When Family and Immigration Laws Intersect: Case Law and Department of Homeland Security Policy Update[1]

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I. Introduction

Immigration issues continue to play a significant role in the U.S. and misconceptions about the immigration system and immigrant relief for immigrant victims of crime and abuse can lead to discrepancies in the treatment of immigrant litigants who seek help from state courts. Immigrants continue to face obstacles to accessing justice in a variety of legal scenarios. While prosecutors struggle to keep biases against immigrant victims from undermining criminal prosecutions, a less obvious forum where courts must resolve conflicting claims about immigration status and its impact, if any, is in family court. Litigants, particularly those in custody proceedings, have increasingly used the immigration status of an opposing party in an attempt to gain advantage in court.[2]

In the 2013 article "Custody of Children in Mixed-Status Families: Preventing the Misunderstanding and Misuse of Immigration Status in State-Court Custody Proceedings" (hereinafter the 2013 article) the authors explained how immigration status has increasingly been used by opposing parties in family courts and specifically in custody proceedings.[3] The tactic is used in an attempt to prejudice the court against an immigrant parent. Arguments built on immigration status are used to lead judges to apply state laws governing best interests of the child in custody cases differently in families where a parent and/or child is an immigrant than the ways such laws were designed to apply to protect all children.[4]

Immigration status arguments are used as a tool to mislead judges into misapplying state family laws so that the litigant raising immigration status is able to secure an outcome in a custody or family court case that is contrary to the result that litigant would otherwise be able to attain under state statutes. Though parties put forth immigration status as a relevant and potentially determinative fact, the best interest of the child and the primary caretaker determinations are the statutorily required factors in custody determinations. No state best interest statute lists immigration status as a best interest factor.[5] Immigration status should not be determinative.

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[2] *See* NATIONAL CENTER FOR STATE COURTS, PROMOTING ACCESS TO JUSTICE FOR IMMIGRANT CRIME VICTIMS AND CHILDREN: FINDINGS OF A NATIONAL JUDICIAL SURVEY AND POLICY RECOMMENDATIONS 9-10 (2018), *available at* https://niwaplibrary.wcl.american.edu/pubs/trends-in-state-courts-survey-findings

[3] *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).

[4] HOWARD DAVIDSON, THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN: A REPORT TO THE PRESIDENT OF THE AMERICAN BAR ASSOCIATION 19-20 (Aug. 1994), *available at* https://niwaplibrary.wcl.american.edu/pubs/impact-dv-children.

[5] *See* Morgan Lewis and Bockius, LLP, Appendix Q - Best Interests of the Child Maps – Summary Matrix (December 29, 2017), *available at* https://niwaplibrary.wcl.american.edu/pubs/appendix-q-best-interests-of-the-child-matrix. *See also* Appendices Q1-Q12 Best Interests of the Child Factors in State Law (December 29, 2017), *available at* https://niwaplibrary.wcl.american.edu/sijs-manual-table-of-contents (These

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There will be cases in which immigrant survivors of domestic and sexual violence will describe the immigration related abuse that they have been subjected to as part of the description of the domestic violence, power and coercive control occurring in their relationship with their spouse or their children's other parent. Facts related to threats of deportation one party has been using against the other to prevent the custody case from being initiated or succeeding are relevant facts in a custody case as they provide evidence of domestic violence occurring in the relationship. Congress created special forms of immigration relief designed to offer protection for immigrant victims of domestic violence, child abuse, sexual assault, stalking, human trafficking and other mostly violent crimes.[6]

Research has found that perpetrators of domestic violence and child abuse are the parents who typically raise immigration status of the victim parent or child in family court cases and that this form of immigration related abuse declines by 65% once immigrant victims are granted protection from deportation and work authorization in their Violence Against Women Act (VAWA) self-petitions, U visa applications, or VAWA applications filed with immigration judges.[7] Any time a family court judge determines that a non-citizen has been a victim of domestic violence, child abuse, sexual assault, stalking, human trafficking or other U visa listed criminal activity, that person will likely be eligible for a crime victim or abuse related form of immigration relief that has been found to promote safety, stability, and resiliency of immigrant victims and their children.[8]

Further, on September 30, 2021 the Department of Homeland Security issued policies governing enforcement priorities that substantially limits the extent to which immigrant parents are likely to become targeted for immigration enforcement, detained, or removed from the United States.[9] An undocumented or other immigrant parent before the court in a custody matter will only be an immigration enforcement priority if the parent poses a current threat to public safety, a threat to national security, or is a border security concern because the parent entered the United States after November 1, 2020.[10] If a parent or child does not fall into one of these enforcement priorities immigration enforcement actions DHS will exercise its discretion not to initiate or continue to pursue immigration enforcement actions against them. Importantly, since

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appendices to the Special Immigrant Juvenile Status Bench book: A National Guide to Best Practices for Judges and Courts list the statutory language and compare factors by topic for each state's best interest of the child laws).

[6] *See* 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/judg-tkit-bchcrdvictimsimmrights10-11-13 (Describing the primary forms of immigration relief available to immigrant survivors of crime and abuse). *See also* U.S. DEPARTMENT OF HOMELAND SECURITY, *Protections for Immigrant Victims* (2018), available at https://niwaplibrary.wcl.american.edu/pubs/infographic-on-protections-for-immigrant-victims. The full range of criminal activities for which immigrant victims may be U visa eligible include: rape, torture, trafficking, incest, domestic violence, sexual assault, abusive sexual contact, prostitution, sexual exploitation, stalking, female genital mutilation, being held hostage, peonage, involuntary servitude, slave trade, kidnapping, abduction, unlawful criminal restraint, false imprisonment, blackmail, extortion, manslaughter, murder, felonious assault, witness tampering, obstruction of justice, perjury, fraud in foreign labor contracting, solicitation to commit any of the above-mentioned criminal activity, or any similar activity in violation of federal, state, or local criminal law and solicitation, attempts, or conspiracy to commit any such criminal activity. *See* Id. The term any similar activity accounts for the wide variety of state and federal criminal laws, which may be named differently than the enumerated criminal activity in the statute but are comparable in nature and elements to the U visa listed criminal activity. Leslye E. Orloff et al., *U Visa Quick Reference for Judges* (Oct. 14, 2020), *available at* https://niwaplibrary.wcl.american.edu/pubs/u-visa-quick-reference-guide-for-judges.

[7] *See* Leslye E. Orloff, Haley Iesha Magwood, J.D.; Yasmin Campos-Mendez, M.S.W, and Giselle A. Hass, TRANSFORMING LIVES: HOW THE VAWA SELF-PETITION AND THE U VISA CHANGE THE LIVES OF VICTIMS AND THEIR CHILDREN AFTER WORK AUTHORIZATION AND LEGAL IMMIGRATION STATUS 47-54 (April 12, 2021), *available at* https://niwaplibrary.wcl.american.edu/pubs/transforming-lives-full-report.

[8] *See* Leslye E. Orloff, Haley Iesha Magwood, J.D.; Yasmin Campos-Mendez, M.S.W, and Giselle A. Hass, TRANSFORMING LIVES: HOW THE VAWA SELF-PETITION AND THE U VISA CHANGE THE LIVES OF VICTIMS AND THEIR CHILDREN AFTER WORK AUTHORIZATION AND LEGAL IMMIGRATION STATUS 134-48 (April 12, 2021), *available at* https://niwaplibrary.wcl.american.edu/pubs/transforming-lives-full-report.

[9] *See* Memorandum from Alejandro N. 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

[10] Id. at 3-4.

immigration enforcement actions require an "assessment of the individual and the totality of the facts and circumstances" DHS will consider both aggravating and mitigating factors in exercising its prosecutorial discretion.[11] Mitigating factors include crime victimization or abuser suffered and the impact of removal of a caregiver on family members in the U.S.[12] As a result, immigrant parents and children who are victims of crime or abuse, who are caregiving or providing for children or other family members, and immigrants who are eligible for victim related, humanitarian or other forms of immigration relief are even less likely to be removed from the United States including when the immigrant parent is undocumented.

While the 2013 article identified several trends in courts misapplying immigration status in custody proceedings, developments in the law since 2013 tend to show that family courts have an increased awareness of the fact that immigration status should not be applied as a factor in determining best interests in custody cases. This increase in courts' awareness about the role, if any, immigration status in any particular case might play in a court's application of state best interest of the child laws and primary caretaker determinations is particularly important. Research has found that as anti-immigrant sentiment rises in the country, courts are seeing a rise in the numbers of family court cases in which parties attempt to raise immigration status as a weapon against an immigrant party in family court.[13] This article aims to serve as an update to the 2013 article on trends in court rulings when immigration status is raised by a party in a custody case. This article also provides legally correct information about immigration laws that courts and parties should use as evidence that immigration status should not be used as a determinative factor in custody proceedings.

Part I of this article introduces the issue of using immigration status in family court custody determinations. Part II provides background on family and immigration law as they pertain to custody determinations. Part III establishes positive trends in case law since 2013. Part IV analyzes negative trends in case law. Part V discusses additional findings where human trafficking has been a factor in custody determinations. Part VI concludes that the case law largely indicates that courts are moving away from using immigration status as a persuasive factor in custody determinations. Part VII provides additional resources.

II. Family Law and Immigration Law: Custody Determinations

In order to understand whether immigration status should be considered in custody determinations, it is necessary to first understand the constitutional pillars of custody determinations. It is also important to understand current immigration laws, policies and practices, because without accurate information about U.S. immigration laws and how they are implemented by the Department of Homeland Security, courts can be misled into inaccurately determining that the best interest of the child standard is not met because of the court's assumptions about how immigration status might interfere with an immigrant parent's ability to be a good and fit parent. However, when legally correct information about immigration laws,

[11] Id. at 3.
[12] Id. at 3.
[13] *See* NATIONAL CENTER FOR STATE COURTS, PROMOTING ACCESS TO JUSTICE FOR IMMIGRANT CRIME VICTIMS AND CHILDREN: FINDINGS OF A NATIONAL JUDICIAL SURVEY AND POLICY RECOMMENDATIONS 9-10 (2018), *available at* https://niwaplibrary.wcl.american.edu/pubs/trends-in-state-courts-survey-findings (Survey of 107 judges from 25 states reported that in 2017 compared to 2016 the extent to which judges reported somewhat or much higher numbers of cases in which immigration status was raised by an opposing party was 31% in custody cases, 32% in civil protection order cases and 23% in divorce cases. The survey also found that 57% of judges reported that court cases were interrupted due to a victim's fear of coming to court in 2017 vs. 2016).

policies, and practices are considered, the impact on the custody case will often be contrary to what the court might otherwise assume. This is often because of the forms of immigration relief designed to offer protection to immigrants who are victims of crime or abuse that immigrant litigants and children qualify to receive.

A. The Constitutional Mandate and the Best Interest of the Child

The United States Constitution guarantees a fundamental right to privacy.[14] Over time, this right to privacy has been interpreted to include certain rights within the family. This includes parents' fundamental liberty and privacy interests in the care and custody of their children.[15] The presumption states that it is in the best interest of the child to be in the care and custody of a fit parent.[16] The presumption can only be overridden when a parent is deemed unfit.[17]

In cases where there is a custody dispute between two parents who both have a constitutional right to raise their child, courts must apply the best interest of the child standard to determine who should have legal and/or physical custody.[18] The best interest of the child analysis applies several factors to determine who should serve as the child's primary caretaker.[19] The best interest factors vary between states, but include factors like prior involvement of the parents, stability of the children, and the ability of parents to support the children.[20]

The constitutional right to the care and custody of one's children applies to immigrant parents regardless of immigration status.[21] It also applies whether the parent is detained or deported from the United States.[22] Courts have found that the overriding presumption that children should reside with their parents is not diminished or impacted by immigration status.[23] Therefore, unless a parent is found unfit, the best interest of the child analysis should be applied in custody determination cases to all parents and children without regard to a parent or child's immigration status, including when a parent or child may have temporary or undocumented immigration status.

In these situations, the best interest factors determined by state statute should be applied and unfitness determinations must not be based on immigration status or assumptions based on or that flow from a parent's immigration status.[24] Even when a parent is an enforcement priority because they recently entered the United States and that parent has a removal order issued against them, absent unfitness based on facts unrelated to immigration status, the state statutes'

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[14] *See* U.S. CONST. amend. IV.

[15] *See* Stanley v. Illinois, 405 U.S. 645 (1972); Meyer v. Nebraska, 262 U.S. 390 (1923).

[16] *See In re* Interest of Angelica L., 767 N.W.2d 74 (Neb. 2009).

[17] *See In re* Interest of Angelica L., 767 N.W.2d at 92.

[18] *See Determining Best Interest of the Child*, U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, CHILD WELFARE INFORMATION GATEWAY (2020), available at https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/best-interest/.

[19] Id.

[20] *See Determining Best Interest of the Child*, U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, CHILD WELFARE INFORMATION GATEWAY (2020), *available at* https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/best-interest/ (Lists the text of state best interests of the child statutes). *See also* Appendices Q1-Q12 Best Interests of the Child Factors in State Law (December 29, 2017), *available at* https://niwaplibrary.wcl.american.edu/sijs-manual-table-of-contents (These appendices to the Special Immigrant Juvenile Status Bench book: A National Guide to Best Practices for Judges and Courts list the statutory language and compare factors by topic for each state's best interest of the child laws).

[21] *See In re* Interest of Angelica L. 767 N.W.2d 74 (Neb. 2009).

[22] *See In re* Interest of Angelica L. 767 N.W.2d 74 (Neb. 2009).

[23] *E.g., In re* Welfare of Churape, 719 P.2d 127 (Wash. Ct. App. 1986); *In re* Interest of Angelica L., 767 N.W.2d 74 (Neb. 2009) (the best interest of the child approach is the same in both in child welfare proceedings and in custody proceedings).

[24] *See In re* Interest of Angelica L. 767 N.W.2d 74 (Neb. 2009).

best interest factors should be applied in the case. This may result in a fit parent being awarded custody with the court ensuring that the parent secures passports for U.S. born children to have them ready so that, should the parent be required to leave the United States, they can take their U.S. born children with them and the children will have the documentation they need to return to the U.S. in the future.[25]

B. DHS Policies

In the 2013 article, the authors reviewed Department of Homeland Security (DHS) policies on immigration enforcement.[26] These policies prioritized enhancing public safety, national security, border security and the integrity of the immigration system. Fundamentally, this meant focusing removal efforts on persons with criminal histories, terrorists, and immigrants who had removal orders issued against them. As will be discussed below, in practice this focus on removal of persons with criminal histories and outstanding deportation orders has continued over the past decade.

Although there have been important and significant differences in the approach to immigration enforcement taken by each Administration the impact of these policies on the likelihood that an individual immigrant parent or child appearing in family court will be removed from the United States is limited to specified groups of immigrants. To describe which non-citizens are at most risk for removal we first discuss the trajectory of DHS enforcement policies since 2011. Then we provide an analysis of which immigrant parents and children who came before state courts over the past decade were at the greatest risk of removal or deportation from the United States. We conclude this section by listing the 2021 enforcement priorities along with lists of aggravating and mitigating factors that are used by DHS to decide whether to pursue an immigration enforcement action against an individual immigrant. These lists will help judges, courts, family lawyers and victim advocates better assess the risks that a particular immigrant parent involved in a custody, child welfare, divorce, child support, or other family court matter is likely to be removed from the United States.

Timeline:

- **June 17, 2011:** DHS established immigration enforcement priorities in the memorandum "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens."[27] This policy, discussed in detail in the 2013 article, remained in effect from June 2011 through February 19, 2017.

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[25] *See* Leslye Orloff, DETENTION AND TERMINATION OF PARENTAL RIGHTS TOOL KIT 94, 146 (2012), *available at* https://niwaplibrary.wcl.american.edu/pubs/terminationofparentalrightsindetention; APPLESEED NETWORK, PROTECTING ASSETS & CHILD CUSTODY IN THE FACE OF DEPORTATION: A GUIDE FOR PRACTITIONERS ASSISTING IMMIGRANT FAMILIES 23 (2017), *available at* https://www.appleseednetwork.org/deportationmanual.html. *See also* ICE Directive No. 11064.2, *Detention and Removal of Alien Parents or Legal Guardians* (Aug. 29, 2017), *available at* https://niwaplibrary.wcl.american.edu/pubs/directivedetainedparents-2017; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, FACT SHEET: POLICIES AND PROCEDURES INVOLVING DETAINED PARENTS AND LEGAL GUARDIANS (2018), *available at* https://niwaplibrary.wcl.american.edu/pubs/factsheetdetainedparents (Discussing ICE procedures designed to ensure that parents being removed from the U.S. can be accompanied by their children).

[26] *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, 198-215 (2013).

[27] *See* Memorandum from John Morton, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention and Removal of Aliens* (June 17, 2011), *available at* https://niwaplibrary.wcl.american.edu/pubs/exercising-prosecutorial-discretion-civil-imm-priorities (The purpose of the policy was that "ICE must prioritize the use of its enforcement personnel, detention space, and removal assets to ensure that the aliens it removes represent, as much as reasonably possible, the agency's enforcement priorities." The policy memo set out a list of immigrants who do not fall within DHS enforcement

- **February 20, 2017:** Immigration enforcement priorities were governed by Executive Order 13768: "Enhancing Public Safety in the Interior of the United States."[28] This policy overturned the preceding policy in the Morton Prosecutorial Discretion Memo.
- **January 20, '2021:** DHS issued the "Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities" a policy that reinstated the 2011 Morton Prosecutorial Discretion Memo[29] and provided further guidance and clarifications governing civil immigration enforcement actions through November 29, 2021.[30]
- **September 2021:** DHS issued "Guidelines for Enforcement of Civil Immigration Law" with expands upon, rescinds, and replaces both the 2011 Morton Prosecutorial Discretion Memo and the January 2021 Interim Revision memos and governs prosecutorial discretion determinations by DHS officials from November 29, 2021 forward.[31]

Additionally, the following DHS policies reviewed in the 2013 article remain relevant and in effect in 2021:

- December 21, 2010 – DHS Broadcast Message on new 384 Class of Administration Code[32]
- June 17, 2011 – Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs[33]
- June 15, 2012 – Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children[34]

These policies are supplemented by the following Executive Orders, DHS Directives and DHS policies that are relevant to state court judges understanding of which non-citizens who appear in court are eligible for immigration protections and which may be likely to be removed:

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priorities, who may have violated civil immigration laws, whose removal is a "low priority" and against whom DHS will not expend enforcement resources. The policy provided several factors that result in an immigrant being considered a "low priority" and not likely to be removed, including the person's pursuit of education in the United States, whether the person has served in the U.S. military, the person's ties and contributions to the community and several other factors).

[28] *See* Memorandum from John Kelly, *Enforcement of the Immigration Laws to Serve the National Interest* (Feb. 20, 2017, *available at* https://niwaplibrary.wcl.american.edu/pubs/kelly-enforcement-prioirities-2-20-17 (the policy overturned memoranda exempting classes or categories of removable aliens from potential enforcement. However, the department priorities remained consistent, with priority on removable aliens who (1) had been convicted of any criminal offense; (2) had been charged with any criminal offense that had not been resolved; (3) had committed acts which constitute a chargeable criminal offense that had not been resolved; (4) had engaged in fraud or willful misrepresentation in connection with any official matter before a governmental agency; (5) had abused any program related to receipt of public benefits; (6) were subject to a final order of removal but had not complied with their legal obligation to depart the United States; or (7) in the judgment of an immigration officer, otherwise posed a risk to public safety or national security).

[29] Memorandum from John Morton, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention and Removal of Aliens* (June 17, 2011), *available at* https://niwaplibrary.wcl.american.edu/pubs/exercising-prosecutorial-discretion-civil-imm-priorities.

[30] *See* Memorandum from David Pekoske, *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities* (Jan. 20, 2021), *available at* https://niwaplibrary.wcl.american.edu/pubs/civil-immigration-enforcement-priorities-1-20-21.

[31] *See* Memorandum from Alejandro N. 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

[32] U.S. DEPARTMENT OF HOMELAND SECURITY, *DHS Broadcast Message on New 384 Class of Admission Code* (Dec. 21, 2010), available at https://niwaplibrary.wcl.american.edu/pubs/dhs-broadcast-class-admission-code.

[33] Memorandum from John Morton, Director, Immigration Customs Enforcement, to All Field Office Directors, Special Agents in Charge, and Chief Counsel, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs* (June 17, 2011), *available at* https://niwaplibrary.wcl.american.edu/pubs/discretion-victims-witnesses-plaintiffs.

[34] Memorandum from Janet Napolitano, Secretary, Department of Homeland Security, to David V. Aguilar, Acting Commissioner, U.S. Customs and Border Protection, Alejandro Mayorkas, Director, U.S. Citizenship and Immigration Services, and John Morton, Director, U.S. Immigration and Customs Enforcement, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (June 15, 2012), *available at* https://niwaplibrary.wcl.american.edu/pubs/discretion-individuals-came-as-children.

- January 20, 2021 – Executive Order 13993: Revision of Civil Immigration Enforcement Policies and Priorities[35]
- January 20, 2021 – Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities[36]
- February 2, 2021 – Executive Order 14012: Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans[37]
- May 27, 2021 – Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities[38]
- July 1, 2021 -- Identification and Monitoring of Pregnant, Postpartum, or
- Nursing Individuals[39]
- August 10, 2021 – ICE Directive 11005.3: Using a Victim-Centered Approach with Noncitizen Crime Victims[40]

A review of statistical data from DHS on actual removals documents which categories of non-citizens are most likely to be removed or deported from the U.S. Detention and removal statistics are a vital component in understanding how DHS policies are actually implemented. They also reveal how likely removal is for certain individuals. Updated Immigrations and Customs Enforcement (ICE) removal statistics from 2020 state that 90% of administrative immigration arrests by ICE in 2020 were of individuals who had criminal convictions or pending criminal charges at the time of arrest.[41] Ninety-two percent (92%) of removals of persons who were in the interior of the U.S. were of persons who had criminal convictions or pending criminal charges.[42] It is important to note that the period of time from February 2017 through January 19, 2021 was the only time historically in which DHS policies took the unusual step of encouraging the removal of persons with pending criminal cases in state and federal courts before the criminal case was completed.[43]

In comparing removal data from 2013, 2017, and 2020 the removal numbers indicate that very little has changed over the past seven years with regard to who is being deported and why.

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[35] Exec. Order No. 13993, 86 Fed. Reg. 7051 (Jan. 20, 2021), *available at* https://niwaplibrary.wcl.american.edu/pubs/exec-order-13993.

[36] Memorandum from David Pekoske, *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities* (Jan. 20, 2021), *available at* https://niwaplibrary.wcl.american.edu/pubs/civil-immigration-enforcement-priorities-1-20-21.

[37] Exec. Order 14012, 86 Fed. Reg. 8277 (Feb. 2, 2021), *available at* https://niwaplibrary.wcl.american.edu/pubs/exec-order-14012.

[38] 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.

[39] ICE Directive No. 11032.4: Identification and Monitoring of Pregnant, Postpartum, or Nursing Individuals (July 1, 2021), *available at* https://niwaplibrary.wcl.american.edu/pubs/ice-pregnant-postpartum-nursing-individuals. (Rescinding and replacing: Prosecutorial and Custody Discretion for Nursing Mothers (November 7, 2007) *available at* https://niwaplibrary.wcl.american.edu/pubs/imm-memo-dhsprosdiscretion; and ICE, Identification and Monitoring of Pregnant Detainees (December 14, 2017) *available at* https://niwaplibrary.wcl.american.edu/pubs/2017-ice-identification_and_monitoring_of_pregnant_detainees.

[40] 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.

[41] *See* U.S. DEPARTMENT OF HOMELAND SECURITY, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, ICE ANNUAL REPORT FISCAL YEAR 2020 5 (2020), *available at* https://niwaplibrary.wcl.american.edu/pubs/ice-annual-report-2020.

[42] *See* U.S. DEPARTMENT OF HOMELAND SECURITY, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT FISCAL YEAR 2020 Enforcement and Removal Operations Report 4 (2020), *available at* https://niwaplibrary.wcl.american.edu/pubs/ice-ero-report-2020 (interior removals are enforcement actions against individuals who were not arrested within 100 miles of a U.S. border or in the process of crossing a border).

[43] Historically, ICE would wait until a convicted individual had served their sentence and was being released from jail to issue a detainer and deport immigrants with criminal convictions.

In each year, the overwhelming majority of those deported had criminal convictions (See Table A).

Table A: Percentage of Total Removals

	2013[44]	2017[45]	2020[46]
Individuals previously convicted of a crime	82%	73.7%	92% (includes those with pending charges)
Repeat immigration violators	7.8%	N/A	N/A
Pending criminal charges		15.5%	See above
Ordered removed and failed to depart	1.6%	2.8% (with reinstatement)	N/A
Other immigrants	7.7%	2.6%	N/A

What these numbers indicate is that, while policies may change, the numbers are consistent over time. These statistics show that little has changed in terms of who is being removed by DHS. Parents before the court in a custody case will not be likely to be removed unless they have criminal convictions.[47] Immigrants who had a removal order issued against them by DHS or an immigration judge who failed to depart the U.S. made up a small percent of removals.

This data establishes that allegations that an immigrant parent is likely to be deported has been and will continued to be largely unfounded with regard to the vast majority of immigrant parents that courts encounter in custody proceedings in state courts. This has been historically true even when a parent is undocumented. The September 30, 2021 Department of Homeland Security agency-wide immigration enforcement priorities memorandum explains why:[48]

> "It is well established in the law that federal government officials have broad discretion to decide who should be subject to arrest, detainers, removal proceedings, and the execution of removal orders. The exercise of prosecutorial discretion in the immigration arena is a deep-rooted tradition. The United States Supreme Court stated this clearly in 2012:
>
> > "A principal feature of the removal system is the broad discretion exercised by immigration officials. Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all."

[44] *See FY 2013 ICE Immigration Removals*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (Jan. 7, 2021), https://www.ice.gov/doclib/about/offices/ero/pdf/2013-ice-immigration-removals.pdf.

[45] *See FY 2017 ICE Enforcement and Removal Operations Report*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (Jan. 26, 2021), https://www.ice.gov/remove/removal-statistics/2017.

[46] *See* U.S. DEPARTMENT OF HOMELAND SECURITY, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT FISCAL YEAR 2020 ENFORCEMENT AND REMOVAL OPERATIONS REPORT 4 (2020), *available at* https://niwaplibrary.wcl.american.edu/pubs/ice-ero-report-2020.

[47] It is important to note that not all criminal convictions constitute deportable offenses or are grounds of inadmissibility that could lead to removal. Also, juvenile adjudications in delinquency cases are not considered criminal convictions under immigration law. Further, immigrant victims of crime or abuse who apply for immigration benefits under abuse related forms of immigration relief qualify for waivers of inadmissibility grounds that include some other based on criminal convictions. *See* Limayli Huguet, Faiza Chappell and Leslye E. Orloff, *Comparing Inadmissibility Waivers Available to Immigrant Victims in VAWA Self-Petitioning, U Visa, T Visa and Special Immigrant Juvenile Status Cases* (Jan. 28, 2021), *available at* https://niwaplibrary.wcl.american.edu/pubs/inadmissibility-chart-vawa-t-u-sijs.

[48] *See* Memorandum from Alejandro N. Mayorkas, *Guidelines for the Enforcement of Civil Immigration Law* 2 (Sept. 30, 2021), *available at* https://niwaplibrary.wcl.american.edu/wp-content/uploads/guidelines-civilimmigrationlaw.pdf

> In an opinion by Justice Scalia about twelve years earlier, the Supreme Court emphasized that enforcement discretion extends throughout the entire removal process, and at each stage of it the executive has the discretion to not pursue it…"
>
> "In exercising our discretion, we are guided by the fact that the majority of undocumented noncitizens who could be subject to removal have been contributing members of our communities for years. They include individuals who work on the frontlines in the battle against COVID, lead our congregations of faith, teach our children, do back-breaking farm work to help deliver food to our table, and contribute in many other meaningful ways…"
>
> "The fact an individual is a removable noncitizen therefore should not alone be the basis of an enforcement action against them. We will use our discretion and focus our enforcement resources in a more targeted way. Justice and our country's well-being require it."
>
> By exercising our discretionary authority in a targeted way, we can focus our efforts on those who pose a threat to national security, public safety, and border security and thus threaten America's well-being. We do not lessen our commitment to enforce immigration law to the best of our ability. This is how we use the resources we have in a way that accomplishes our enforcement mission most effectively and justly."

In discussing this policy directive Secretary Mayorkas stated:[49]

> "For the first time, our guidelines will, in the pursuit of public safety, require an assessment of the individual and take into account the totality of the facts and circumstances… In exercising this discretion, we are guided by the knowledge that there are individuals in our country who have been here for generations and contributed to our country's well-being, including those who have been on the frontline in the battle against COVID, lead congregations of faith, and teach our children. As we strive to provide them with a path to status, we will not work in conflict by spending resources seeking to remove those who do not pose a threat and, in fact, make our Nation stronger…"
>
> "There is also recognition that the majority of the more than 11 million undocumented or otherwise removable noncitizens in the United States have been contributing members of our communities across the country for years. The fact an individual is a removable noncitizen will not alone be the basis of an enforcement action against them. The Department's personnel are to use their discretion and focus the Department's enforcement resources in a more targeted way…"
>
> "The new guidelines will enable our Department to most effectively accomplish our law enforcement mission and, at the same time, advance our country's well-being by recognizing the invaluable contributions of millions of individuals who are part of the fabric of our communities. The guidelines will help us exercise our prosecutorial discretion to achieve justice."

[49] DHS Press Release: Secretary Mayorkas Announces New Immigration Enforcement Priorities (September 30, 2021) https://niwaplibrary.wcl.american.edu/pubs/mayorkas-enforcement-priorities-press-release-9-30-21.

This history and DHS policies clarify why state family courts should not use immigration status as a factor in determining a parents' fitness and why immigration status should not be considered as a negative factor used against a parent in making a best interest of the child determinations.

Further, DHS removal policies have for more than a decade recognized that immigrant victims of crime and abuse are to be protected from removal. These victim protection policies implement over three decades of Congressional action that has consistently expanded legislative protections providing immigration protections for immigrant victims of crime and abuse.[50] ICE has "long recognized the importance of victims and witnesses and the critical role they play in successful investigations and prosecutions."[51] Further, the ICE memo "Prosecutorial Discretion: Certain Victims, Witnesses and Plaintiffs" has remained in full force and effect since it was originally issued in 2011. This policy is "intended to minimize the effect that immigration enforcement may have on the willingness and ability of victims and witnesses to call the police to report crimes or protect their safety."[52]

Most recently, ICE Directive 11005.3: "Using a Victim-Centered Approach with Noncitizen Crime Victims" set forth a policy that ICE will exercise prosecutorial discretion in appropriate circumstances to "facilitate access to justice and victim-based immigration benefits by noncitizen crime victims."[53] The policy requires that, absent exceptional circumstances, ICE will refrain from taking civil immigration enforcement action against a known beneficiary of victim-based immigration benefits and those known to have a pending application for such benefits.[54] ICE officers and agents must also look for indicia or evidence that suggests that a noncitizen is a victim of a crime even where the individual is not yet the beneficiary of victim-based immigration benefits.[55]

In addition to these special protections offered to immigrant victims, DHS has historically[56] and again recently[57] confirmed that prosecutorial discretion is to be used to

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[50] Including the following: Battered Spouse Waiver, Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 (1990) (INA Section 216(c)(4)(C); 8 U.S.C.1186a(c)(4)(C)); Violence Against Women Act of 1994 (VAWA) that was part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994); Violence Against Women Act of 2000 and the Trafficking Victims Protection Act of 2000 passed together as the Victims of Trafficking and Violence Protection Act of 2000, § 1504(a), Pub. L. No. 106-386, 114 Stat 1464 (2000); Violence Against Women Act of 2005, in the Violence Against Women and the Department of Justice Reauthorization Act of 2005, Pub. L. 109-162, 119 Stat. 2960 (2005); Trafficking Victims Protection Act of 2008, William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457, 122 Stat. 5044 (December 23, 2008); and the Violence Against Women Reauthorization Act of 2013, Pub. L. 113-4, 127 Stat. 54 (March 7, 2013).

[51] Danielle Bennett, *Immigration and Customs Enforcement, U Visa Applicants and Enforcement and Removal (ERO) Priorities* (April 19, 2019), *available at* https://niwaplibrary.wcl.american.edu/pubs/ice-memo-april-2019-memo-on-crime-victims.

[52] Danielle Bennett, *Immigration and Customs Enforcement, U Visa Applicants and Enforcement and Removal (ERO) Priorities* (April 19, 2019), *available at* https://niwaplibrary.wcl.american.edu/pubs/ice-memo-april-2019-memo-on-crime-victims.

[53] 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.

[54] *See* 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.

[55] *See* 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.

[56] *See* Memorandum from John Morton, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention and Removal of Aliens* (June 17, 2011), available at https://niwaplibrary.wcl.american.edu/pubs/exercising-prosecutorial-discretion-civil-imm-priorities. The 2021 list of persons who are likely to receive prosecutorial discretion is similar and to some extent expands upon the list of immigrants who were considered low priorities for removal in 2011.

[57] *See* Memorandum from Alejandro N. 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 [hereinafter Mayorkas Enforcement Guidelines];

conserve and not expend immigration enforcement resources on immigrants who are not a high priority for removal. Under the 2021 guidelines immigration enforcement officials are required to follow the following steps to determine whether or not to initiate or carry out and immigration enforcement action against an individual.

1. Determine whether the individual is an enforcement priority.
2. *If the individual is not an enforcement priority*, DHS officials are directed to exercise their discretion not to initiate or continue with an immigration enforcement action against them.
3. *If the person is a potential enforcement priority*, immigration enforcement officials are next required to make an assessment of the individual considering the totality of the facts and circumstances which includes reviewing aggravating, mitigating, and extenuating facts and circumstances.

The September 30, 2021 memoranda directs that DHS:[58]

> "personnel must evaluate the individual and the totality of the facts and circumstances and exercise their judgment accordingly. The overriding question is whether the noncitizen poses a current threat to public safety… The decision how to exercise prosecutorial discretion can be complicated and requires investigative work. Our personnel should not rely on the fact of conviction or the result of a database search alone. Rather, our personnel should, to the fullest extent possible, obtain and review the entire criminal and administrative record and other investigative information to learn of the totality of the facts and circumstances of the conduct at issue. The gravity of an apprehension and removal on a noncitizen's life, and potentially the life of family members and the community, warrants the dedication of investigative and evaluative effort."

For state court judges hearing custody and other family court matters, it is helpful to understand more about the details of who is and who is not an immigration enforcement priority. It is also important for courts and family lawyers to understand the examples of the types of mitigating and aggravating factors DHS officials are directed to consider in deciding whether to enforce immigration laws against an immigrant who may be an enforcement priority.

Civil Immigration Enforcement Priorities: [59]

- **Threat to National Security** –
  - A noncitizen who engaged in or is suspected of terrorism or espionage, or terrorism-related or espionage-related activities; or
  - Who otherwise poses a danger to national security, is a priority for apprehension and removal.

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; 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 [hereinafter Trasvina Enforcement and Removal Policies].

[58] *See* MAYORKAS ENFORCEMENT GUIDELINES at 4.

[59] *See* MAYORKAS ENFORCEMENT GUIDELINES at 3.

- **Border Security** –
    - A noncitizen apprehended at the border or port of entry while attempting to unlawfully enter the United States; or
    - A noncitizen apprehended in the United States after unlawfully entering after November 1, 2020.
    - In cases concerning border security, there could be mitigating or extenuating facts and circumstances that militate in favor of declining enforcement action.

- **Public Safety** – a noncitizen poses a current threat to public safety, typically because of serious criminal conduct.
    - Whether a noncitizen poses a current threat to public safety requires an assessment of the individual and the totality of the facts and circumstances.
    - In revaluating whether a noncitizen currently "poses a threat to public safety" requires an assessment of the individual and the totality of the facts and circumstances and consideration of both aggravating and mitigating factors.
    - DHS personnel should, to the fullest extent possible, obtain and review the entire criminal and administrative record and other investigative information to learn of the totality of the facts and circumstances of the conduct at issue.

DHS policies include non-exclusive lists of factors and facts that could serve as mitigating, extenuating, or aggravating factors and DHS enforcement officials will use in exercising prosecutorial discretion and making immigration enforcement decisions. These lists of factors also provide legally correct information about immigration law that will be helpful to state court judges' decision-making responding to allegations by parties about whether, if, and/or how immigration status should play any role in state court custody or other family law cases. Further, when state courts familiar with the fact of the cases before them make findings of fact about the existence of any of these factors and include such findings in state court orders, this can provide useful evidence about the factors that pertain in a particular case to both the immigrant before the court and DHS investigators, adjudicators, and enforcement agents.

The following examples of relevant mitigating factors, [60] absent serious aggravating factors:[61]

- Compelling humanitarian factors
    - Persons with poor health or a serious health conditions[62]
    - Persons who are minors, pregnant, or elderly[63]

[60] *See* MAYORKAS ENFORCEMENT GUIDELINES at 3-4 (noting mitigating factors that mitigate in favor of declining enforcement action in determining whether a noncitizen poses a current threat to public safety); TRASVINA ENFORCEMENT AND REMOVAL POLICIES at 9.

[61] *See* MAYORKAS ENFORCEMENT GUIDELINES at 3 (listing factors that can militate in favor of enforcement action when considering whether a noncitizen poses a current threat to public safety); TRASVINA ENFORCEMENT AND REMOVAL POLICIES at 6. (Relevant aggravating factors include: criminal history, participation in persecution or other human rights violations, extensiveness and seriousness of prior immigration violations (e.g. prior removals by ICE, prior illegal entries, noncompliance with conditions of release), fraud or material misrepresentation).

[62] *See* TRASVINA ENFORCEMENT AND REMOVAL POLICIES at 5, 6, and 9.

[63] *See* MAYORKAS ENFORCEMENT GUIDELINES at 3; TRASVINA ENFORCEMENT AND REMOVAL POLICIES at 6 and 9.

    - The person is the primary caregiver to a seriously ill relative in the United States,[64] including an immediate family or household member who is, known to be suffering from serious physical or mental illness[65]
    - Victims of domestic violence, trafficking, or other serious crimes[66]
    - Status as a victim, witness, or plaintiff in civil or criminal proceedings[67]
    - Persons who came to the U.S. as young children and have since lived in the U.S. continuously[68]
    - The person is a party to significant collateral civil litigation (e.g., family court proceedings, non-frivolous civil rights or labor claims)[69]
    - The person is otherwise eligible for humanitarian protection[70]
- Veterans (military service members or immediate relatives thereof)[71]
- Persons likely to be granted temporary or permanent immigration relief[72]
- Whether the person has potential immigration relief available[73]
- Significant law enforcement or other governmental interest[74]
    - This includes cooperating witnesses, confidential informant and immigrants otherwise assisting state or federal law enforcement officials, prosecutors, and agencies involved in enforcing labor and civil rights laws
- Long term Lawful Permanent Residents[75]
- Length of residence in the United States[76]
- Work history in the United States[77]
- Pursuit or completion of education in the United States[78]
- Contributions to the community[79]
- Family or community ties to the United States[80]
- The impact of removal on family in the United States, such as loss of a provider or caretaker[81]
- Where an individual has a criminal history, mitigating factors include:
    - Length of time since a crime or offense was committed and evidence of rehabilitation[82]

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[64] *See* MAYORKAS ENFORCEMENT GUIDELINES at 3 (listing as a mitigating factor how removal would impact family in the United States, such as loss of a caregiver); TRASVINA ENFORCEMENT AND REMOVAL POLICIES at 6.
[65] *See* TRASVINA ENFORCEMENT AND REMOVAL POLICIES at 9-10.
[66] *See* TRASVINA ENFORCEMENT AND REMOVAL POLICIES at 10 (This includes all criminal activities that would qualify for protections under the T and U visa certification programs).
[67] *See* MAYORKAS ENFORCEMENT GUIDELINES AT 3; TRASVINA ENFORCEMENT AND REMOVAL POLICIES at 6.
[68] *See* TRASVINA ENFORCEMENT AND REMOVAL POLICIES at 10.
[69] *See* TRASVINA ENFORCEMENT AND REMOVAL POLICIES at 10.
[70] *See* MAYORKAS ENFORCEMENT GUIDELINES at 3.
[71] *See* MAYORKAS ENFORCEMENT GUIDELINES at 3; TRASVINA ENFORCEMENT AND REMOVAL POLICIES at 9.
[72] *See* MAYORKAS ENFORCEMENT GUIDELINES at 3 (listing as a mitigating factor whether the individual is eligible for humanitarian protection or other immigration relief); TRASVINA ENFORCEMENT AND REMOVAL POLICIES at 9.
[73] *See* TRASVINA ENFORCEMENT AND REMOVAL POLICIES at 6.
[74] *See* TRASVINA ENFORCEMENT AND REMOVAL POLICIES at 10.
[75] *See* TRASVINA ENFORCEMENT AND REMOVAL POLICIES at 10.
[76] *See* MAYORKAS ENFORCEMENT GUIDELINES at 3; TRASVINA ENFORCEMENT AND REMOVAL POLICIES at 5-6.
[77] *See* TRASVINA ENFORCEMENT AND REMOVAL POLICIES at 6.
[78] *See* TRASVINA ENFORCEMENT AND REMOVAL POLICIES at 6.
[79] *See* TRASVINA ENFORCEMENT AND REMOVAL POLICIES at 6.
[80] *See* TRASVINA ENFORCEMENT AND REMOVAL POLICIES.
[81] *See* MAYORKAS ENFORCEMENT GUIDELINES at 3.
[82] *See* MAYORKAS ENFORCEMENT GUIDELINES at 4.

- Convictions that were vacated or expunged[83]
- A mental condition that may have contributed to criminal conduct, or a physical or mental condition requiring care or treatment[84]

In addition to mitigating factors, the latest DHS guidance on prosecutorial discretion[85] provides aggravating factors that militate in favor of enforcement action, particularly in considering whether an individual poses a threat to public safety. Addressing these aggravating factors in state court findings and orders can be useful for both immigrant crime victims and DHS officials responsible for making immigration enforcement and prosecutorial discretion determinations. Aggravating factors include:

- The gravity of the offense of conviction and the sentence imposed[86]
- The nature and degree of harm caused by the criminal offense[87]
- The sophistication of the criminal offense[88]
- Use or threatened use of a firearm or dangerous weapon[89]
- A serious prior criminal record[90]

As the protections for immigrant victims make clear and the categories of immigrants who are both likely and unlikely to be deported augment, many immigrants involved in custody proceedings in state court including those who are undocumented are not likely to be subject to immigration enforcement or deportation. For these reasons, it is especially important that with very limited exceptions[91] allegations regarding a noncitizen parent's potential removal is not an appropriate consideration when courts conduct an in the best interest of the child analysis in custody or any other state family court proceeding.

III. Positive Trends

Custody status will often times be raised by opposing parties in custody disputes in an attempt to influence custody determinations. It is a strategy that is being used more frequently over the last few decades in an attempt to persuade the court to award custody to the citizen or lawful permanent resident parents or guardians instead of immigrant parents.[92] Moreover, there is a significant connection between intimate partner violence and the use of immigration status in custody cases by abusers.[93] Commonly abusers of immigrant domestic violence and child abuse

[83] *See* MAYORKAS ENFORCEMENT GUIDELINES at 4.
[84] *See* MAYORKAS ENFORCEMENT GUIDELINES at 3.
[85] *See* MAYORKAS ENFORCEMENT GUIDELINES.
[86] *See* MAYORKAS ENFORCEMENT GUIDELINES at 3.
[87] *See* MAYORKAS ENFORCEMENT GUIDELINES at 3.
[88] *See* MAYORKAS ENFORCEMENT GUIDELINES at 3.
[89] *See* MAYORKAS ENFORCEMENT GUIDELINES at 3.
[90] *See* MAYORKAS ENFORCEMENT GUIDELINES at 3.
[91] These exceptions are immigrants, including immigrant parents who are immigration enforcement priorities. *See* MAYORKAS ENFORCEMENT GUIDELINE 3-4. *See also* Anna Pohl et al., *Battered Immigrants and the Criminal Justice System*, BREAKING BARRIERS: A COMPLETE GUIDE TO LEGAL RIGHTS AND RESOURCES FOR BATTERED IMMIGRANTS 8-9 (2013), *available at* http://niwap.wpengine.com/pubs/ch7-batteredimmcriminaljusticesystem. (Providing an overview of how criminal convictions impact immigration relief and immigration enforcement.
[92] For more information *see* NAT'L CTR. FOR STATE COURTS, TRENDS IN STATE COURTS (2018), *available at* https://niwaplibrary.wcl.american.edu/pubs/trends-in-state-courts-survey-findings; RAFAELA RODRIGUES ET AL., PROMOTING ACCESS TO JUSTICE FOR IMMIGRANT AND LIMITED ENGLISH PROFICIENT CRIME VICTIMS IN AN AGE OF INCREASED IMMIGRATION ENFORCEMENT: INITIAL REPORT FROM A 2017 NATIONAL SURVEY (2018), *available at* https://niwaplibrary.wcl.american.edu/pubs/immigrant-access-to-justice-national-report.
[93] *See* HOWARD DAVIDSON, THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN: A REPORT TO THE PRESIDENT OF THE AMERICAN BAR ASSOCIATION (Aug. 1994), *available at* https://niwaplibrary.wcl.american.edu/pubs/impact-dv-children.

victims will use this tactic as part of a pattern of immigration related abuse manipulation and coercive control.[94] Because of the frequency of using immigration status by opposing parties as well as the risks for children of being placed with abusive parents, it is imperative that courts understand that state family laws are to be applied equally and in the same manner to cases involving citizen and immigrant parents and children.

State statutes and case law on best interest of the child and primary caretaker determinations require consideration of factors that do not include immigration status. For this reason, immigration status should not impact the best interest of a child analysis. However, courts and parties that are unaware that immigration laws have no effect on the application of state laws to custody cases may be unduly influenced by immigration status allegations and the assumptions that flow from those allegations. The 2013 article highlighted several instances in which the courts incorrectly considered immigration as factors when making custody determinations.[95] Since 2013, court decisions have reflected positive trends away from using immigration status in family court custody and guardianship determinations.

Courts Correctly Recognize That Undocumented or Temporary Immigration Status Does Not Mean Removal Is Likely

The first positive trend sees courts shifting away from determining that undocumented or temporary immigration status means that the parent is at risk of being removed from the U.S. Many courts have correctly acknowledged that the mere risk of removal is too remote to be taken into consideration. In an Illinois case, the judge noted that the risk of deportation is extremely remote.[96] The judge stated, "[i]t is true that, theoretically, any illegal alien can be deported. The danger, however, is extremely remote. Statistically, the chances are minuscule that any particular illegal alien will be apprehended and placed in removal proceedings."[97] Undocumented immigrants who do not have criminal convictions are unlikely to face deportation and therefore the undocumented status of the mother was not considered by the court.[98] This approach is consistent with DHS policies and practices regarding immigration enforcement discussed in section II of this article.

Evidence of a Parent's Detention or Removal Proceedings When Considered Are a Single Not Determinative Factor

Some courts might still consider evidence regarding the likelihood of removal. Evidence may include detention or immigration-related charges, pending removal proceedings, or whether the party was subject to a criminal prosecution. However, this has been treated more frequently as a single factor in the analysis rather than determinative of the child's best interest. For

[94] For more information on countering an abuser's use of immigration status, *see* Leslye Orloff, et al., *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 1-15 (2013), *available at* https://niwaplibrary.wcl.american.edu/pubs/ch6-1-counterabuserraisingimmstatus; *see also* ORLOFF ET AL., *Executive Summary*, TRANSFORMING LIVES: HOW THE VAWA SELF-PETITION AND U VISA CHANGE THE LIVES OF VICTIMS AND THEIR CHILDREN AFTER WORK-AUTHORIZATION AND LEGAL IMMIGRATION STATUS (2021), *available at* https://niwaplibrary.wcl.american.edu/pubs/exec-summary-transforming-lives (Once immigrant victims who file VAWA self-petitions or U visa applications obtain work authorization and deferred action which offers formal protection against deportation there is a 65% reduction in perpetrators using immigration status against victims in custody cases, there are 78% fewer threats to cut off the victim from the children and a 74% reduction in immigration related abuse).

[95] *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, 219-20 (2013).

[96] *See* Hupp v. Rosales, 2013 IL App (4th) 130433-U.

[97] *See* Hupp v. Rosales, 2013 IL App (4th) 130433-U.

[98] *See* Hupp v. Rosales, 2013 IL App (4th) 130433-U.

example, in a New Jersey Case, the court noted there may be a risk of deportation in the future, but even so the circumstances weighed in favor of granting custody to the immigrant brother.[99] In another Delaware case, the court noted that the mother may be at risk of deportation if she attempted to relocate with the children, but the totality of the circumstances still weighed in favor of granting the mother custody.[100] In the Louisiana case *Ramirez v. Ramirez*, the court noted that being subject to deportation alone is not sufficient to support a finding that custody would result in substantial harm to the child.[101] However, "Elba's possible deportation, combined with the uncertainty created by Elba's history of delegating the responsibility for raising her other children to others, as well as her failure to support and keep in contact with [the child], are sufficient for the trial court to have found that [the child] would have faced substantial harm if Elba was granted custody in this case."[102]

It is important to distinguish, as the court did in *Ramirez*, that there is a difference between cases in which the only facts that the court uses to support its finding of unfitness are the parent's immigration status itself or are facts based upon or related to immigration status[103] and cases in which the court finds a myriad of factors unrelated to immigration status that provide sufficient grounds to find a parent unfit under the law.

Another positive trend was seen in the Georgia case *Huff v. Vallejo*, where the court determined that the father's undocumented immigration status did not make him a flight risk.[104] This counters many earlier cases that denied custody to parents because the courts believed the parent's undocumented status places the child at risk of parental kidnapping. In *Huff*, even though the father was subject to pending immigration proceedings, the court found that there was no showing that he was a flight risk.

A Child's or Parent's Stability or Ability to Provide and Care for a Child is Not Controlled by Immigration Status

Another positive trend is courts largely abandoning the assumption that immigration status impacts a child's stability and the parent's ability to provide for the child. For example, the judge in an Illinois case, recognizing the undocumented status of the mother, disputed the argument that the mother was unable to provide a stable environment, stating that "this argument

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[99] *See* N.C.T. v. F.T.S., No. A-3822-16T3, 2018 WL 891216 (N.J. Super. Ct. App. Div. Feb. 15, 2018).

[100] *See* M.R.R.J. v. P.F.T., No. 13-05045, 2015 WL 9855922 (Del. Fam. Ct. Sept. 4, 2015); *see also In re* Margarita T., No. A-95-530, 1995 WL 749701 (Neb. Ct. App. Dec. 19, 1995) (finding that the parents of the child were unfit not based on the father's immigration status and risk of removal, but based on his failure to protect the child from the mother's abuse and neglect).

[101] *See* Ramirez v. Ramirez, 12-166 (La. App. 5 Cir. Aug. 8, 2013), 124 So. 3d 8.

[102] *See* Ramirez v. Ramirez, 12-166 (La. App. 5 Cir. Aug. 8, 2013), 124 So. 3d 8.

[103] Examples of facts that are based upon and related to immigration status include:

- Lack of legal work authorization (many parents who are undocumented are working and earning income although they lack legal work authorization and immigrant victims will receive work authorization as part of their crime victims based immigration cases)
- No drivers' license (Only 12 states offer state drivers' licenses to immigrants who do not qualify for a federally recognized drivers' license). *See* Leslye E. Orloff, STATE-FUNDED PUBLIC BENEFITS COMPARISON CHART (April 12, 2021), *available at* https://niwaplibrary.wcl.american.edu/pubs/state-benefits-comparison-chart
- Does not qualify for public benefits (immigrant parents without regard to their immigration status can apply for and receive public benefits on their citizen children's behalf to the same extent as citizen parents even though the immigrant parent may not qualify to receive additional public benefits for themselves). *See* DEPARTMENT OF HEALTH AND HUMAN SERVICES, *Policy Guidance Regarding Inquiries into Citizenship, Immigration Status and Social Security Numbers in State Applications for Medicaid, State Children's Health Insurance Program (SCHIP), Temporary Assistance for Needy Families (TANF), and Food Stamp Benefits* (March 24, 2006), *available at* https://niwaplibrary.wcl.american.edu/pubs/policy-guidance-regarding-inquiries.

[104] *See* Huff v. Vallejo, 347 Ga. App. 127, 817 S.E.2d 696 (2018). *See also* Welsch v. Lewis, 292 A.D.2d 536 (N.Y. App. Div. 2002); Rory H. v. Mary M., 786 N.Y.S.2d 195 (App. Div. 2004); Ish-Shalom v. Wittman, 797 N.Y.S.2d 111 (App. Div. 2005).

has surface plausibility, but it is ultimately unconvincing…admittedly, 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."[105] The same sentiment was echoed in a Minnesota case where the Minnesota Court of Appeals stated that the "mother's undocumented-immigrant status is not unusual. There are approximately 10.2 million undocumented adult immigrants living in the United States, and about 46% of those adults are parents of minor children."[106]

Ultimately courts are moving away from previous tendencies to use immigration status as a determinative factor in custody proceedings. While some courts may still consider undocumented-immigration status, it is seen as one factor in the overall analysis of the best interest of the child. Importantly, courts are finding more frequently that immigration status does not negatively impact best interest factors and therefore should not be considered or persuasive in the custody determination.

IV. Prior Negative Trends

The 2013 article summarized five categories of common mistakes judges made in custody cases that involved undocumented immigrant parents.[107] Each of these common mistakes are a misapplication of immigration law used by the court instead of correctly and fully considering the best interest of the child standard under state law. The five legally incorrect assumptions and the correct application of the law are addressed in this section.

a. MYTH #1: Citizen and lawful permanent resident parents need legal custody of children in order to file applications asking DHS to grant lawful permanent residency and citizenship to their children.

In past custody proceedings, courts have incorrectly assumed that granting custody to a citizen parent over a non-citizen parent is in the best interest of the child based on the assumption that the citizen parent needs legal custody in order obtain lawful permanent residency or U.S. citizenship for the child.[108] However, the correct application of immigration law contradicts this assumption. All citizen and lawful permanent resident parents can file applications with DHS asking that their children be granted lawful permanent residency without regard to whether or not the citizen or lawful permanent resident parent has been granted legal custody. Once the child is a legal permanent resident, the child qualifies for naturalization five years after the date the child became a lawful permanent resident. The ability to pass on citizenship is only contingent on custody for citizenship purposes in very limited circumstances when (1) the child is a legal permanent resident and the parent is filing for the child to become a naturalized U.S. citizen; and (2) when the child is born and resides outside of the United States and has a citizen parent.[109] However, in regards to scenario (1) where the child is a legal permanent resident, if the custodial parent is not a citizen, the child can still qualify to file for naturalization five years after the date

[105] *See* Hupp v. Rosales, 2013 IL App (4th) 130433-U; *see also In re* Nunes Duenas, 2006 WL 3314553, 725 N.W.2d 658 (Iowa Ct. App. Nov. 16, 2006) (holding that lack of legal immigration status was not determinative in the parents' abilities to provide stable environments for the children); *In re* Interest of Aaron D., 691 N.W.2d 164 (Neb. 2005) (finding that immigration status is not relevant in establishing clear and convincing evidence that the termination of custody is in the best interest of the child).

[106] In re Custody of A.L.R., 830 N.W.2d 163 (Minn. Ct. App. 2013).

[107] *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, 219-20 (2013).

[108] *See* Rico v. Rodriquez, 120 P.3d 812 (Nev. 2005).

[109] *See* Immigration and Nationality Act, 8 U.S.C. § 1431 (2021).

the child became a lawful permanent resident. Given that legal permanent resident children can still qualify for citizenship independently, awarding custody based on the impact on the child's citizenship opportunities is largely unfounded.[110]

b. MYTH #2: A Parent's Undocumented or Temporary Immigration Status Means That the Parent Before the Court is at Risk of or is Likely to be Removed (Deported) from the United States

As was identified in the 2013 article, research shows that having a parent without citizenship does not impact a child's stability.[111] Several factors weigh in favor of the stability provided in homes where at least one parent is an immigrant. These include valuing higher education, two-parent homes, valuing community service, and valuing work.[112] Considering that a parent's undocumented or temporary immigration status means the parent is at risk of removal is an improper assumption. First, when the immigrant parent or child is a victim of domestic violence, child abuse, or is a victim of a U or T visa listed crime the immigrant parent qualifies for immigration relief.[113] Even where the parent is not yet a recipient of immigration relief, ICE officers and agents must determine whether an individual is the victim of a crime, in which case they must exercise prosecutorial discretion.[114] Second, as discussed in Part II, parents who are immigrant crime victims are a low priority for removal and it is speculative to make assumptions about their removal.

Courts seem to be moving away from the assumption that a parent's undocumented or temporary immigration status means that the parent is at risk or is likely to be removed. However, courts may consider whether the immigrant parent before the court has a history of criminal convictions, has been ordered removed, or has been detained.[115]

c. MYTH #3: Immigration Status Impacts the Child's Stability and the Parent's Ability to Provide for the Child[116]

When applying the best interest of the child standard, the court considers several factors, including the stability of the child(ren). As discussed in detail in section II, removal of

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[110] *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, 219-20 (2013) (The exception is a small minority of cases in which the child was born and resides outside of the United States. Such cases are unlikely to be cases that come before state courts for custody determinations because the child was born and resides abroad.)

[111] *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, 224-30 (2013) (citing Randy Capps, Michael Fix, et al., *The Health and Well-Being of Young children of Immigrants*, The Urban Institute (2004), *available at* https://www.urban.org/sites/default/files/publication/51501/311139-The-Health-and-Well-Being-of-Young-Children-of-Immigrants.PDF). *See also* Donald J. Hernandez & Jeffrey S. Napierala, *Children in Immigrant Families: Essential to America's Future*, FCD Child and Youth Well-Being Index (CWI) Policy Brief – Foundation for Child Development (June 2012), *available at* https://www.fcd-us.org/children-in-immigrant-families-essential-to-americas-future/.

[112] 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, 224 (2013).

[113] *See* U.S. DEPARTMENT OF HOMELAND SECURITY, *Protections for Immigrant Victims* (2017), *available at* https://niwaplibrary.wcl.american.edu/pubs/infographic-on-protections-for-immigrant-victims.

[114] *See* 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.

[115] *See e.g.,* Turrubiartes v. Ollvera, 539 S.W.3d 524 (Tex. App. 2018), review denied (Aug. 31, 2018). It is important for courts to recognize that having an open removal case before the immigration courts does not mean that an immigrant's removal is imminent. It takes an average of over two and a half years (2.6) for immigration cases to be initially decided by the immigration courts for cases based on civil immigration violations. *See Immigration Court Backlog Tool,* TRAC IMMIGRATION, https://trac.syr.edu/phptools/immigration/court_backlog/. These time frames do not include the time involved in appeals to the Board of Immigration Appeals or the federal courts. Thus, the fact that there may be an open removal case is not a relevant consideration for state courts in custody cases.

[116] *See e.g., In re* Nunes Duenas, 2006 WL 3314553, 725 N.W.2d 659 (Iowa Ct. App. Nov. 16, 2006).

immigrant parents who do not have a record of criminal convictions is not an immigration enforcement priority. Thus, a parent's immigration status will not affect parental stability. Parents of child abuse victims and parents who have suffered abuse themselves will be eligible for victim related forms of immigration relief that provide both for protection from deportation and work authorization. The correct application of state best interest laws involves considering the full range of factors listed in state statutes in all cases, including those involving immigrant parents. As to a parent's ability to provide for the child, the court should focus on the actual employment history of both parents and the extent to which each parent applied their income and resources to support their child(ren). Many immigrants living in the U.S., both documented and undocumented immigrants, have jobs and are working to support themselves and their families.[117] Immigrants who are working and those who have earned income through work in the U.S. can be ordered to pay child support either based on their income or imputed income applying the same approach taken with citizen parents. Non-custodial parents have an obligation to pay child support regardless of immigration status.[118] When considering ability to provide for a child, courts should be considering the fact that custodial parents can help provide for their children by obtaining support awards.

Immigration status, therefore, should not be used in this best interest analysis. Undocumented-immigration status alone is not enough to determine that a parent is unable to care for a child. Immigrant parents who are before the court in custody cases who have been victims of domestic violence, sexual assault, stalking, or human trafficking or who may not be abused themselves but have a child who has been a victim of abuse or crime have a path to legal immigration status through the Violence Against Women Act (VAWA), U visa or T visa programs. Research has found that, as immigrant victims file for crime victim-based immigration relief and gain work authorization and protection from deportation, their stability, resilience, engagement as parents, and earning capacity grow exponentially.[119]

d. MYTH #4: Immigration Status Impacts the Parent's Ability to Obtain Public Benefits on the Child's Behalf

Courts have frequently considered immigration status as it relates to a parent's ability to obtain public benefits when using the best interest of the child analysis. Parents with undocumented immigration status have limited ability to access public benefits for themselves. However, parents without regard to their immigration status are able to file for and receive public benefits that their citizen or qualified immigrant children are eligible to receive.[120]

The proper consideration of access to public benefits is that used in the New York case, *In re Kittridge*, in which the court orders that Child Protective Services (CPS) provide an undocumented immigrant mother facing charges of neglect with the court ordered supportive

[117] *See* Dan Kosten, *Immigrants as Economic Contributors: They Are the New American Workforce*, NATIONAL IMMIGRATION FORUM (Jun. 5, 2018), *available at* https://immigrationforum.org/article/immigrants-as-economic-contributors-they-are-the-new-american-workforce/.

[118] *See* Asal v. Asal, 960 P.2d 849 (Okla. Civ. App. 1998).

[119] *See* Orloff et al., *Abstract, Conclusions and Recommendations*, TRANSFORMING LIVES: HOW THE VAWA SELF-PETITION AND U VISA CHANGED THE LIVES OF VICTIMS AND THEIR CHILDREN AFTER WORK-AUTHORIZATION AND LEGAL IMMIGRATION STATUS (2021), *available at* https://niwaplibrary.wcl.american.edu/pubs/transforming-lives-abstract-conclusions-recommendations.

[120] *See* Pohl et al., *Barriers to Accessing Services: The Importance of Advocates Accompanying Battered Immigrants Applying For Public Benefits*, BREAKING BARRIERS: A COMPLETE GUIDE TO LEGAL RIGHTS AND RESOURCES FOR BATTERED IMMIGRANTS 3-7 (2013), *available at* https://niwaplibrary.wcl.american.edu/pubs/ch4-3-importance-advocates. *See also* U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *Q&A Re: Citizenship and Immigration Status Policy Guidance* (Mar. 24, 2006), *available at* https://niwaplibrary.wcl.american.edu/pubs/pb-gov-hhsqacitizenshippolicyguidance-03-24-06.

services she needs to be able to reunite with her child.[121] The court found that the refusal by CPS to provide or arrange for an undocumented mother to receive public benefits amounted to depriving her of the fundamental right to care for her child.[122]

e. MYTH #5: A parent's undocumented immigration status places the child at risk of parental kidnapping

Opposing parties may raise immigration status of another party in an attempt to allege the potential for international parental kidnapping. Parties will try to convince courts to incorrectly believe that an undocumented immigrant parent is likely to engage in parental kidnapping and the parent with legal immigration status or citizenship is not. However, the threat of parental kidnapping should only be considered in cases where there are facts presented in the case that merit the concern. In assessing the likelihood that a parent may abduct a child from the United States, research has found that parents who have the legal immigration or citizenship status that allows them to travel freely to and from the U.S. are more likely to kidnap children internationally.[123] It is important to consider whether the parent is foreign born, has dual citizenship in the United States and another country, has residency in another country, has worked in another country or works for a company that could transfer their job to another country.[124] When kidnapping allegations are brought against an undocumented immigrant parent, the likelihood then of international parental kidnapping is very low because the ability to leave the U.S. and return is limited.[125]

Where the allegation is plausible, the court should focus on the same factors that it would consider in cases involving citizen parents. For example, in *Welsh v. Lewis*, the New York Appellate Division determined that the immigrant mother posed a risk of parental kidnapping based on evidence that her work visa had expired and a letter written by the mother in which she indicated she was considering returning with the children to England.[126] Contrast this with *Rory H. v. Mary M.*, in which the court upheld a custody order for the undocumented immigrant mother based on the overall best interest of the child analysis, despite the fact that the mother had already relocated with the child to Ireland.[127] Another case, *Huff v. Vallejo*, the court found that the father's pending immigration proceedings and possible criminal charges, in the absence of any showing that the father may have been a flight risk, was not sufficient to deny the father custody.[128]

f. Recent Trends Discussed in Section III

Recent research suggests that courts are increasingly understanding the fact that immigration status, standing alone, should not be a factor in the best interest of the child analysis

[121] *See In re Kittridge*, 714 N.Y.S.2d 653 (Fam. Ct. 2000).
[122] *See In re Kittridge*, 714 N.Y.S.2d 653 (Fam. Ct. 2000).
[123] *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, 234 (2013) (citing Janet Chiancone, Linda Girdner & Patricia Hoff, U.S. Department of Justice, *Issues in Resolving Cases of International Child Abduction by Parents*, JUV. JUSTICE BULL. (Dec. 2001), *available at* https://www.ncjrs.gov/pdffiles1/ojjdp/190105.pdf.)
[124] *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, 234 (2013).
[125] *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, 234 (2013).
[126] *See* Welsh v. Lewis, 292 A.D.2d 536 (N.Y. App. Div. 2002).
[127] *See* Rory H. v. Mary M., 786 N.Y.2d 195 (App. Div. 2004).
[128] *See* Huff v. Vallejo, 347 Ga. App. 127, 817 S.E.2d 696 (2018).

in custody cases. Many courts seem to reject the common mistakes prior courts had made that were outlined in the 2013 article.[129] Though courts seem to be largely correctly turning away from considering immigration status as a significant or determinative factor in custody proceedings, courts should be careful to avoid using immigration status itself and factors that overlap with, are the result of, or are related to immigration status so that these factors do not incorrectly impact or implicitly bias custody determinations.[130]

V. Findings: Human Trafficking in Custody Proceedings

The authors of this article conducted legal research that sought to identify decisions in custody cases between a trafficking victim and their trafficker and were unable to identify any such reported or unreported decisions through June of 2021. It appears that courts are not identifying facts of human trafficking that could be present in custody cases. Based on social science data, there is a strong possibility that at least some family court custody cases involve traffickers attempting to gain custody of a child, either against a party that they have trafficked or of a child that they have trafficked. The reason that there is not more evidence of these types of cases among reported decisions is most likely because courts are not aware of the status of one party as a trafficker or as a victim of trafficking.

Nearly every state considers family violence in determining a child's best interest in a custody dispute. Many states also provide additional or different factors for determining a child's best interest in other circumstances, such as adoption or termination of parental rights.[131] State statutes mostly indicate that courts should consider factors such as family violence, history of abuse, domestic violence, or other similar terminology.[132] This same analysis and the same laws should apply in cases of human trafficking where there is a custody dispute between a trafficker and a victim or where a trafficker is seeking custody of or guardianship over a child trafficking victim. Factors in state best interests of the child laws including domestic violence, child abuse, substance abuse, criminal history, the fitness of the person seeking custody and the child's needs would all be helpful factors that would contribute to denying custody to a perpetrator of human trafficking. Judges hearing custody cases should receive training on human trafficking that will improve their ability to identify custody cases that may involve traffickers and their victims.[133]

VI. Conclusion

Though family law clearly establishes that immigration status should not be used as a determinative factor in making custody determinations, and a review of cases demonstrated that courts are becoming more likely than in the past to not allow immigration status or factors related to immigration status to bias state court custody decisions, some courts are still using

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[129] *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, 219-20 (2013).

[130] *See generally* Tal D. Eisenzweig, *In the Shadow of Child Protective Services: Noncitizen Parents and the Child-Welfare System*, 128 YALE L. J. F. 482 (2018).

[131] *See* NIWAP, *Best Interest of the Child – Family Violence*, SPECIAL IMMIGRANT JUVENILE STATUS BENCH BOOK: A NATIONAL GUIDE TO BEST PRACTICES FOR JUDGES AND COURTS 515 (2018).

[132] Maps and charts tracking state-by-state best interests of the child are available at Appendix Q – Q12 SIJS manual, *available at* https://niwaplibrary.wcl.american.edu/sijs-manual-table-of-contents.

[133] Judges who wish to learn more about human trafficking and immigrant crime victims in state court are invited to join the National Judicial Network, which provides peer-to-peer learning opportunities for judges. Judges, Commissioners, Magistrates, Tribal Judges and other judicial officers interested in joining the National Judicial Network can learn more at https://niwaplibrary.wcl.american.edu/national-judicial-network.

undocumented-immigration status to varying degrees. The authors in the 2013 article established clear misconceptions being made by courts with regard to immigration.[134] Since publication of the 2013 article, many courts have started to move away from these misconceptions and have relied more accurately on the best interest of the child standard. However, undocumented immigration status is still being considered as a factor in many cases across the county. Given the fact that parties will continue to try to raise immigration status to gain advantage in custody cases, courts and counsel for immigrant victims and immigrant parents need to be prepared to respond using legally correct information about immigration laws to promote just and fair outcomes for immigrant parents, immigrant children and children with immigrant parents in state custody decisions that correctly uphold all parents' constitutional rights to raise their children.

VII. Additional Resources

For additional resources regarding immigration status as applied to custody determinations, see below:

- Family Court Bench Card on Issues That Arise in Custody Cases Involving Immigrant Parents, Children and Crime Victims (Oct. 13, 2013): https://niwaplibrary.wcl.american.edu/pubs/benchcard-issues-arise-custody-cases
- Winning Custody Cases for Immigrant Survivors: the Clash of Laws, Cultures, Custody and Parental Rights (2017) https://niwaplibrary.wcl.american.edu/winning-custody-article-2017
- Custody of Children in Mixed-Status Families: Preventing Misunderstanding and Misuse of Immigration Status in State-Court Custody Proceedings (2013) https://niwaplibrary.wcl.american.edu/pubs/custody-in-mixed-status-families
- NIWAP Custody Newsletter (Oct. 19, 2018): https://niwaplibrary.wcl.american.edu/pubs/2018-10-child-custody-newsletter
- Countering Abuser's Attempts To Raise Immigration Status of the Victim in Custody Cases (6.1): https://niwaplibrary.wcl.american.edu/pubs/ch6-1-counterabuserraisingimmstatus
- The Implications of the Hague International Child Abduction Convention: Cases and Practice (6.3): https://niwaplibrary.wcl.american.edu/pubs/ch6-3-hagueintlchildabduction

[134] *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, 219-20 (2013).