

Immigrant Victims Legal Rights in Family Court Cases

Leslye Orloff

Immigrant Women Program,

Legal Momentum

Sioux Falls, South Dakota

December 1, 2010

www.iwp.legalmomentum.org

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

- Understand how immigration status may arise in family law cases
- Screen for immigration relief that immigrant mothers who are crime victims qualify to receive
- Understand the potential unintended immigration consequences that may arise in the family law context when working with detained immigrant victims.

Children in Immigrant Families

- 85% of immigrant families are “mixed status”, including at least 1 U.S. citizen, often a child
- 1 in 5 children is the child of an immigrant
- 18% (5 and older) speak a language other than English at home

What are the barriers Immigrant Victims Face Seeking Help in Family Law Cases?

Barriers to Access

- Fear of abuser raising immigration status and loss of custody
- Fear of immigration detention
- Language and cultural barriers
- Lack of access to legal services

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

Immigration Related Abuse as a Lethality Factor

- 10 times higher in relationships with physical/sexual abuse as opposed to psychological abuse
- Lethality factor can predict abuse escalation
- Corroborates existence of physical and sexual abuse

NIJ Funded CPO Study Found

- With advocates support immigrant victims will use and benefit from justice system assistance
- 60.9% did not know about CPOs
- 81% got CPO with help from advocate
- 96% found them helpful
- 68.3% of violations immigrant related

What are some ways immigration status or being an immigrant can be raised in or can affect a family law case?

Intersections in Family Law Court

- Immigrant Access to family court
 - Jurisdiction
 - VAWA confidentiality and DHS
 - Language and cultural barriers
- Civil Protection orders
 - Creative remedies for immigrants
 - Immigration consequence of violating protection orders

Impact of Divorce On:

- VAWA self-petitioners
 - Must file within two years of final divorce
 - Bigamy/innocent spouse not a bar
- Spouses and children of:
 - Students
 - Persons with legal work visas
 - Diplomats
- Spouses/children of people seeking lawful permanent residency
 - Employment based
 - Asylees
 - Family based
 - Cancellation of removal applicants

Issues With Annulment

- VAWA self-petitioning
 - Must file within two years of annulment judgment
 - Does not matter who files
- Impact on
 - Spousal support
 - Property division

Marriage Fraud Finding

- Annulment can lead to immigration marriage fraud finding that
 - Permanently bars approval of any visa petition
 - Ground of Deportation

Child Custody

Best Interests and Immigration

- No state family code lists immigration status or English language competency as a factor
- All have provisions that encourage courts not to award custody to batterers

ABA Center on Children and The Law - Position

- ABA– “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.”

ABA Center on Children and the Law -- Position

- “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.”

ABA Position Continued

- “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.”

Facts:

- Safety of children is promoted by awarding custody to non-abusive parent without regard to the parent's immigration status
- Many immigrant victims who come to courts for help will today qualify for legal immigration status through VAWA or the U visa but they may not know it.

In a custody case what arguments might an abuser raise to the judge against an immigrant victim?

Intersections in Family Law Court

- Immigration status as a factor in custody determinations
 - Will flee or be deported and will take children
 - Public benefits
 - Need custody to confer citizenship benefits
 - Undocumented parent less able to financially support child
 - Ability to care for child (driver's license)
- Child's best interests are still to be placed with non-abusive parent

Undocumented Immigrants & Custody

- Lack of legal immigration status does not mean
 - Deportation is eminent
 - Parent is likely to flee U.S.
 - Victim parent does not qualify for immigration relief
- Legal immigrants and naturalized citizens are more likely to flee with children
 - When have been threats of kidnapping children
 - When they are dual nationals
 - Because they can travel freely to and from U.S.
- Crime victims can attain legal immigration status

Court Should Treat As Any Other Case Of Alleged Child Kidnapping

- Require abuser to prove that victim is likely to flee (or be deported from) the U.S.
- Evidence court should examine includes evidence of the victim's:
 - Connections to the US
 - Connections to the home country
 - Plans to leave
 - Whether she has purchased airline tickets
 - Whether her deportation is imminent

Undocumented Status, Detention and Removal and Termination of Parental Rights for Immigrant victims

- Loss of child due to immigration enforcement actions
- Loss of child as a result of accessing a community resource

How Victims End Up In DHS Custody

- Abusers report them
- Employers or co-workers report them
- Driving without a license
- Immigration enforcement at the worksite
- Report by CPS
- Report by welfare worker
- Report by others

Case Hypothetical: Maria Luis

- Read over the fact pattern in teams and answer the following questions:
- Questions:
 - What are Maria's parental rights?
 - What community members need to work together to ensure that the parental rights of Maria are not jeopardized?

Immigrant Parents' Constitutional Right to Custody of Their Children

- Constitution right to custody absent finding of unfitness
- Overriding presumption that parent child relationship is constitutionally protected and
- In child's best interest to stay with/be reunited with their parent
- Applies to all families without regard to
 - Immigration status; and
 - Whether or not the parent is
 - In immigration detention or deported
- Child's best interests not comparison of natural vs. adoptive parent's
 - cultures, countries, or financial means

Abuser's Raising Immigration Status of Non-abusive Immigrant Parent in Custody Proceedings

- Presumptions against awarding custody to abusers in most state laws
- Abusers raise immigration status to gain advantage in custody cases
- Abusers will try to use discovery in the family law case to obtain information about VAWA immigration case
 - Hawke v. U.S.
 - Legal Momentum's tool kit for family lawyers

A Family Reunited



Lessons Learned From the Maria Luis Case

- Due Process: Court documents and proceedings in immigrant parents' native languages
- Improper for Court to weigh where children “better off”
- Consular Notification, Consular Notification, Consular Notification!!!
- Preventive Measure: Execute Power of Attorney

DHS Humanitarian Release

- Breastfeeding mothers
- Sole/primary caregivers of children
- Screening in detention done
 - In English/Spanish
 - Oral and writing
- Release as
 - Order of recognizance
 - Order of supervision
 - Alternatives to Detention
- Victim advocate/attorney/social worker role

New Release From Detention DHS Policy (August 20, 2010)

- Applies to
 - Initiation and prosecution of removal
 - DHS detention
- Release for immigrants with a filed, pending or approved application for immigration benefits
- Adjudication of U visa, VAWA, Family Petition
 - If detained within 30 days
 - If released within 45 days

August 2010 DHS Policy

- Dismissal without prejudice of immigration removal case if the applicant is likely to receive an immigration benefit
- Unless applicant
 - Has criminal convictions or misconduct
 - Is a treat to public safety or national security
 - Evidence of fraud
- Effect of VAWA confidentiality protections for victim advocacy

Safety Planning and Action Steps for Immigrant Mothers

- Timing of immigration and family court cases
- Documentation victim can carry with her
 - Evidence that immigration case has been filed
 - Civil protection order
- Understand and intervene early in child welfare system

Overview of Child-Welfare System: Process

- Report called in to hotline or child taken in on emergency basis
- Cross-report filed
- In-person investigation
- Child removed from home or voluntary services provided
- Dependency process
- Family maintenance or reunification
- Permanency planning

Challenges of Reunification for Immigrant Parents and Victims

- Lack of language access to system
- Lack of information about immigrant parent victim's legal rights
- Limited or lack of eligibility for public-funded services
- Limited timeframe for filing termination of parental rights (TPR) petitions under the Adoption and Safe Families Act
 - conflict with immigration case time frames

Challenges of Reunification for Detained or Deported Parents

- Limited ability to participate in court proceedings and case plan
 - New come up procedures
- Limited cooperation or communication between DHS and child welfare agencies
- Difficulty of communicating with detained immigrants new procedures
- Challenges in finding relative placement (both domestic and international)
- Making travel arrangements for children

Solutions Review

- Advocacy for victims in all immigration enforcement actions
- Prevents unnecessary child welfare system involvement
- Execute power of attorney
- Carry information about immigration filings
- Client must tell DHS that she is a primary caretaker of children
- Give client phone number of her government's consular office
- Increased collaboration among child welfare staff, immigration enforcement personnel, immigration and family attorneys, consulates, community-based organizations, and service providers

Protection Orders

Myth: Issuance of a Protection Order Will Result in Abuser's

Deportation

- Issuance of Protection Order \neq abuser's deportation
- Violation of protection order is a deportable offense

Criminal Convictions and Protection Order Violations Can

- Cause Non-citizens to Lose Their Legal Immigration Status**
- Dangers of Orders Issued Against Immigrant Victims**

Creative Protection Order Remedies

Catch All Provisions

- Included in all state statutes
- Offer any additional relief that may potentially
 - Curb future abuse, harassment
 - Interfere with abuser/perpetrators ability to exert power and/or control
 - Offer victim remedy-relief for past abuse
 - Help victim overcome victimization and build new post abuse life
- Nexus With Victimization

Creative Protection Order Remedies Are Constitutional

- Protection orders rationally and reasonably effectuate the state interest in preventing domestic abuse
- Orders crafted with specificity designed to stop abuse, taunts, harassment, threats, molestation, assault, interference with the victim have all be universally found to be constitutional

Creative Protection Order Remedies Do Not Violate

- Equal Protection
- Due Process
- Free speech rights
- Freedom of association rights
- Constitutional right to bear arms
- Liberty interests in home
- Privacy rights
- And are not cruel and unusual punishment

Creative Remedies

What creative protection order remedies might help an immigrant victim?

Victims who stay

- Protection orders can be issued in all states to offer protections to immigrant victims who stay with their abusers
 - No abuse
 - Counseling

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.

Help For Victim's Immigration Case and Preventing Deportation

Creative Remedies in Protection Orders

- **Catch-all Provisions for CPOs**
 - **Respondent Shall:**
- sign DHS Freedom of Information Act request
- pay costs of petitioner's immigration case
- turn over to petitioner information, documents, or copies of documents
- Cooperate in and not withdraw any immigration case filed on the victim's behalf

A protection order or discovery can help a victim obtain needed evidence:

- Marriage certificate
- Wedding/family pictures
- Birth certificates
- Love letters
- Copies of joint leases/utility bills
- Police, medical, court documents about the relationship,
- Copy of abuser's green card or passport

Protection order or discovery continued

- School records
- Medical records
- Employment records
- Social security number information
- Health insurance
- Children's birth certificates
- Letters and other mail addressed to the victim and to the abuser at the same address
- Copy of I-130 petition

Catch-all Provisions Preventing 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

Protection Orders Prohibiting Abuser From Contacting DHS Are Constitutional

- Attempting to have a person deported or have their immigration case denied is conduct
- It is immigration related abuse
- Narrowly crafted remedies designed to stop this abuse do not violate free speech rights
- Order controls abuser's behavior in using immigration status as power and control – not his speech
- VAWA confidentiality

Obtaining Economic Relief and Protection Against Child Kidnapping

Protection Order 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

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

Economic Relief Continued

- Turn over income tax statements (subpoena before hearing)
- Protective provisions regarding income tax returns
 - Victim named trustee for receipt of tax return funds, respondent ordered to sign check
 - Victim awarded exclusive right to claim children as tax exemptions
 - Respondent pays victim $\frac{1}{2}$ of return

Bond and Release Orders in Criminal Cases

- Can include many of the same creative remedies as in protection order cases

THANK YOU!!