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## **NIWAP Newsletter    Child Custody in Immigrant Families<sup>12</sup>**

### **WEBINAR: Custody for Abused Immigrants: Tips, Tools and Best Practices**

Date: Thursday, November 15, 2018, Update October 27, 2021<sup>3</sup>  
View this past webinar and additional resources by clicking the link above.

Parents have a constitutional right in the care and custody of their children without regard to the parent's or the child's immigration status. Despite this, perpetrators of domestic and sexual violence against immigrant victims with whom they share children, commonly raise immigration status related issues in custody litigation. Abusers often provide the court with legally incorrect information about immigration law and how immigration law applies to the victim and the parties' children. This webinar will provide judges, attorneys and advocates with legally correct information about the immigration relief available to battered immigrants and abused children. The webinar discussed the most

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<sup>2</sup> This publication was supported by Grant No 2015-TA-AX-K043 awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this program are those of the authors and do not necessarily reflect the views of the Department of Justice, Office on Violence Against Women.

<sup>3</sup> The information in this document was updated as of September 2021 to include links to relevant and updated information. While the newsletter has not been redistributed since publication, all information contained herein has been reviewed for accuracy and relevance.

common immigration status related myths that are raised by parties in contested custody cases and will provide up to date immigration law information and best practices of applying state best interests of the child laws in custody cases involving battered immigrants and their children.

- Leslye Orloff, Director, National Immigrant Women's Advocacy Project (NIWAP), American University Washington College of Law
- Judge Rosemary Collins, 17th Judicial Circuit Court, Domestic Violence Coordinated Courts (DVCC), Winnebago County
- Judge Mary Weir, 16th Judicial Circuit Court, Jackson County

#### Target Audience:

This webinar was designed for advocates, attorneys, and others who are new to or would like to learn up-to-date information on the legal rights of abused immigrant parents in state court custody proceedings.

This project was supported by Grant No 2015-TA-AX-K030 awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this program are those of the authors and do not necessarily reflect the views of the Department of Justice, Office on Violence Against Women.

*In the last decade, the immigrant population has steadily increased in the United States. Currently, almost a quarter of the population under 18 years of age has at least one foreign-born parent. Many immigrant families are mixed-status families, with family members ranging from being undocumented, to holding legal permanent residency status, to being U.S. citizens, or holding some other form of temporary immigration status. In families consisting of mixed immigration statuses, particularly when there is a history of domestic violence, the parent with legal immigration status may try to use the other parent's temporary or undocumented immigration status against them to influence the court in a custody case.<sup>4</sup> Custody is often used in abusive relationships by the abuser as a means of coercive control by threatening to cut off or severely limit the abused parent's access to the children.*

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<sup>4</sup> For more information on updates to case law and Department of Homeland Security policy concerning immigration status in family court proceedings, see Abigail Whitmore & Leslye E. Orloff, *When Family and Immigration Laws Intersect: Case Law and Department of Homeland Security Policy Update* (Jun. 5, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/immigration-in-custody-cases-update>. See also Leslye E. Orloff and Benish Anver, *Family Court Bench Card on Immigration Rights of Battered Spouses, Children and Immigrant Crime Victims* (October 11, 2013), available at <https://niwaplibrary.wcl.american.edu/pubs/bench-card-on-immigration-relief-for-crime-victims>.

*For immigrant parents, this is exacerbated by threats of deportation and the abuser's control of immigration related paperwork that the abuser can or has filed on the victim's and/or the children's behalf. Immigrant parents seeking custody of children in the United States have the same parental rights and entitlements of U.S. citizen parents.*

*This newsletter will provide an overview of the legal rights of immigrant parents who are victims of domestic violence, sexual assault, stalking, and dating violence in state custody proceedings, a discussion of common misconceptions about immigration status and child custody including current Department of Homeland Security protections for immigrant crime victims and enforcement priorities, and practice tips on obtaining custody of children for immigrant survivors of domestic violence. Finally, it will cover how to counter the assumption that a parent's immigration status should operate as a negative factor in custody determinations.*

*This newsletter uses the terms "immigrant victims" and "immigrant survivors" interchangeably to refer to immigrant victims of domestic violence, sexual assault, stalking, dating violence and/or victims of human trafficking.*

*Please contact NIWAP ([info@niwap.org](mailto:info@niwap.org) or 202-247-4457) for free technical assistance on custody cases involving immigrant survivors and addressing immigration status issues that arise in state custody proceedings. More information regarding immigrant families in state courts is available in the [NIWAP web library](#).*

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## **Legal Rights of Immigrant Parents in State Court Custody Proceedings**

Parents have a fundamental right in the care and custody of their children without regard to immigration status. Despite this constitutionally protected right, immigration status is often raised in custody proceedings when one party is without legal or permanent immigration status and the other party is a legal permanent resident or U.S. citizen. While it is legally inaccurate, the legal permanent resident or U.S. citizen parent often argues that it is not in the child's best interests to be placed in the

custody of the immigrant parent for a variety of reasons including the parent's immigration status.

Abusive parents raise these arguments even when the immigrant parent has clearly been the child's primary caretaker. The following section of this newsletter addresses many of the most commonly raised myths and misconceptions around custody along with legally correct information on each. This following section will also discuss the legal rights and precedents affirming an immigrant parent's and their child's constitutional rights and laws supporting the award of custody to non-abusive immigrant parents without regard to that parent's immigration status.

State courts all over the country commonly grant custody to immigrant parents who have temporary immigration status and who are undocumented when the immigrant parent has been the primary caretaker of the children because placement with that parent is in the child's best interests under state law without considering the parent's immigration status. This is particularly true when the parent challenging custody by the non-abusive immigrant parent is a perpetrator of domestic violence and/or child abuse.

The Nebraska Supreme Court has articulated immigrant parents' constitutional rights to care and custody of their children in *In Re Angelica L.* ([277 Neb. 984 \(2009\)](#)) (fact sheet available [here](#)). In this case, the court unanimously overturned a lower court decision to terminate an undocumented mother's parental rights after she was detained by the Department of Homeland Security (DHS) and deported. The state of Nebraska welfare authorities reported an immigrant mother to DHS, took and placed her children in foster care, did not allow the mother to take her children with her to her home country, and sought termination of the mother's parental rights. The court held that an immigrant mother has a constitutional right to care and custody of her children and that it is in a child's best interests to remain in the care of their natural primary caretaker parent absent a finding that the parent is unfit. The opposing side in this case, the state of Nebraska, argued that it was in the immigrant mother's citizen children's best interest to be raised in the United States, with foster parents, rather than in Guatemala with their mother. The Nebraska Supreme Court overturned this ruling and confirmed that the immigration status of the parent should not be considered in a best interest analysis and that the constitutional rights to care and custody apply to immigrant parents including those who are undocumented, detained, or deported.

Other courts have made similar decisions regarding parental rights of undocumented immigrant parents and their children, highlighting the importance of the parent-child relationship. In *In re the Welfare of R. and*

*N. Churape, 43 Wn. App. 634, (1986)* the Washington Court of Appeals remanded the case to the trial court with instruction to focus on the legislative intent of family laws designed to keep family units intact.

Opposing parties often raise immigration status when there is a history of domestic violence as a means of power and control and in an effort to turn the court's attention away from the abuser's history of violence, abuse, and coercive control. Domestic violence is a consideration in determining the best interest of the child in all states and U.S. jurisdictions, while no state domestic relations statutes list immigration status as a factor. Immigration status is not relevant to either the core primary caretaker determination or the evaluation of parenting skills.<sup>5</sup>

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### **Common Misconceptions About Immigration Status and Child Custody**

Immigration status is often raised in family court proceedings in one of two ways:

- 1) the opposing party will bring up the immigrant parent's immigration status to bias the court against the immigrant parent, to continue to threaten, abuse and exert coercive control over the immigrant parent victim when familial violence is present, or to allege that the immigrant parent's lack of permanent status disadvantages the child; or
- 2) the immigrant parent will provide evidence in the custody case documenting the [abuser's use of immigration-related abuse](#) to do one of the following:
  - Exert power and control over the battered immigrant spouse, intimate partner, or child;
  - Prove immigration-related domestic or child abuse;
  - Show the court that the immigrant victim parent has obtained or is eligible to obtain legal immigration status; or
  - Explain how the immigration-related abuse created or contributed to the victim's lack of legal immigration status

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<sup>5</sup> For more up-to-date case information involving the consideration of immigration status in family court proceedings, *See* Abigail Whitmore & Leslye E. Orloff, *When Family and Immigration Laws Intersect: Case Law and Department of Homeland Security Policy Update* (Jun. 5, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/immigration-in-custody-cases-update>. *See also* Leslye E. Orloff and Benish Anver, *Family Court Bench Card on Immigration Rights of Battered Spouses, Children and Immigrant Crime Victims* (October 11, 2013), available at <https://niwaplibrary.wcl.american.edu/pubs/bench-card-on-immigration-relief-for-crime-victims>.

and affects the victim's and the victim's current inability to access public benefits and thus should impact both child/spousal support awards and the level of spousal and/or child support awarded.

Once the court is aware of either party's immigration status, it is crucial they have correct information about DHS policies against removal of crime victims and witnesses as well as information on access to work authorization and benefits that accompany an immigrant parents' crime victim based application for legal immigration status. This information helps courts correctly determine to what extent, if any, immigration status should be considered in custody cases. Below are common misconceptions and facts to counter them if they arise in custody cases involving immigrant parents who are victims of domestic violence, sexual assault, dating violence, and/or stalking.<sup>6</sup>

*Myth:* Deportation of immigration parent is imminent.

**Fact:** Department of Homeland Security enforcement and deportation policies aim to prevent the detention/removal of immigrants who are crime victims without regard to the child's or parent's immigration status. These policies are further explained in our [bench card for state court family judges on DHS policies](#).

When there is history of domestic violence, sexual assault, or stalking, the immigrant parent is likely eligible for immigration relief. Immigrant victims of crime are protected under federal law and may be eligible for legal permanent residency, visas with a path to legal permanent residency, cancellation of removal, suspension of deportation, and/or battered spouse waivers.

Each of these forms of immigration relief protect victims from deportation and include access to legal work authorization and some access to public benefits depending on the state in which the victim resides. For an overview of the public benefits immigrant victims can be eligible for see [Bench Card on Immigrant Crime Victim Access to Public Benefits and](#)

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<sup>6</sup> For more on myths relating to the impact of immigration status on the best interest of the child, see Soraya Fata et al., *Custody of Children in Mixed-Status Families: Preventing the Misunderstanding and Misuse of Immigration Status in State-Court Custody Proceedings*, 47.2 FAM. L. Q. 191 (2013). See also Leslye E. Orloff, et. al *Family Court Bench Card on Issues that Arise in Custody Cases Involving Immigrant Parents, Children and Crime Victims* (Oct. 13, 2013 (Updated September 2021)), available at <https://niwaplibrary.wcl.american.edu/pubs/benchcard-issues-arise-custody-cases>; Leslye E. Orloff and Benish Anver, *Family Court Bench Card on Immigration Rights of Battered Spouses, Children and Immigrant Crime Victims* (October 11, 2013), available at <https://niwaplibrary.wcl.american.edu/pubs/bench-card-on-immigration-relief-for-crime-victims>.

[Services](#) and [NIWAP's public benefits map](#). For an overview of the types of relief available see:

- [Breaking Barriers Ch. 3.1: Introduction to Immigration Relief for Immigrant Victims of Domestic Violence and Sexual Assault and Glossary of Terms](#),
- [Immigration Protection Screening Checklist](#),
- [Overview of Types of Immigration Status](#)
- [DHS Infographic](#) (A useful screening tool for immigration remedies).

*Myth:* Immigrant parent has no means of income.

**Fact:** Immigrants with a variety of forms of immigration status have access to legal work authorization. Further, many immigrants are in fact working and earning income in the United States even though they may not have legal work authorization. It is important to be aware of this because non-custodial immigrant parents who work can be ordered to pay child support without regard to the immigrant parent's immigration status. For more information, see [Bench Card on Economic Remedies in State Court](#).

The immigrant parent can have legal and physical custody of the child and the other parent can contribute financially through spousal and/or child support. This is particularly important because immigrants have limited access to state and federal public benefits. When an immigrant victim was sponsored by their citizen spouse on an application for immigration relief, the spouse will have filed an Affidavit of Support that can be extremely useful in establishing both the obligation to pay child and spousal support and the minimum level of support to be ordered. See, [Till Death Do Us Part: Affidavits of Support and Obligations to Immigrant Spouses](#).

As immigration status progresses from undocumented to legal permanent residence, access to legal work authorization and public benefits increases. Many abused immigrant parents in family court have a path to crime victim related immigration relief that comes with access to legal work authorization and some access to state and/or federal public benefits.

Regardless of the parent's immigration status, U.S. citizen and legal permanent resident children are entitled to access public benefits based

on the child's own immigration status and any parent can apply for the child even if the parent themselves is not additionally eligible. Lawfully present children in most states can legally access state health care exchanges and in some states may be eligible for subsidized health care. For more information, please see the [public benefits section](#) of NIWAP's web library and for state-specific information see the [benefits map](#) and contact NIWAP for state-by-state public benefits technical assistance (202) 274-4457 or [info@niwap.org](mailto:info@niwap.org).

*Myth:* Legally present parent must have custody in order to file for immigration benefits for child.

**Fact:** The parent with the legal authority to sponsor their child or step-child for an immigration visa, lawful permanent residency, or for immigration benefits that will result in the child attaining lawful permanent residency can do so regardless of where or with whom the child resides and whether or not the sponsoring parent has legal or physical custody of the child. Immigrant parents who are eligible to apply for crime victim related or other forms of immigration relief (e.g., work visas, diplomatic visas, and lawful permanent residency) can sponsor the child themselves by including their children in the immigrant parent's immigration case application. VAWA self-petitioners, U visa, and T visa applicants can include their children who are under 21 at the time of filing in their immigration applications. Attaining legal custody or having physical custody of the child is not a factor that affects either parent's ability to sponsor a child for lawful permanent residency or another form of legal immigration status. See, [Immigration Status: Work Authorization, Public Benefits, and Ability to Sponsor Children](#)

*Myth:* Immigrant parent is likely to flee the U.S. with the child.

**Fact:** U.S. citizens, legal permanent immigrants, naturalized citizens, and immigrants with visas that allow them to travel freely to and from the U.S. are more likely to flee with children, especially when there is history of abuse, previous threats of kidnapping children, or the legally present parent is a dual national. The Department of Justice discusses the factors contributing to parental kidnapping in this [article](#). Undocumented parents, parents with temporary immigration status, and immigrant victims who have received or are pursuing crime victim related legal immigration status are less likely to flee the U.S. because leaving the U.S. can trigger a multiyear or permanent bar to reentry under



immigration law. See also NIWAP's [Family Law Bench Card on Custody Cases](#).

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## Practice Tips on Addressing Immigration Status in Custody Cases

The impact that the opposing party raising immigration status will have on an immigrant victim's custody case will be largely determined by how the state court judge received, interpreted, and used immigration law information and whether the information they received and applied was legally correct. When judges in custody cases rely upon legally incorrect information about immigration law and its impact on an immigrant parent, the result can be that immigrant crime victim and immigrant primary caretaker parents are not awarded child custody.

Few state court judges have received training on immigration relief available to immigrant crime victims that would assist the court in reaching just and fair outcomes in custody case involving domestic violence and/or child abuse. Briefing the court, submitting training materials on immigrant victims' legal options, or presenting expert testimony on immigration-related issues in custody cases can help ensure that judges receive correct information about immigration law as it pertains to a clients' case. NIWAP has developed training materials and conducts judicial trainings to provide state court with accurate information about immigrant victims, children, and litigants. Our resources for judges are available 24/7 [here](#).

**Best Practice:** If you believe that the opposing party may raise the immigration status of your client to gain advantage in a custody case, consider raising immigration-related abuse, power, and control as part of your case in chief. This is particularly helpful if your client is the plaintiff and you will present your side of the case first in the family court matter. Evidence of immigration-related abuse corroborates evidence of domestic violence that your client has suffered. Evidence of immigration-related abuse together with other evidence of abuse including the impact that the trauma of child abuse or living with an abusive parent can have on a child will help demonstrate to the court that it is not in the child's best interest to be in the custody of the abuser. Evidence of abuse may trigger state laws that create presumptions or evidentiary rules that mitigate against awarding custody to abusers. See, information on immigration related abuse:

- [Battering or Extreme Cruelty: Drawing Examples from Civil Protection Order and Family Law Cases](#)

- [Dynamics of Domestic Violence Experienced by Immigrant Victims](#)
- [Expert Testimony Concerning Abused Suffered By Immigrant Victims](#)
- [Understanding the Significance of a Minor's Trauma History in Family Court Rulings](#)

NIWAP's trauma informed interviewing tools can be helpful to family lawyers in interviewing abused immigrant clients and identifying the full history of the abuse in the relationship, including the perpetrator's abuse of the client's child. This tool helps attorneys learn about the full history of abuse, power and coercive control earlier in the case and strengthen the evidence in the victim's custody case. Resources include:

- [Trauma Informed Structured Interview Questionnaires for Immigration Cases \(SIQI\)](#)
- [How to Prepare Your Case Through a Trauma Informed Approach: Tips on Using the Trauma Informed Structured Interview Questionnaires for Family Court Cases \(SIQI\)](#)

There are two common ways of presenting information to the court about immigration-related abuse:

- 1) present the evidence and then submit bench brief to the judge laying out the social science data on immigration-related abuse and the effect of witnessing domestic violence on children; and
- 2) an expert witnesses can provide testimony about immigration-related abuse and/or providing legally correct information about immigration law that counters the myths discussed above that the perpetrator has alleged.

Expertise on the intersection of immigration and violence against women can provide the court with detailed information on immigration protections for immigrant victims of domestic violence, sexual assault, stalking, dating violence, and human trafficking. See, the following resources:

- [Family Court Bench Card on Immigration Rights of Battered Spouses, Children, and Immigrant Crime Victims](#)
- [Family Court Bench Card on VAWA Confidentiality](#)

When immigrant victim clients are eligible, it is best practice to file an immigration petition for your client ideally before the perpetrator is served in a custody case. Otherwise, it is very important that the victim's immigration case is filed before the date the victim's custody case is

litigated. Filing a VAWA self-petition, U visa, T visa or work authorization application by abused spouses of work visa holders gives immigrant victims [VAWA confidentiality protections](#). This offers your client access to the protection from deportation provided by the special DHS “[384 computer](#)” tag that places a red flag on your client’s case. This helps prevent immigrant victims from becoming subject to immigration enforcement actions, including detention and removal. See:

- [Immigration and Customs Enforcement VAWA Guidance](#) pp 2-3
- [ICE OPLA Memo 2.1.07 p 5](#)
- [All DHS VAWA Confidentiality Directive # 002-02](#)

### **What Family Lawyers Need to Know about Courthouse Enforcement Limitations**

ICE issued a [new policy](#) on January 10, 2018, limiting civil immigration enforcement at courthouses.<sup>7</sup> Under the new policy, supervisory approval at the high levels of the local ICE offices is needed to approve any civil immigration enforcement action that is to take place at a courthouse in a family court or civil court case. These protections help victims in a wide range of family and civil court cases including but not limited to protection orders, custody, divorce, child support, small claims, and landlord tenant cases. The protections apply to all immigrants and are in addition to the protections provided immigrant crime victims by [VAWA Confidentiality’s protections and limitations on immigration enforcement against crime victims at courthouse](#).

If you are working on a custody case, you should file the immigration case early to protect the victim/client from ICE enforcement and possible removal. Once the victim (it includes victims of domestic violence, sexual assault, human trafficking, stalking, and other U visa listed criminal activities) has filed their VAWA confidentiality protected immigration case (VAWA, T Visa, U Visa, battered spouse waiver, or VAWA cancellation of

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<sup>7</sup> For recent updates to DHS policy and enforcement priorities, see Memorandum from Alejandro Mayorkas, *Guidelines for the Enforcement of Civil Immigration Law* (Sept. 30, 2021), available at <https://niwaplibrary.wcl.american.edu/wp-content/uploads/guidelines-civilimmigrationlaw.pdf>; Memorandum from Tae D. Johnson, *Interim Guidance: Civil Immigration Enforcement and Removal Priorities* (Feb. 18, 2021), available at [https://niwaplibrary.wcl.american.edu/pubs/021821\\_civil-immigration-enforcement\\_interim-guidance-tae-johnson](https://niwaplibrary.wcl.american.edu/pubs/021821_civil-immigration-enforcement_interim-guidance-tae-johnson); Memorandum from John Trasvina, *Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities* (May 27, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/trasvina-opla-interim-guidance-civil-enforcement-priorities-5-27-21>; ICE Directive No. 11005.3: Using a Victim-Centered Approach with Noncitizen Crime Victims (Aug. 10, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/ice-victim-centered-directive-11005-3>. See also Abigail Whitmore & Leslye E. Orloff, *When Family and Immigration Laws Intersect: Case Law and Department of Homeland Security Policy Update* (Jun. 5, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/immigration-in-custody-cases-update>.

removal action), the case will appear in a DHS “384” database of VAWA confidentiality protected cases. Should the perpetrator or the perpetrator’s family member or agent report the victim to immigration enforcement officials or should the victim otherwise become subject to immigration enforcement, DHS supervisors and enforcement officers will be able to see that the victim is in the process of receiving VAWA immigration relief and they will be substantially less likely to initiate an enforcement action against the victim. DHS officials will need to check this “384” system as part of the process of approving any civil enforcement action being considered against the victim at a courthouse in a non-criminal case. For more information:

- [DHS Enforcement Priorities Bench Card<sup>8</sup>](#)
- [Immigration and Customs Enforcement January 2018 Courthouse Enforcement Policy](#)

If you have already filed a [VAWA, U, or T petition](#), you can consider presenting evidence in your client’s custody case that your client has received approval of an immigration case that provides access to legal work authorization and protection from deportation. It is important to conduct safety planning with your client to identify any safety implications of this strategy. Presenting evidence that the child has filed for or has an approved VAWA self-petition or U visa case can be helpful evidence to counter claims that your client cannot work legally in or is likely to be removed from the U.S. Additionally, depending on the state, immigrant victims of domestic violence and victims with pending VAWA or U visa cases may qualify to receive state or federally funded public benefits that can help your immigrant victim clients support themselves and their children while the victims’ immigration case is pending. See NIWAP’s [public benefits map](#)). You can also use this approach to inform the court that your client is on a path toward receipt of legal work authorization.

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<sup>8</sup> For additional up-to-date information on enforcement priorities, see Memorandum from Alejandro Mayorkas, *Guidelines for the Enforcement of Civil Immigration Law* (Sept. 30, 2021), available at <https://niwaplibrary.wcl.american.edu/wp-content/uploads/guidelines-civilimmigrationlaw.pdf>; Memorandum from Tae D. Johnson, *Interim Guidance: Civil Immigration Enforcement and Removal Priorities* (Feb. 18, 2021), available at [https://niwaplibrary.wcl.american.edu/pubs/021821\\_civil-immigration-enforcement\\_interim-guidance-tae-johnson](https://niwaplibrary.wcl.american.edu/pubs/021821_civil-immigration-enforcement_interim-guidance-tae-johnson); Memorandum from John Trasvina, *Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities* (May 27, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/trasvina-opla-interim-guidance-civil-enforcement-priorities-5-27-21>; ICE Directive No. 11005.3: Using a Victim-Centered Approach with Noncitizen Crime Victims (Aug. 10, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/ice-victim-centered-directive-11005-3>. See also Abigail Whitmore & Leslye E. Orloff, *When Family and Immigration Laws Intersect: Case Law and Department of Homeland Security Policy Update* (Jun. 5, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/immigration-in-custody-cases-update>.

If you plan to raise the existence of the victim's VAWA, T, or U visa case, you should work with your client to do safety planning to be ready for how the perpetrator might respond when he learns about the existence of the victim's VAWA, T, or U visa immigration case. This should include preparation of your response should the abuser attempt to obtain a copy of the victim's immigration case file as discovery in the custody case. Please refer to this [sample brief](#) to prevent such discovery in family court cases. Strategies for preventing discovery of VAWA confidentiality protected immigration case files in state family court cases based on reported case law are discussed in [Utilizing VAWA Confidentiality Protections in Family Court](#).

If you will not be raising immigration-related abuse in your case and the perpetrator raises the victim's immigration status, be prepared to make a record. The first step is to object to the evidence of immigration status offered on the grounds it is not relevant to the primary caretaker and best interest determinations.<sup>9</sup> Second, make the court aware of case law and submit memos on the fact that immigration status is not relevant under state best interest of the child laws. [See Appendices Q – Q-12 on State Best Interests Laws, Special Immigrant Juvenile Status Bench Book](#). Third, present evidence to establish the status quo regarding primary caretaker and parenting duties. By evaluating this evidence, the court can determine who has been the child's primary caretaker and that it is in the child's best interests to be placed in the care of the child's non-abusive immigrant parent who has been the child's primary care taker. The immigration status of the non-abusive primary caretaker parent should not be a negative factor in this determination. Fourth, establish that is in the child's best interest to be in your client's custody.

Under the Uniform Marriage and Divorce Act, best interest factors include the wishes of the parents and child, the interaction of the child with parents/siblings, the child's adjustment to home, school, or community, and the mental and physical health of all individuals involved. State best interest determinations consider domestic violence and your state statute may include additional factors. Immigration status is not included as a factor in any state's best interest laws and is not relevant to the core primary caretaker determination.

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<sup>9</sup> See Abigail Whitmore & Leslye E. Orloff, *When Family and Immigration Laws Intersect: Case Law and Department of Homeland Security Policy Update* (Jun. 5, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/immigration-in-custody-cases-update>; Leslye E. Orloff and Benish Anver, *Family Court Bench Card on Immigration Rights of Battered Spouses, Children and Immigrant Crime Victims* (October 11, 2013), available at <https://niwaplibrary.wcl.american.edu/pubs/bench-card-on-immigration-relief-for-crime-victims>.

Finally, if your immigrant client who has been the child's primary caretaker is not awarded custody, ask for specific findings and conclusion of law from the Court and make objections needed to preserve the record for appeal.

When the abuser raises the victim's immigration status in a custody case, go on the offensive. If the opposing party is using immigration status to portray your client as a bad actor based on lack of legal immigration status, use the perpetrators' knowledge of the victim's undocumented status against them during cross-examination. For example, address the abuser's knowledge of the victim's immigration status directly or question the perpetrator's authority and decision-making power exerted to control the victim. Examples include: when the perpetrator decided not to file immigration papers for your client; when the perpetrator filed and withdrew immigration papers; or when the perpetrator delayed years before filing papers. Demonstrate through cross-examination that the perpetrator's actions or inaction are the reason that your client does not have legal immigration status, legal work authorization, or a driver's license and/or present evidence of immigration-related abuse.

The motivation for raising a parent's immigration status is often malicious. If the opposing party or opposing counsel makes threats of criminal prosecution or deportation to elicit a settlement or concession of custody it may be a violation of Rule 11 of the Federal Code of Civil Procedure. The Federal Rule of Civil Procedure Rule 11 deters litigants and attorneys from abusing pleadings. Specifically, Rule 11(b)(1) provides that an attorney or pro se litigant presenting to the court a pleading, written motion, or other papers, certifies to their best knowledge that the claims, defenses, and other legal contentions are not meant to harass, cause unnecessary delay, or increase the cost of litigation (for more information please see our sample [Motion in Limine for Federal Rule of Civil Procedure 11](#) addressing a Rule 11 violation in cases protected by VAWA Confidentiality).

The rule was designed to deter malicious behavior and abuses of the legal system. If immigration status is raised for the purpose of prejudicing the court against an immigrant party the opposing side's motions, pleadings, or other papers may be stricken from the record and disciplinary sanctions can be sought. Additionally, the contents of an open immigration case are confidential and should not be discovered in state court. VAWA Confidentiality is a federal law that protects victims of domestic violence, sexual assault, stalking, dating violence, and other crimes from their abusers using the state family court discovery process to obtain information about a victim's VAWA confidentiality protected immigration case. For a full discussion of this protection see NIWAP's

- [VAWA Confidentiality newsletter](#)
- [VAWA Confidentiality Protections for Immigrant Crime Victims](#)

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### **Additional Resources on Immigration and Family Law**

- Family Quarterly, Vol. 47, No. 2 (Summer 2013), Soraya Fata, Leslye E. Orloff, Andrea Carcamo-Cavazos, Alison Silber, & Benish Anver, [Custody of Children in Mixed-Status Families: Preventing the Misunderstanding and Misuse of Immigration Status in State-Court Custody Proceedings](#)
- Veronica T. Thronson, Carole Angel, Soraya Fata, Rocio Molina, Benish Anver, Kalli Wells and Leslye E. Orloff, [Winning Custody Cases for Immigrant Survivors: The Clash of Laws, Cultures, Custody and Parental Rights](#)
- Abigail Whitmore & Leslye E. Orloff, [When Family and Immigration Laws Intersect: Case Law and Department of Homeland Security Policy Update](#) (Sept. 19, 2021)
- [Justice for All: How Attorneys Can Successfully Win Custody Cases for Immigrant Survivors When There Is a Clash of Laws, Cultures, Custody and Parental Rights](#)
- Breaking Barriers: A Complete Guide to Legal Rights and Resources for Battered Immigrants, [Chapter 6.1: Countering Abuser's Attempts to Raise Immigration Status of the Victim in Custody Cases](#)
- Breaking Barriers: A Complete Guide to Legal Rights and Resources for Battered Immigrants, [Chapter 6.5: Immigration Status and Family Court Jurisdiction](#)
- [In Re Interest of Angelica L. and Daniel L. \(N.W.2d\)](#), & [Fact Sheet](#)
- Bench Card: [Common Immigration Issues that Arise in Custody Cases Involving Immigrant Crime Victims and Their Children](#)
- Bench Card: [DHS Enforcement Priorities, Courthouse Enforcement and Sensitive Location Policies and Memoranda Information for State Court Judges](#)
- Bench Card: [Quick Guide For State Court Judges On Common Issues That Arise From Parties' Immigration Status: Economic Remedies](#)





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NIWAP addresses the needs of immigrant women, immigrant children and immigrant victims of domestic violence, sexual assault, dating violence, stalking, human trafficking and other crimes by advocating for reforms in law, policy and practice.

NIWAP is a national provider of training, legal and social science research, policy development, and technical assistance to advocates, attorneys, pro bono law firms, law schools, universities, law enforcement, prosecutors, social service and health care providers, justice system personnel, and other professionals who work with immigrant women, children and crime victims. Our work supports those in the field and in government who work to improve laws, regulations, policies, and practices to enhance legal options and opportunities for immigrant women and children.

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