

How to Get a Detained Person to Court for Family Court Cases Involving Children and/or Criminal Proceedings

By: Benish Anver and Leslye E. Orloff¹

June 23, 2014

This handout will provide best practices for judges, attorneys and advocates on how to secure the attendance, in court proceedings, of immigrants who are being detained by the U.S. Department of Homeland Security (DHS) so that immigrants can participate in family court proceedings involving their children and criminal court proceedings.

Where children of an immigrant parent, who is a party to a court case impacting their parental rights, are involved the U.S. Immigration and Customs Enforcement (ICE) Parental Interests Directive applies.² The ICE Parental Interests Directive pays particular attention to parents or legal guardians:

- who are primary caretakers;
- who have a direct interest in family court or child welfare proceedings; and/or
- whose minor children are physically present in the U.S. and are U.S. citizens or Lawful Permanent Residents.³

It should be noted that the ICE Parental Directive does not apply to criminal cases involving domestic violence, sexual assault, stalking, dating violence or human trafficking in which there are no custodial issues or children involved.⁴ Securing attendance of immigrants in DHS custody in criminal court

¹ Copyright © The National Immigrant Women's Advocacy Project, American University, Washington College of Law 2014. This document was developed under grant number SJI-13-E-199 from the State Justice Institute. The points of view expressed are those of the authors and do not necessarily represent the official position or policies of the State Justice Institute.

² See U.S. Immigration and Customs Enforcement, 11064.1: Facilitating Parental Interests in the Course of Civil Immigration Enforcement Activities (Aug. 23, 2013)(hereinafter "ICE Parental Directive"), available at: https://www.ice.gov/doclib/detention-reform/pdf/parental_interest_directive_signed.pdf; For more details about the implementation and applicability of the ICE Parental Directive, see U.S. Immigration and Customs Enforcement, *FAQs on the Parental Interests Directive*, available at: <https://www.ice.gov/about/offices/enforcement-removal-operations/parental-directive-faq.htm>

³ *Id.* at 1.

⁴ Some of these criminal court cases may involve determinations regarding the child(ren) as part of the terms of a criminal defendant's release, bond order, or criminal sentence. For questions regarding criminal cases regarding such issues, please contact NIWAP for technical assistance by calling our technical assistance line at (202) 274-4457 or emailing NIWAP at info@niwap.org. We provide technical assistance directly to judges, court staff, advocates and attorneys.

National Immigrant Women's Advocacy Project (NIWAP, pronounced *new-app*)

American University, Washington College of Law

4910 Massachusetts Avenue NW · Suite 16, Lower Level · Washington, D.C. 20016

(o) 202.274.4457 · (f) 202.274.4226 · niwap@wcl.american.edu · wcl.american.edu/niwap

proceedings will be discussed in the last section of this handout.

I. Attorneys and Advocates

The following client scenarios take place in the family court context where custody of children is a key issue and include but are not limited to the following types of cases:

- divorce;
- legal separation;
- annulment;
- custody;
- child support;
- civil protection order;
- child abuse and neglect;
- dependency;
- termination of parental rights;
- guardianship; and/or
- adoption.

a. How to get a detained respondent parent to a family court proceeding

- First, ask the judge to include a requirement that the respondent who is a detained immigrant parent be physically present for all court appearances related to this case in a court order that the judge issues. The court order should include language about the relationship between the child(ren) and the detained immigrant and the direct interest the detained immigrant parent has in the court proceeding.
- Next, send a copy of the court order to your local ICE Field Point of Contact for Parental Rights (ICE POC).⁵ This provides them reasonable notice of the request to transport the respondent detained immigrant parent to court for a court case involving the immigrant's child(ren).
- The ICE POC may give you the following two options:

⁵ To find the ICE Parental Directive POC in your area, see Migration and Child Welfare National Network, *Fact Sheet: ICE Points of Contact for Implementation of the Parental Interest Directive* (April 2014), available at: <http://research.jacsw.uic.edu/icwnn/files/2014/04/ICE-Points-of-Contact1.pdf>

- If the court is “located within a reasonable driving location of the detention facility” and “transportation and escort of the detained” respondent parent “would not be unduly burdensome” and does not pose “any security and/or public safety concerns,” the Field Office Director of the detention facility can arrange for the defendant to attend in-court proceedings.⁶
- If the above criteria are not met and it is not feasible for the detention center to transport the defendant, attendance via “video or standard teleconferencing” may be arranged, if the court has this technology available.⁷

b. How to get a detained immigrant victim or immigrant parent client to a family court proceeding

If your client is an immigrant victim of domestic violence, sexual assault, stalking, dating violence, human trafficking or other crime⁸ or is an

⁶ *Id.* at 4 § 5.4(1).

⁷ *Id.* at 4 § 5.4(2). Check with the court before contacting the POC to see whether video or standard teleconferencing is available and seek approval from the judge to use such technology in future proceedings.

⁸ If your client is an immigrant crime victim or witness who has been detained, you should also advocate for the client’s release from detention using this DHS policy: Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, U.S. Department of Homeland Security, to All Field Office Directors, All Special Agents in Charge, & All Chief Counsel, *Prosecutorial Discretion: Certain Victims, Witnesses and Plaintiffs* (June 17, 2011), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/Morton-CertainVictimsWitnessesandPlaintiffs-Memo-06-17-2011.pdf/view>. If your client has filed a VAWA, T or U visa immigration case and is detained, you should advocate for release from detention using the DHS Broadcast Message on New 384 Class of Admission Code (December 21, 2010), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/message-to-DHS-384-COA-Final-12.21.10.pdf/view>. If your client is the primary caretaker of a child or has a U.S. citizen or lawful permanent resident child you should advocate for your client’s release from detention using this DHS Policy: Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, U.S. Department of Homeland Security, to All Field Office Directors, All Special Agents in Charge, & All Chief Counsel, U.S. Immigration and Customs Enforcement, U.S. Department of Homeland Security, *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: <http://niwaplibrary.wcl.american.edu/reference/additional->

immigrant parent who has been placed in temporary or long-term detention, you should:

- Request the judge to include a requirement that your client be physically present at all proceedings related to the case in a court order that the judge issues. The court order should include language about the relationship between the child(ren) and the detained immigrant victim or parent and the direct interest the detained immigrant victim or parent has in the court proceeding.
 - Send the order to the ICE POC in your area and work with them to secure transport to or virtual participation in court proceedings of your client.
- c. What if the immigrant victim is *pro se*?

If you are an advocate, therapist, social worker, police officer or other non-lawyer professional working with an immigrant victim who is *pro se* in the family court proceedings, you should do the following:

- If the victim/parent is the person who is detained, help the victim/parent obtain legal representation in the family court case.⁹
- If the victim/parent is detained and is unable to expeditiously obtain counsel, inform the court about the need to issue a court order requiring that the victim be present in court for all proceedings related to the case. The court order should include language about the relationship between the child(ren) and the detained immigrant victim or parent and the direct interest the detained immigrant victim or parent has in the court proceeding.
- If the victim/parent is involved in a family court case involving a child and the opposing party in the case is in immigration detention, provide the *pro se* victim/parent

[materials/immigration/enforcement-detention-and-criminal-justice/government-documents/Morton-6.17.11prosecutorial-discretion-memo.pdf/view](http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/Morton-6.17.11prosecutorial-discretion-memo.pdf/view)

⁹ To identify free or low cost legal assistance programs in your state with expertise in working with immigrant crime victims, please visit the National Directory of Programs with Experience Serving Immigrant Victims, available at: <http://niwaplibrary.wcl.american.edu/reference/service-providers-directory>. The detained immigrant victim’s or parent’s consulate can be an excellent source of legal representation and support for victims in detention and best practices call for notifying a detained immigrant parent’s consulate as early as possible so that the parent can take advantage of the full range of services the consulate can offer.

with the information they will need to ask the judge to include the provision that the detained defendant be physically present at all related proceedings in a court order and tell the *pro se* victim/parent that they will need to send the order to the ICE Parental Directive POC in your area.

II. Judges

Judges sitting in family courts will encounter cases in which the judge or court staff will be the first to identify the fact that a parent, legal guardian, or other person with a direct interest in a case before the court involving custody of children is in immigration detention.¹⁰ When a party, with an interest in a child's care, before the court is in immigration detention, the court can take the following steps to have the detained immigrant brought to court to participate in court proceedings involving children, using the ICE Parental Interests Directive.

- Issue a court order requiring the detained parent or legal guardian to be physically present at any proceedings related to the case.
 - Include in the court order a description about the
 - relationship between the child(ren) and the detained immigrant; and
 - direct interest the detained immigrant has in the court proceeding involving the children.
 - Including these provisions in the court's order will help ensure that the ICE POC and/or the Field Office Director will work with detention center personnel to arrange transportation of the detained party to the court for appearances and hearings involving children over which the court is presiding.
- Direct counsel for the detained immigrant to send a copy of the court order to your local ICE POC,¹¹ to provide them reasonable notice of the request to transport the defendant detained immigrant parent to court for a court case involving the immigrant's child(ren).
 - If the detained immigrant parent is unrepresented, the judge's court staff can provide a copy of the court's order to the ICE POC.
 - If the court is "located within a reasonable driving location of the detention facility" and "transportation and escort of the detained" defendant parent "would not be unduly burdensome" and does not pose "any security and/or public safety concerns," the Field Office Director of the detention facility can arrange for the defendant to attend in-court proceedings.¹²
 - If transportation to the court is not feasible for the reasons listed above, and the court has video or standard teleconferencing technology available, the court can work with the POC to secure the detained immigrant's attendance via "video or standard teleconferencing"¹³
 - a. What to do if one of the parties to the case is detained and *pro se*

If a party to the case before the court is detained and is *pro se* and, therefore, does not have an attorney or an advocate to request an order requiring physical presence, the court should issue an order requiring the detained immigrant's appearance at proceedings before the court involving children and the order should include the information outlined in the previous section. Court staff or the judge's law clerk should contact the ICE POC for the jurisdiction the court is located in and work with the POC to arrange for the detained immigrant's appearance either in person or through

¹⁰ To determine whether an immigrant parent is in ICE detention and to locate where the immigrant is detained, use the ICE detainee locator <https://locator.ice.gov/odls/homePage.do>. It is important to note that if the person you are trying to locate is an immigrant crime victim, the victim may not appear in the detainee locator system although they are detained, because they may have opted out of the locator system for safety reasons or to prevent stalking. Immigrant victims who opt out can use the ICE telephone system to contact family members, their advocates and attorneys. DHS Informational Brochure on Detainees Calls Home available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/tools/DCH-brochure-calls-home.pdf/view>

¹¹ To find the ICE POC in your area, see Migration and Child Welfare National Network, *Fact Sheet: ICE Points of Contact for Implementation of the Parental Interest Directive* (April 2014), available at: <http://research.jacsw.uic.edu/icwnn/files/2014/04/ICE-Points-of-Contact1.pdf>

¹² *Id.* at 4 § 5.4(1).

¹³ *Id.* at 4 § 5.4(2). Check with the court before contacting the Parental Directive POC to see whether video or standard teleconferencing is available and seek approval from the judge to use such technology in future proceedings.

video and standard teleconferencing, if transportation is not available or is not feasible.

b. Criminal Court: What to do if the defendant in a domestic violence case is detained and there are no children involved in the case

The ICE Parental Interests Directive does not apply in a criminal case where there are no custody issues or children of the crime victim or the defendant involved. However, courts and judges need to be able to secure attendance of criminal defendants in criminal court proceedings for the criminal case to be adjudicated. Both DHS and the courts have an interest in adjudication of and sentencing in criminal cases. Defendants who are convicted and sentenced are often high priorities for DHS removal once the immigrant criminal defendant has completed serving any jail sentence imposed in the criminal case. DHS will put a detainer on immigrants with criminal convictions who will be released into ICE custody when their jail sentence is completed.

To secure attendance of a criminal defendant, the judge's clerk or court staff should communicate with the ICE Field Office Director in their area. The Director "has broad discretion and several legal mechanisms available to him/her that could help facilitate the release of detained [defendants]."¹⁴ These tools include:

- Release the detained defendant to the custody of state or local authorities per a writ of the court or
- Exercise prosecutorial discretion by granting a request for deferred action in the detained defendant's immigration case.¹⁵

When the court seeks to have ICE transport a criminal defendant to court to participate in a criminal court proceeding, the judge should issue a writ. The court can issue a writ on its own or at the request of the prosecutor in the case before the court. The writ is an essential component to any request made to ICE regarding the release and transport of a detained immigrant defendant into the

custody of local or state law enforcement for the purposes of a criminal case.

It should be noted that ICE is not bound by a writ issued by a state court; however, such writs are "generally honored."¹⁶ The judge's law clerk or court staff should contact the Assistant Field Office Director that is assigned as the field liaison at the field office where the defendant is detained to file the writ requesting transfer of the defendant to state or local police custody so that the defendant can be present in the criminal case brought by the state against the defendant.¹⁷

The writ should include¹⁸:

- The specific date(s) of the proceedings for which the defendant must be physically present;
- Exact reasons why the detained defendant has to be physically present for these proceedings; and
- A point of contact at the local or state law enforcement agency that will take custody of the detained defendant for the purposes of the criminal domestic violence case.

III. Implementation Issues

If you requested assistance from an ICE POC, NIWAP is interested in your experience. Please contact our technical assistance line at (202) 274-4457 or email us at info@niwap.org with your stories of successful or unsuccessful implementation of the ICE Parental Interests Directive in getting a detained party to court proceedings.

¹⁴ U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, TOOL KIT FOR PROSECUTORS 8 (April 2011), available at: <https://www.ice.gov/doclib/about/offices/oslrc/pdf/tool-kit-for-prosecutors.pdf>

¹⁵ *Id.* at 8-9 (detailed information about both options and request procedures are discussed in this section of the tool kit).

¹⁶ *Id.* at 9.

¹⁷ For a list of names and contact information for field liaisons, listed by field office, *see* U.S. Immigration and Customs Enforcement, Enforcement and Removal Operations Contacts ("Contact Field Offices"), available at: <https://www.ice.gov/contact/ero/>

¹⁸ For specific instructions and information about legal bars to release in this circumstance, *see* ICE Tool Kit at 10-11.