Immigrant Litigants in Family Court: Advanced Custody Issues

Day 2
Session 3A
New Orleans, LA

Introductions

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- Session 1: Commissioner Loretta Young -State of Delaware -New Castle County,
- Session 2: Judge Rosemary Collins, State of Illinois -Rockford,

Participant Introductions, Goals and Expectations



Workshop Learning Objectives

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

- Know how to provide accurate immigration law information, policy, and practice to judges in immigrant survivors' custody cases
- Respond to attempts by perpetrators to raise immigration status and deportation issues in custody cases
- Develop custody case strategies that benefit from the survivor having filed for immigration benefits prior to the custody trial
- Keep the focus of an immigrant survivor's custody case on best interests and offensively raise perpetrator's immigration related abuse

Immigrant Demographics

Data from the U.S. Census, the Migration Policy Institute Data Hub, and the Department of Homeland Security Office of Immigration Statistics

U.S. Immigrant Demographics

- "Immigrant" = born outside the U.S.
- 40.4 million immigrants in U.S (MPI 1/13)
  - 12.5% U.S. population (MPI 12/10)
- Among foreign born
  - 45% are naturalized citizens (MPI 1/13)
  - 32.4% are lawful permanent residents (MPI 10/12)
  - 64.9% (8.5 million) eligible to naturalize (MPI 10/12)
  - 11.6 million undocumented (DHS OIS 3/12)
- Today over 26% of U.S. population are immigrants or children of immigrants
  - (US Census)
- 24.3% of children under age 18 live with at least one immigrant parent (MPI 1/14)
- 93% of children with 1+ immigrant parents are U.S. citizens (MPI 1/14)

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

State By State Immigrant Demographics

- www.niwap.org/go/statedemographics

Dynamics of Domestic Violence Experienced by Battered Immigrants

Connection Between Abuse and Control Over Immigration Status

(Hass, Ammar, Orloff 2006) and (Dutton, Orloff, Hass 2000)

Abuse rates among immigrant women

- Lifetime as high as 49.8%
- Those married to citizens and lawful permanent residents – 50.8%
- U.S. citizen spouse/ former spouse abuse rate rises to 59.5%
- Almost three times the national average

Coercive Control Over Immigration Status (Dutton, Orloff, Hass 2000)

- Among abusive spouses who could have filed legal immigration papers for victims:
  - 72.3% never file immigration papers
  - The 27.7% who did file had a mean delay of **3.97 years**
- 65% of immigrant victims report some form of immigration related abuse (Erez Ammar NIJ 2003)

Immigration Related Abuse

- Refusal to file immigration papers on spouse/child/parent's behalf
- Threats or taking steps to withdraw an immigration case filed on the survivor's behalf
  - Family or work based visas
- Forcing survivor to work with false documents
- Threats/attempts to have her deported
- Calls to DHS to turn her in – have her case denied

Immigration Related Abuse as a Lethality Factor (Dutton, Orloff, Hass 2000)

- **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

Immigrant Survivors & Co-Occurrence of Child Abuse (Hass, Dutton, Orloff, Ammar 2004)

- Battered immigrant women who report abuse occurring in front of their children ≈50%
- Domestic violence-child abuse co-occurrence= 40-44% (Similar to national statistics)
- Physical violence vs mother *and* vs child = 35%
- Co-occurrence among:
  - Abused Immigrant Help Seekers = 23%
  - Abused immigrants who did not seek help= 77%
- Children of help seekers 20% less likely to have abuser threaten them
  - 1/3 less likely to have abuser threaten to take children away from their mother

Immigration Status In Custody Cases

Special Considerations for Cases Involving Foreign Born Survivors

What are the issues you encounter or are concerned about abusers raising in custody cases that you want to be prepared to address?

Custody

- Factors courts consider:
  - Status quo
  - Primary caregiver
  - Division of labor within the household
  - Stability
  - Ability
  - Domestic violence

Is Immigration Status Relevant to Custody?

- Relevant to: Immigrant crime victim presents evidence of immigration related abuse, power, and control suffered
  - Either not filing or withdrawing immigration papers
  - Threats to turn victim in for deportation
  - Part of history of violence
- Not relevant to:
  - Core primary caretaker determination
  - Evaluation of parenting skills
  - Best interests of the child determination
  - Requirements regarding custody awards to non-abusive parent

ABA Center on Children & The Law (1991)

- "Parties should not be able to raise, and courts should not consider, immigration status of domestic violence victims and their children in civil protection order, custody, divorce or child support proceedings…"
- "Batterers whose victims are immigrant parents use threats of deportation to avoid criminal prosecution for battering and to shift the focus of family court proceedings away from their violent acts…"

ABA Center on Children & The Law (1991)

- "When the judicial system condones these tactics, children suffer"
- "This … will ensure that children of immigrant domestic violence victims will benefit from …laws (like presumptions against awarding custody or unsupervised visitation to batterers) in the same manner as all other children"

Immigrant Parents' Constitutional Right to Custody of Their Children

In re Interest of Angelica L., 277 Neb. 984,1007, 1009 (2009)

- Constitutional right to custody absent finding of unfitness
- Overriding presumption that:
  - Parent-child relationship is constitutionally protected; and
  - In children's best interest to stay with/be reunited with their parent(s)
- Applies to all families without regard to:
  - Immigration status; and
  - Whether or not the parent is:
    - Undocumented
    - In immigration detention; or
    - Deported
- **Child's best interests = most important**
  - **A comparison of parent's cultures, countries of origin not appropriate in this determination**



"Best Interest" Factors
Uniform Marriage and Divorce Act

The court shall consider all relevant factors including:

- The wishes of the parents
- The wishes of the child
- The interaction/interrelationship of the child with parents, siblings, other significant persons
- The child's adjustment to home, school, community
- The mental and physical health of all individuals involved

Best Interests and Immigration

- No state family code lists immigration status or English language competency as a factor
- All states have provisions that encourage courts not to award custody to batterers
- As a general rule immigration status is NOT relevant to:
  - Core primary caretaker determination
  - Evaluation of parenting skills

When Immigration Status is raised in Custody Proceedings

- Parent raises the other parent's undocumented or temporary immigration status
  - to prejudice the decision maker
- Courts should not rely on immigration status as a stand-alone factor
- Courts must decide child's best interests:
  - Who has been primary caretaker? What has been status quo?
  - Who has been primarily responsible for child's education and health care?
  - History of abuse (or sexual assault) perpetrated by 1 parent against the other

Small Group Activity

What immigration remedies might victims and their children qualify for?

What are the protections against deportation?

Legal Immigration Status Options for Non-citizen crime victims and children

VAWA self-petition

- Abused spouses/children of US citizens and lawful permanent residents
- Abused parents of U.S. citizens over 21 years of age

VAWA cancellation of removal

- Abused spouses/children of US citizen and lawful permanent residents protection from deportation

Battered spouse waiver

- Abused spouses of US citizens with two-year conditional permanent residency

T visa : Victims of severe forms of human trafficking

Asylum: DV as a ground of asylum protection for abuse suffered in home country

U visa

- Victims of criminal activity
- Has been, is being or is likely to be helpful in the detection, investigation, prosecution, conviction or sentencing
- Substantial harm from criminal activity

Special Immigrant Juvenile (SIJ)

- Juveniles that have been abused, battered, abandoned or neglected

Deferred Action (DACA)

- Deferred action for child arrivals including Dreamers

DHS Prosecutorial Discretion

- "low priority" for removal immigrants -- survivors, witnesses, parents, children, elderly, disabled
- Humanitarian detention release

DHS 2011 Victim Witness Memo

- Prevent DHS from wasting enforcement resources on crime victims
- Increase willingness of victims to call the police for help and seek help from the civil and criminal justice systems
- Protects the following victims from removal/deportation
  - Victims of crime
  - Witnesses to crime
  - Individuals pursuing legitimate civil rights complaints
- Helps victims who have not or may not file for VAWA/T/U/SIJS immigration relief

What can you do to help your client if:

The abuser threatens or takes steps to have victim deported...



Steps you can take

- File victim's VAWA, T or U case as soon as possible
- Have victim memorize her A# from receipt notice
- Collect evidence of battering, extreme cruelty or criminal activity
  - –Show DHS enforcement officials if she is stopped
- Once VAWA/T/U filed take with you to court
  - Victim's receipt notice A#
  - DHS Broadcast on VAWA confidentiality computer system
  - DHS VAWA confidentiality policies
  - All available in NIWAP's web library

Make Your Record

- Provide accurate information about immigration law
  - DHS memos and victim remedies brochure
  - ABA report and other research materials
  - Sponsorship of children chart and other SJI funded judicial training materials
  - Expert testimony
  - Judicial notice
  - Brief the issue for the court
- Be prepared for perpetrator efforts to trigger courthouse enforcement
  - Have DHS policies with you

Make Your Record Cont.

- Include evidence of immigration related abuse
- Consider presenting evidence that your client has or will attain legal status through VAWA or U visa
- Describe client's economic support strategy
  - Work authorization
  - Benefits
  - Child/spousal support

Seek Parental Kidnapping Prevention Remedies

- Special protection order provisions
- Obtain children's passports
- Post bond
- Consular officials not issue visas or passports to the children
- Supervised visitation
- Prohibition of removal of the children from the country, state, or jurisdiction

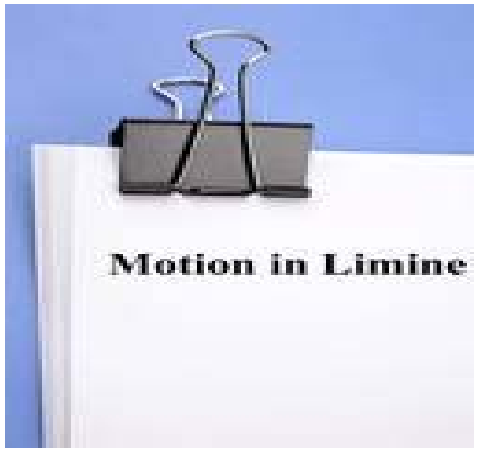
Rule 11 Sanctions



- Designed to deter malicious behavior, abuses and bad faith acts by
  - Attorneys and pro se parties
- Striking pleadings, written motions or other papers and
- Disciplinary sanctions
- When the claims, defenses or legal contentions are meant to
  - Harass
  - Cause unnecessary delay or
  - Increase the cost of litigation

File Motion In Limine

- Based on Rule 11 when
  - Threats of deportation or
  - To stop discovery of a VAWA immigration case



Group A

- Presents cross examination of perpetrator who has raised the immigration status of the survivor against her in the custody case

Group B

- Raises the immigration status of the survivor affirmatively as part of the survivor's case in chief

Group C

- Conducts a redirect of the survivor after the perpetrator has raised the survivor's immigration status as an issue in the custody case

Group D and E

- Group E: Argues that the perpetrator should be awarded custody because he is a U.S. citizen and the survivor is likely to be deported
- Group D: Offers a counter argument

Facts

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

Myths

- Myth: Documented parent needs to be awarded custody to give child immigration benefits
  - **FACT: Parent can apply for child to have immigration benefits whether or not they have custody**
    - Timing of citizenship may differ with custody
- Myth: Undocumented parent cannot receive public benefits for the child
  - **FACT: Incorrect, they can apply for "child only" benefits**

Myths and Facts

- *MYTH:*
  - *Undocumented parent cannot financially support child*
- **FACTS:**
  - **Immigrant survivor would have work authorization <u>but</u> batterer never filed papers (Catch 22)**
- **Immigrant survivor parents are likely eligible for immigration benefits that include:**
  - legal work authorization
  - some access to benefits
- **Child/Spousal support can be ordered**
- **Economic relief**
  - Housing
  - Health care

Discussion and Case Strategy and Preparation

- What might be the advantages of filing the survivor's immigration case before the custody case is litigated?
- How would you ideally time the immigration case filing to be most advantageous to the custody case?

Technical Assistance and Materials

- Power Point presentations and materials for this conference at www.niwap.org/go/NOLA2016
- **NIWAP Technical Assistance:**
  - Call (202) 274-4457
  - E-mail niwap@wcl.american.edu
- Web Library: www.niwaplibrary.wcl.american.edu

Questions



Evaluations



Thank you!

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