Battered Immigrants (85-116)(Winter 2017) in Winning Custody Cases for Immigrant Survivors: The Clash of Laws, Cultures, Custody and Parental Rights
<https://www.courts.ca.gov/documents/BTB24-PreCon1E-11.pdf>
- Chapter 06.1: Countering Abuser's Attempts to Raise Victim's Immigration Status in Custody Cases (July 1, 2013)
<http://niwaplibrary.wcl.american.edu/pubs/ch6-1-counterabuserraisingimmstatus/>
- Chapter 06.3: The Implications of the Hague International Child Abduction Convention: Cases and Practice (July 1, 2013)
<http://niwaplibrary.wcl.american.edu/pubs/ch6-3-hagueintlchildabduction/>
- Border Crossings: Understanding the Civil, Criminal, and Immigration Implications for Battered Immigrants Fleeing Across State Lines with Their Children <https://niwaplibrary.wcl.american.edu/pubs/border-crossings-battered-immigrants-fleeing-across-state-lines-children> **

Custody Tools

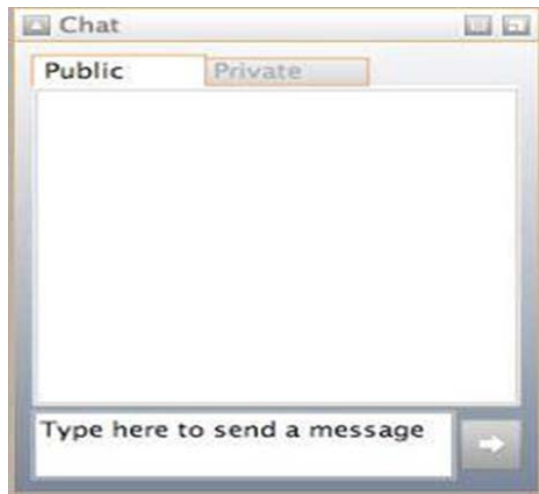
- Family Court Bench Card on Issues that Arise in Custody Cases Involving Immigrant Parents, Children, and Crime Victims (October 13, 2013, Updated November 30, 2021) <http://niwaplibrary.wcl.american.edu/pubs/common-imm-issues-custody-cases>
- Families and Children Model Code on Domestic and Family Violence – Revised Chapter Four – NCJFCJ (January 2023) <https://www.ncjfcj.org/publications/revised-chapter-four-families-and-children-model-code-on-domestic-and-family-violence/>
- Best Interests of the Child Laws – State-by-State Comparison Maps and Charts (Updated July 7, 2021) <https://niwaplibrary.wcl.american.edu/best-interest-of-the-child>
- Chapter VII – Service of Process in SIJS (December 29, 2017) <http://niwaplibrary.wcl.american.edu/pubs/chapter-vii-service-of-process-in-sijs/>
- Family Law Service of Process and Jurisdiction Requirements Charts (March 2, 2021) <https://niwaplibrary.wcl.american.edu/family-law-service-jurisdiction-charts> *

Links to Custody Collected Resources

- Child Custody and Immigration Related Abuse: Myths and Best Practices – Webinar
<https://niwaplibrary.wcl.american.edu/custody2021/>
- Representing Immigrant and LEP Litigants in Custody Cases – Advanced Custody
<https://niwaplibrary.wcl.american.edu/bostoncustody/>

Civil Protection Order Cases Involving Immigrant Survivors

What immigration issues are you seeing in protection order cases?



Perpetrator claims that issuance
of a protection order will make
them deportable.

Poll 2: Check all of the following that would be deportable for a noncitizen (Check all that apply)



- A. Issuance of a protection order against them
- B. A finding of fact in a family court case that they violated the terms of a protection order issued against them
- C. Conviction for violating a protection order
- D. Being found in contempt for violating a protection order
- E. Agreeing to diversion for a protection order violation

Protection Orders and Immigration Considerations

- Violation of a protection order is a deportable offense
 - Can lead to loss of lawful permanent residence and other immigration consequences for the perpetrator
 - Victims should not be charged with violation of orders issued for their own protection
 - Importance of self-defense and primary aggressor determinations when CPO filed against immigrant victim
 - Ask the judge to issue *Padilla* advisals in CPO cases

Violation of Domestic Violence Protection Order

Immigration law provides for the removal of any noncitizen:

- who at any time after admission is enjoined under a protection order issued by a court and whom **the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable**. For purposes of this clause, the term “protection order” means any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions)

INA§237(a)(2), INA§237(a)(2)(E)(ii) (emphasis added).

Violation of Domestic Violence Protection Order

The statute only requires that a court “determines” that the immigrant has engaged in conduct violating the protection order, a finding is sufficient, and conviction is not required.

Garcia-Hernandez v. Boente, 847 F. 3d at 872 (2017),

Matter of Obshatko, 27 I&N Dec. 173, 175 (BIA 2017)

- Includes family court adjudications (“court has found”)
- Includes violation of “no-contact” provision of an order of protection.

Matter of Strydom, 25 I&N Dec 507 (BIA 2011)

Civil Protection Orders are not available to or useful for battered immigrants who are staying with their abusers or who have returned to live with their abusers.

Poll 3: Why Might Victims Not Separating From Their Abusers Seek Protection Orders?

(Check all that apply)



- A. Living in extended families
- B. Limited housing options
- C. Awaiting legal work authorization
- D. Curb abuse
- E. Help shift power and control in relationship

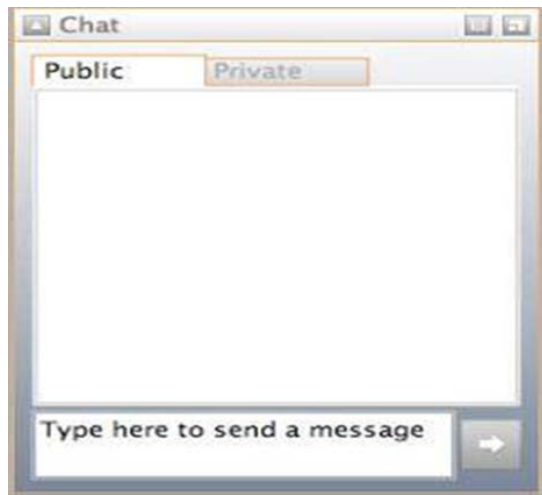
The Majority of Immigrant Victims Stay With Their Abusers ...

- Until the victim receives work authorization as part of their immigration case or their case is approved
- Percent who leave before receiving work authorization or approval
 - VAWA self-petitioners 33.9%
 - U visa victims 30.1%

Victims Who Stay: No Unlawful Contact Protection Orders

- No state's protection order statute requires separation of the parties
- Provisions
 - No abuse
 - No immigration related abuse
 - No unlawful contact
 - Batterer's treatment

What type of creative remedies have you sought in protection orders to counter immigration related abuse of your client?



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
- Economic relief
 - Child/Spousal support, health insurance, rent, mortgage, utilities, one-time emergency monetary relief, tax returns

Beneficial Findings to Include When Issuing Family Court Orders

- In contested cases findings of:
 - Physical and sexual abuse, stalking, extreme cruelty, & human trafficking against
 - The immigrant survivor, their child, and/or their step-child
- In all cases showing existence of:
 - Parent/child relationship
 - Spousal relationship
 - Stepparent/stepchild relationship
 - Age of children

Protection Order Strategies

- Seeking Protection Orders for Immigrant Victims (57-68) (Fall 2016) in Family Court Proceedings in Winning Custody Cases for Immigrant Survivors: The Clash of Laws, Cultures, Custody and Parental Rights
<https://www.courts.ca.gov/documents/BTB24-PreCon1E-11.pdf>
- Battered Immigrants and Civil Protection Orders (July 1, 2013)
 - <http://niwaplibrary.wcl.american.edu/pubs/ch5-1-imm-civil-protection-orders/>
- Creative Methods in Protecting Battered Immigrants (June 20, 2014)
 - <http://niwaplibrary.wcl.american.edu/pubs/creative-cpo-batimms/>
- Ensuring Access to Protection Orders for Immigrant Victims of Family Violence (July 1, 2014)
 - <http://niwaplibrary.wcl.american.edu/pubs/ch5-2-access-protection-orders/>
- Jurisdictionally Sound Protection Orders (July 3, 2013)
<http://niwaplibrary.wcl.american.edu/pubs/ch5-3-jurisdictionallysound-cpos/>
- Unintended Consequences: How Civil Protection Orders Affect Immigrants, *Delaware Lawyer's Magazine* (Fall 2018)
<http://niwaplibrary.wcl.american.edu/wp-content/uploads/DELA-FALL-2018.pdf>

Protection Order Tools

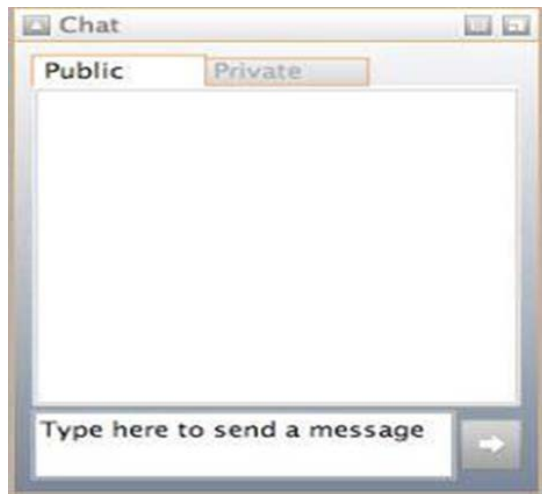
- Immigrants and Protection Orders Bench Card (March 29, 2019) <https://niwaplibrary.wcl.american.edu/pubs/protection-orders-bench-card>
- How Immigration Law and Policies Impact State Courts — When Children and Litigants are Victims of Human Trafficking, Domestic Violence, Child Abuse, or Sexual Assault (NCJFCJ, In-Session -Fall 2023) <https://niwaplibrary.wcl.american.edu/pubs/ncjfcj-in-session-fall-2023-dhs-policies-and-courts>
- NCJFCJ's Break From the Bench: What a judge needs to know about...Responding to Immigrant Victims of Domestic and Sexual Violence (April 27, 2021) <https://www.ncjfcj.org/webcasts/responding-to-immigrant-victims-of-domestic-and-sexual-violence/>
- Obtaining U Visa Certification from Judges in Protection Order, Family, Criminal, and Other State Court Proceedings (February 20, 2014) <https://niwaplibrary.wcl.american.edu/webinar-u-visa-certification-by-state-court-judges>

Links to Protection Order Collected Resources and Immigrant Victim CPO Research

- Civil Protection Orders Webinar Materials List (February 24, 2024) <https://niwaplibrary.wcl.american.edu/pubs/civil-protection-order-materials-list>
- Immigrant Victims of Interpersonal Violence and Protection Orders (2020) <https://niwaplibrary.wcl.american.edu/pubs/immigrant-victims-and-protection-orders-2020>
- Use and Outcomes of Protection Orders by Battered Immigrant Women (2006) <https://niwaplibrary.wcl.american.edu/pubs/fam-gov-nijtechnicalreportprotectionorders11-10-06>

Divorce and Child Support Cases Involving Immigrant Survivors

What immigration issues are you seeing in divorce or child support cases?



Impact of Divorce

- VAWA self-petitioners:
 - Spouse must file within two years of final divorce
 - Step-children must file before divorce
- Ends legal immigration status for spouses and children of visa holders:
 - Students, Work Visa Holders, Diplomats
- Divorce cuts off access to lawful permanent residence for spouses and children of people seeking lawful permanent residence based on:
 - Employment
 - Asylum
 - Family relationships
 - Cancellation of removal

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 grant immigration relief
 - Can set victim up for marriage fraud investigation
- Impacts
 - Spousal support
 - Property division

Child Support & Immigration: The Parent Paying Child Support

- Payment of child support through the court provides a non-citizen parent with a history of child support payments
- This is helpful evidence of good moral character for either parent's immigration case
 - Cancellation of removal
 - Naturalization
 - Obtaining relief in immigration court
 - Can be used to show hardship to family members

Immigration Issues Arising in Child Support Cases

- Lack of legal work authorization is not a valid defense to non-payment of child support
- Can order child support, but not a job search, of an undocumented non-custodial parent
- Can order non-custodial parent to obtain an ITIN and pay taxes

Divorce and Economic Relief Strategies

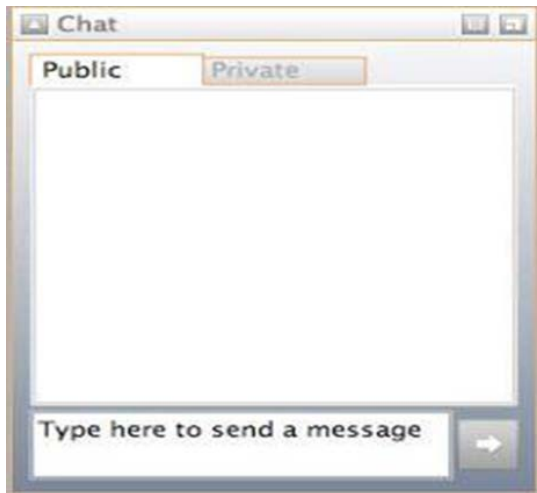
- Immigration Concerns for Family Law Practitioners
<http://niwaplibrary.wcl.american.edu/pubs/family-law-journal-immigration-concerns-for-family-law-practitioners/>
- Providing Economic Relief for Immigrant Victims: Child Support and Spousal Support (117-135)(Winter 2017) in Family Court Proceedings in Winning Custody Cases for Immigrant Survivors: The Clash of Laws, Cultures, Custody and Parental Rights <https://www.courts.ca.gov/documents/BTB24-PreCon1E-11.pdf>
- Chapter 06.4: Ensuring Economic Relief for Immigrant Victims Through Family Law Proceedings: Child Support and Spousal Support (July 1, 2013) <http://niwaplibrary.wcl.american.edu/pubs/ch6-4-ensuring-econ-relief/>

Divorce and Economic Relief Tools

- Bench Card: Impact of Divorce on Immigration Status (December 28, 2021) <http://niwaplibrary.wcl.american.edu/pubs/divorce-bench-card/>
- Bench Card for State Court Judges on Common Issues that Arise From Parties' Immigration Status: Economic Remedies (March 10, 2022) <https://niwaplibrary.wcl.american.edu/pubs/benchcard-economic-relief>
- Affidavits of Support and Enforceability Bench Card (September 30, 2021) <https://niwaplibrary.wcl.american.edu/pubs/affidavits-of-support-bench-card>
- 'Til Death Do Us Part: Affidavits of Support and Obligations to Immigrant Spouses (October 2012) <https://niwaplibrary.wcl.american.edu/pubs/til-death-do-us-part>
- Affidavits Are Forever (March 2023) <https://niwaplibrary.wcl.american.edu/pubs/affidavits-are-forever-march-2023/>

Next Steps

- What do you want learn more about and share strategies about in greater detail at future sessions?



Technical Assistance and Materials

- NIWAP Technical Assistance:
 - Call (202) 274-4457
 - E-mail info@niwap.org
 - Web Library:
www.niwaplibrary.wcl.american.edu
 - Directory
 - <https://niwaplibrary.wcl.american.edu/home/directory-programs-serving-immigrant-victims/>
- Materials for this COP:
 - <https://niwaplibrary.wcl.american.edu/family-law-cop-materials-repository/>

Thank You!

