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Countering Abuser's Attempts To Raise Immigration Status of the Victim in Custody Cases¹²

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Chapter Approach

This chapter is designed to help family lawyers prepare to counter attempts by abusers to raise immigration status in custody cases. Attorneys are encouraged to use the information in this chapter to educate judges hearing custody cases about the fact that they should not consider immigration status in making custody decisions in the best interests of children. The contents of this chapter are written in a format that could be

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² In this Manual, the term "victim" has been chosen over the term "survivor" because it is the term used in the criminal justice system and in most civil settings that provide aid and assistance to those who suffer from domestic violence and sexual assault. Because this Manual is a guide for attorneys and advocates who are negotiating in these systems with their clients, using the term "victim" allows for easier and consistent language during justice system interactions. Likewise, The Violence Against Women Act's (VAWA) protections and help for victims, including the immigration protections are open to all victims without regard to the victim's gender identity. Although men, women, and people who do not identify as either men or women can all be victims of domestic violence and sexual assault, in the overwhelming majority of cases the perpetrator identifies as a man and the victim identifies as a woman. Therefore we use "he" in this Manual to refer to the perpetrator and "she" is used to refer to the victim. Lastly, VAWA 2013 expanded the definition of underserved populations to include sexual orientation and gender identity and added non-discrimination protections that bar discrimination based on sex, sexual orientation and gender identity. The definition of gender identity used by VAWA is the same definition as applies for federal hate crimes – "actual or perceived gender-related characteristics." On June 26, 2013, the U.S. Supreme Court struck down a provision of the Defense of Marriage Act (DOMA) (*United States v. Windsor*, 12-307 WL 3196928). The impact of this decision is that, as a matter of federal law, all marriages performed in the United States will be valid without regard to whether the marriage is between a man and a woman, two men, or two women. Following the Supreme Court decision, federal government agencies, including the U.S. Department of Homeland Security (DHS), have begun the implementation of this ruling as it applies to each federal agency. DHS has begun granting immigration visa petitions filed by same-sex married couples in the same manner as ones filed by heterosexual married couples (<http://www.dhs.gov/topic/implementation-supreme-court-ruling-defense-marriage-act>). As a result of these laws VAWA self-petitioning is now available to same-sex married couples (this includes protections for all spouses without regard to their gender, gender identity - including transgender individuals – or sexual orientation) including particularly:

- victims of battering or extreme cruelty perpetrated by a U.S. citizen or lawful permanent resident spouse against a same sex partner in the marriage is eligible to file a VAWA self-petition; and
- an immigrant child who is a victim of child abuse perpetrated by their U.S. citizen or lawful permanent resident step-parent is also eligible when the child's immigrant parent is married to a U.S. citizen or lawful permanent resident spouse without regard to the spouse's gender

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incorporated into a bench brief to a trial court in a custody matter, or that could be included in materials for educating judges.³ Many attorneys who have used the approach described in this chapter have successfully won custody of children for immigration victims of domestic violence. However, attorneys working with immigrant victims of domestic violence may encounter judges who are not open to listening to the arguments discussed here. Some judges may have strong negative feelings about immigrants that will greatly influence their decision-making. Other judges may not believe that domestic violence is a serious matter, or that domestic violence should affect the perpetrator's ability to gain custody of his children.

It is important for attorneys litigating custody cases on behalf of battered immigrants to learn how the judges they will appear before approach cases of domestic violence or cases involving immigrant victims so that they can prepare to respond to issues that the judge may raise. It will also be important when attorneys anticipate problems with a particular judge, to present, as part of the case and as part of the bench brief filed with the judge, evidence on the effect that domestic violence has on children. Attorneys also should consider presenting expert testimony, both on the issue of domestic violence and its effects on children, and to counter the abuser's attempts to raise immigration status. Expert testimony by a local immigration attorney can provide the court with factual information about how the U.S. Citizenship and Immigration Services (USCIS)⁴ operates locally in the area and on the family-based immigration process and remedies for immigrant victims under the Violence Against Women Act (VAWA).

Since abusers and their counsel often raise issues of immigration status during trial, it is recommended that attorneys representing immigrant victims in custody cases put together packets of materials they can use to counter these arguments ahead of time. These materials can be used as needed to submit as evidence at a hearing or trial, to make arguments on motions before the judge or to use as a basis for developing a bench brief for the judge. These materials could include:

- A copy of the immigrant children's chapter of the ABA report on the Impact of Domestic Violence on Children;
- An overview of VAWA and U-visa immigration relief;
- Information and articles on immigration related abuse and the dynamics of domestic violence experienced by immigrant victims.

Overview

Every day, non-profit organizations, non-governmental agencies, national, local, and state governments, and judicial systems confront the adverse effects of domestic violence. Often, immigrant women are victims. Legislators crafting the Violence Against Women Act of 1994,⁵ found high levels of abuse in households where citizens and lawful permanent residents were married to immigrant spouses who were dependent on them for attaining lawful immigration status.⁶ As a result, Congress clearly stated that one of the purposes of enacting VAWA was to allow "battered immigrant women to leave their batterers without fearing deportation."⁷

³ Persons interested in using the material contained in this chapter for these purposes should contact the National Immigrant Women's Advocacy Project (NIWAP) for technical assistance (202) 274-4457. This manual is available electronically at <http://niwaplibrary.wcl.american.edu/reference/manuals/domestic-violence-family-violence>. NIWAP only asks that we be given credit for use of the materials. For more information on this topic, visit <http://niwaplibrary.wcl.american.edu/family-law-for-immigrants/custody>.

⁴ The agency formerly known as Immigration and Naturalization Services (INS) and later as the Bureau of Citizenship and Immigration Services (BCIS) under the administration of the Department of Homeland Security was recently renamed the U.S. Citizenship and Immigration Services (USCIS). USCIS has three components: USCIS for affirmative applications including VAWA self-petitions, U.S. Immigration and Customs and Enforcement (ICE), the enforcement arm, and Bureau of Customs and Border Protection (CBP). We will be referring to the appropriate component throughout this document.

⁵ Pub. L. No. 103-322, Title IV, 108 Stat. 1902 (codified in scattered sections of 8 U.S.C.) [hereinafter VAWA].

⁶ H.R. REP. NO. 103-395, at 25 (1993); S. REP. NO. 101-545, at 38-39 (1990); see generally, Robin L. Campo et al., *Family Violence Prevention Fund et al., Untold Stories: Cases Documenting Abuse by U.S. Citizens and Lawful Residents on Immigrant Spouses* (1993).

⁷ H.R. REP. NO. 103-395, at 26-7 (1993).

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When children are concerned, however, immigrant victims may be unwilling to leave the abuser and access VAWA protections. Many battered immigrants are reluctant to leave abusive relationships for fear of losing their children. Fear of losing custody of or access to children is a significant factor that keeps battered women from leaving their abusers or seeking help to stop the abuse.⁸ This fear is substantiated by the fact that, in many child custody cases, abusers of immigrant victims raise the issue of the victim's lack of legal immigration status in order to tip the custody scales in their favor. Abusers use child custody litigation as a vehicle to maintain control over the victims.⁹

While abusers often use victims' lack of legal immigration status in custody cases, it is crucial to highlight that victims are often undocumented because their abusers have refused to file immigration papers for them. The abuser's refusal is precisely a tool of power and control over the victim, and becomes a key part of the pattern of abuse. In other instances, the victim's access to a legal immigration visa is based on her marriage to a work-based temporary visa holder who controls whether she can legally remain in the United States.

Abusers keep victims undocumented, without legal status, or cause revocation of legal status previously granted, and then use the victims' lack of legal status, or lack of permanent legal status, and threats of deportation to keep them from calling the police about the abuse, seeking a protection order to stop the abuse, or talking to anyone about the abuse. Fathers who abuse their children's mother are twice as likely to seek sole physical custody than are non-violent fathers.¹⁰ Family courts should be hesitant to validate an abuser's custody arguments that he should be granted custody because he is a citizen or has legal immigration status and the victim does not. To allow such arguments to prevail perpetuates the abuser's control over the victim and dependent children and enhances danger to the children rather than offering them protection.¹¹

ABA APPROACH

Judicial actions affecting the care of children are frequently determined by the "best interests of the child" standard.¹² In applying this "best interests" standard, an adjudicator weighs a variety of factors to make a custody determination.¹³ "All states recognize [that] the welfare or 'best-interests' of the child . . . [is the] paramount concern" in any custody decision.¹⁴ Additionally, the Uniform Marriage and Divorce Act¹⁵ defines a child's best interest as encompassing the following factors:

1. The wishes of the child's parent or parents as to his or her custody;
2. The wishes of the child as to his or her custodian;
3. The interaction and interrelationship of the child with his or her parent or parents, his or her siblings and any other person who may significantly affect the child's best interest;
4. The child's adjustment to his or her home, school and community;
5. The mental and physical health of all individuals involved.¹⁶

⁸ Mary Anne Dutton et al., *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL'Y 245, 301 (2000).

⁹ Daniel G. Saunders, *Child Custody Decisions in Families Experiencing Woman Abuse*, 39 SOCIAL WORK 51, 53 (1994); Barbara Hart, *Family Violence and Custody Orders*, 43 JUV. & FAM. CT. J. 29, 33-34 (1992).

¹⁰ AMERICAN PSYCHOLOGICAL ASSOCIATION, *VIOLENCE AND THE FAMILY: REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE* (1996) [hereinafter APA REPORT].

¹¹ NATIONAL COALITION AGAINST DOMESTIC VIOLENCE, *MYTHS AND FACTS REGARDING DOMESTIC VIOLENCE AND CHILD CUSTODY DISPUTES* (Aug. 1997).

¹² *Id.* at 13.

¹³ Naomi Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1071 (1991).

¹⁴ Ramsay Laing Klaff, *The Tender Years Doctrine: A Defense*, 70 CAL. L. REV. 335 (1982).

¹⁵ UNIFORM MARRIAGE AND DIVORCE ACT § 402 (amended 1970 and 1973), 9 U.L.A. 561 (1998).

¹⁶ National Coalition Against Domestic Violence, *Myths and Facts Regarding Domestic Violence and Child Custody Disputes*, August 1997; Naomi Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1071 (1991); Elizabeth Scott & Robert E. Scott, *Marriage as a Relational Contract*, 84 VA. L. REV. 1225, 1234-35 (1998) (stating that the Uniform Marriage and Divorce Act is the model for several states' custody statutes).

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Most, but not all, states require “that [the] courts consider domestic violence when determining the best interest of a child.”¹⁷ However, inclusion of domestic violence as only one factor to be considered in custody decisions is not proving to be enough to protect victims of domestic violence and their children.¹⁸ In the vast majority of cases, domestic violence is either deemed irrelevant to custody decisions or is not taken seriously.¹⁹ The existence of domestic violence should be proof enough that at least one parent has taken actions that threaten the best interests of the child.²⁰ Courts must not separate issues of abuse from custody. Domestic violence must be recognized as harmful to the entire family.²¹ Limiting the courts’ focus on actions that directly affect the child prevents courts from considering how abuse of a parent also harms the children.²² Since domestic violence has uncontrovertibly injurious effects on children, shifting the custodial standard to require examination of domestic violence in the parents’ relationship is imperative.²³ For these reasons, the ABA has taken the position that any history of abuse toward an adult in the home of the parent seeking custody must be considered the primary factor in applying the “best interests” standard.²⁴

In 1994, the American Bar Association’s Center for Children and the Law issued a report²⁵ that discussed the negative effects children suffer in households rife with domestic violence. The ABA specifically recognized that battered immigrant women and their children face distinct problems.²⁶ The report found that abusers whose victims are immigrant parents often use threats of deportation to shift the focus of family court proceedings away from their violent acts.²⁷ Where abusers are allowed to successfully raise immigration status in custody cases, the best interests of the child are compromised when this action results in the court placing the child in the custody of the abusive parent.²⁸ In this arrangement, it is the child who suffers:

Batterers whose victims are immigrant parents use threats of deportation to avoid criminal prosecution for battering and to shift the focus of family court proceedings away from their violent act...[w]hen the judicial system condones these tactics, children suffer...[p]arties should not be able to raise, and courts should not consider, immigration status of domestic violence victims and their children in civil protection order, custody, divorce, or child support proceedings... [t]his... will ensure that children of domestic violence victims will benefit from... laws (like presumptions against awarding custody or unsupervised visitation to batterers) in the same manner as all other children.²⁹

Mandating consideration of domestic violence as merely one of numerous factors does not ensure understanding of the impact of abuse on the victim and on the children.³⁰ Studies have shown that merely witnessing domestic violence has a severe effect on children.³¹ "Socially, children who witness domestic violence tend to choose either passive or aggressive behavior to resolve interpersonal conflicts. They exhibit

¹⁷ The Family Violence Project of the National Council of Juvenile and Family Court Judges, *Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice*, 29 FAM. L. Q. 197, 201 (1995). These states include: Alabama (ALA. CODE § 30-3-131), Alaska, Arizona, California, Colorado, Delaware, District of Columbia, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi (MISS. CODE ANN. § 93-5-24(9)(a)(i)), Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York (N.Y. DOM. REL. LAW § 240(1)(a)), North Carolina (N.C. GEN. STAT. § 50-13.2(a)), North Dakota, Ohio, Oklahoma, Oregon (OR. REV. STAT. § 107.137(1)(d)), Pennsylvania, Rhode Island, South Dakota (S.D. CODIFIED LAWS § 25-4-45.5), Texas, Virginia, Washington, Wisconsin, and Wyoming.

¹⁸ Molly A. Brown, *Child Custody In Cases Involving Domestic Violence: Is It Really In The "Best Interests" Of Children To Have Unrestricted Contact With Their Mother's Abusers?*, 57 J. MO. B. 302, 305 (2001).

¹⁹ Naomi Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1072 (1991).

²⁰ Brown. at 305.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ HOWARD DAVIDSON, THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN: A REPORT TO THE PRESIDENT OF THE AMERICAN BAR ASSOCIATION (Aug. 1994).

²⁵ *Id.* at 13.

²⁶ *Id.* at 19.

²⁷ *Id.* at 20.

²⁸ *Id.*

²⁹ *Id.*

³⁰ Naomi Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1072-74 (1991).

³¹ See Patricia K. Susi, *The Forgotten Victims of Domestic Violence*, 54 J. MO. B. 231-32 (1998).

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shyness, depression, anxiety, low self-esteem and feelings of shame, guilt, and confusion as a result of their experiences." Additionally, children who witness family violence are significantly more likely to lag behind their peers in all areas of development, including behavioral, emotional and cognitive.³² Children living in households with domestic violence are more likely to become direct victims of physical abuse.³³ Fifty-seven percent of children under the age of 12 who are murdered, are killed by a parent.³⁴ Domestically violent households skew children's conceptions of healthy families, thus perpetuating violence in their future lives.³⁵ Many adults exposed to violence during childhood become violent in their own relationships.³⁶ This can be seen particularly with young boys. A boy's exposure to his father abusing his mother is the strongest risk factor for transmitting violent behavior from one generation to the next.³⁷ Numerous adolescent boys incarcerated for violent crimes and exposed to family violence also believed that "acting aggressively enhances one's reputation or self-image."³⁸ This risk is compounded when the child himself is abused.

A child's best interests are preserved when the child is in a non-abusive household with a non-abusive parent. Offering the non-abusive parent protection and support for her attaining legal custody so that she can remove her children from an abusive home is the most successful manner in which to alleviate the long-lasting effects of domestic violence on children.³⁹ Raising the immigration status of the victim in a custody determination flies in the face of the "best interests" standard because it claims that it is better for children to live with an abusive person rather than with a non-abusive parent who may lack legal immigration status or permanent legal immigration status. In effect, it places children in the hands of the parent who has created the abusive household, and who in many cases has been responsible for assuring that the non-abusive immigrant parent remains without legal immigration status, as a result of abusive behavior. Accordingly, a non-abusive parent's immigration status should not be raised nor should it be considered pertinent in custody, protection order, divorce, or other family law proceedings.⁴⁰ In order to ensure fairness in our legal system, courts must guarantee that children of immigrant domestic violence victims receive equal treatment and legal rights to a safe household that all children receive.⁴¹

IMMIGRATION-RELATED ABUSE AND FEAR OF LOSING CHILDREN: KEY POWER AND CONTROL TOOLS

Historically, immigration laws have made legal permanent residents and citizens responsible for filing immigration papers on behalf of their spouses and children. In non-abusive relationships, the citizen or lawful permanent resident spouse would file immigration papers, either before or shortly after the marriage, requesting that their spouse be granted lawful permanent residence.⁴² If the couple has been married for less than two years at the time they attend their USCIS or consular interview, the immigrant spouse is granted conditional residence.⁴³ At the end of a two-year period following receipt of conditional residence, the couple must file a "joint petition" to remove the condition, or the immigrant spouse must file for a waiver of the joint petition, otherwise the immigrant spouse's lawful status terminates.⁴⁴ The three available waivers are a battered spouse waiver, an extreme hardship waiver and a waiver based on divorce. After the joint petition or waiver has been granted, the immigrant spouse's permanent residence cannot lapse unless she commits an immigration or criminal violation and is ordered removed. If the couple has been married longer than two years at the time of the interview, then the immigrant spouse will receive unconditional lawful permanent residence.

³² Jeffrey Edleson, *Problems Associated with Children's Witnessing of Domestic Violence*, Violence Against Women Online Resources (Apr. 1997), at <http://www.vaw.umn.edu/documents/vawnet/witness/witness.html> (last revised Apr. 1999).

³³ *Id.*

³⁴ *Id.*

³⁵ VIOLENCE POLICY CENTER, *VIOLENCE BEGETS MORE VIOLENCE* (May 1996).

³⁶ See APA REPORT.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Susan Schecter & Jeffrey L. Edleson, *Domestic Violence and Children: Creating a Public Response*, developed for the Open Society Institute's Center on Crime, Communities & Culture, pp. 5-6 (2000).

⁴⁰ HOWARD DAVIDSON, *THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN: A REPORT TO THE PRESIDENT OF THE AMERICAN BAR ASSOCIATION* 20 (Aug.1994).

⁴¹ *Id.*

⁴² See APA REPORT.

⁴³ See Immigration and Nationality Act § 216, 8 U.S.C. § 1186a.

⁴⁴ *Id.* § 1186a(c)(1)(A).

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This procedure from USCIS places an enormous amount of control in the hands of legal permanent residents and citizens over the immigration status of their spouses. The citizen or permanent resident spouse can withdraw the petition filed with USCIS on the immigrant spouse's behalf at any time. In addition, once the immigrant spouse receives conditional residence, the citizen or legal permanent resident spouse can refuse to sign the required joint petition for removal of the condition on the victim's residence, resulting in the potential denial of lawful permanent residence for the immigrant spouse. When abusive citizen or permanent resident visa-holding spouses are granted so much control over the immigration process, an abuser's control over his spouse is strengthened.⁴⁵ Congress has recognized that there is a clear connection between control over immigration status and domestic violence.⁴⁶

Abusers of immigrant women use immigration-related abuse as a powerful form of emotional abuse in order to trap battered immigrant women and their children in these dangerous relationships.⁴⁷ Evidence of immigration-related abuse might include: threats of deportation, threats to turn her into USCIS if she tells anyone about the abuse, refusal to file or threats to withdraw immigration papers for the victim or her children, or threats to raise her immigration status in a custody, protection order or divorce case.⁴⁸

Immigration-related abuse is closely intertwined with some of the most serious and harmful forms of emotional abuse, including intimidation, isolation, economic abuse, and employment-related abuse.⁴⁹ These pernicious forms of abuse cut off immigrant battered women from help, support, and a way out of the abusive relationship.⁵⁰ Threatening an immigrant victim that the police will turn her into USCIS if she calls the police for help isolates the immigrant victim and her children from police and justice system protection and shields the abuser from prosecution for his violence. An abuser's refusal to file immigration papers based on the marriage, or threats to withdraw papers if the victim does not comply with the abuser's demands, prevent immigrant victims from attaining legal immigration status and work authorization. Stalking and harassing a temporary worker at her workplace so that she loses her only form of USCIS-authorized employment are both employment-related and immigration-related abuse. Immigrant victims have deep-seated fears of deportation. In a survey conducted among Latina and Filipina immigrants, 64% of Latina and 57% of Filipina immigrant victims stated that fear of deportation was their primary reason for not reporting abuse.⁵¹

Research has found abuse rates to be significantly higher among immigrant women who have been married or formerly married (59.5%) than for the general population of immigrant women (49.3%).⁵² For undocumented immigrant Latinas whose spouses or former spouses are citizens or lawful permanent residents, the battering rate may rise as high as 67%.⁵³ Among abusive citizen or lawful permanent resident spouses who could file immigration papers for their immigrant spouse to attain legal immigration status based

⁴⁵ *Id.*

⁴⁶ "[T]he Battered Immigrant Women Protection Act of 2000. . . Title V continues the work of the Violence Against Women Act of 1994 ("VAWA") in removing obstacles inadvertently interposed by our immigration laws that may hinder or prevent battered immigrants from fleeing domestic violence safely and prosecuting their abusers by allowing an abusive citizen or lawful permanent resident spouse to blackmail the abused spouse through threats related to the abused spouse's immigration status. . . . VAWA 2000 addresses the residual immigration law obstacles standing in the path of battered immigrant spouses and children seeking to free themselves from abusive relationships that either had not come to the attention of the drafters of VAWA 1994 or have arisen since as a result of 1996 changes to immigration law." Violence Against Women Act of 2000 Section by Section Summary, 146 CONG. REC., S10,195 (daily ed. Oct. 11, 2000).

⁴⁷ Mary Anne Dutton et al., *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL'Y 245, 293 (2000).

⁴⁸ Leslye E. Orloff & Janice V. Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 AM. U.J. GENDER SOC. POL'Y & L. 95, 98-99 (2002).

⁴⁹ Giselle Aguilar Hass et al., *Lifetime Prevalence of Violence Against Latina Immigrants: Legal and Policy Implications*, in DOMESTIC VIOLENCE: GLOBAL PERSPECTIVES, 103-13 (2000).

⁵⁰ *Id.*

⁵¹ Michelle J. Anderson, *A License to Abuse: The Impact of Conditional Status on Female Immigrants*, 102 YALE L.J. 1401, 1421 (1993); See also CHRIS HOGELAND AND KAREN ROSEN, COALITION FOR IMMIGRANT AND REFUGEE RIGHTS AND SERVICES, DREAMS LOST, DREAMS FOUND: UNDOCUMENTED WOMEN IN THE LAND OF OPPORTUNITY (1991); Tien-Li Loke, *Trapped In Domestic Violence: The Impact Of United States Immigration Laws On Battered Immigrant Women*, 6 B.U. PUB. INT. L.J. 589, 591 (1997).

⁵² Hass at 101-03.

⁵³ Domestic Violence Needs and Assessment Survey Among Immigrant Women conducted between 1992 and 1995 (unpublished data, on file with Legal Momentum).

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upon the marriage, 72.3% never file such immigration papers. The 27.7% who do file delay filing for an average of almost four years, holding the abused immigrant spouse hostage in that relationship during that time.⁵⁴

Further, immigration-related abuse almost always exists when physical or sexual abuse is also present.⁵⁵ Immigrant women who were victims of physical or sexual abuse or both suffer from immigration-related abuse, including their abusers' threats of deportation, threats of refusal to file immigration papers, and threats to call the U.S. Immigration and Customs Enforcement (ICE), at over seven-times the rate experienced by psychologically abused immigrant women.⁵⁶ When immigration-related abuse occurs in relationships that do not include physical or sexual abuse, this factor may be a predictor that the lethality of the relationship's violence is likely to escalate.⁵⁷

Abusers are aware of the connection between fear of deportation and losing child custody. Abusers manipulate those fears effectively to keep their victims from leaving the relationship. Courts should consider it significant that 48.2% of battered immigrant women who reported still living in an abusive relationship cited the fear of losing child custody as an obstacle to leaving that relationship.

Many immigrant women are willing to suffer for the sake of family preservation because they fear that leaving their husbands will result in losing their children.⁵⁸ If they leave, and their leaving results in their abuser's securing legal custody of the children because of his superior immigration status, who will protect the children from a father's violence? Often, battered immigrants stay because they believe that leaving means losing custody of and access to their children.

Generally, immigrant women are cultural, racial, and linguistic minorities in the United States and, as such, tend to lack the family support network they would have had if in their countries of origin.⁵⁹ This lack of a support system and cultural community unrelated to their abusers undermines their ability to leave their abusers and forces them to try alternative strategies for protecting themselves and their children from domestic violence.⁶⁰ The following stories, compiled by victims' advocates and attorneys, demonstrate that a battered immigrant woman's fears are real and deep-seated.

Julia came to the United States from Mexico. Since the beginning of their marriage, her husband Luis, a legal permanent resident, physically abused her. Even after Julia left Luis, he continued to harass and threaten her, constantly appearing at her apartment to say he would take away the children and have her deported. Once, Luis punched Julia in the chest and threw her into the street, in front of her children. Although Julia has filed a protection order against Luis, he has made it clear that he wants sole custody of the children. Luis has previously violated court orders by taking the children away from Julia. Julia needs to become a lawful permanent resident, so that she can protect her children from Luis' violence. She cannot return to Mexico because Luis could easily follow her to Mexico, where there would be no consequences for his abuse. If Julia is forced to return to Mexico, leaving the children in the U.S. would jeopardize their safety as well.⁶¹

Nancy and Jesus met in Mexico in 1969, and were married two years later. Eight days after they were married later, Jesus began physically abusing Nancy. When Nancy was three months pregnant, Jesus left her

⁵⁴ Mary Anne Dutton et al., *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL'Y 245, 259 (2000) (noting that 72.3% of citizens or permanent residents that batter their spouses never file immigration papers while 27.7% file the papers after approximately four years).

⁵⁵ Hass at 106-09.

⁵⁶ Dutton at 292.

⁵⁷ Hass at 109; Leslye E. Orloff & Janice V. Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 AM. U.J. GENDER SOC. POL'Y & L. 95, 111 (2002).

⁵⁸ Felicia E. Franco, *Unconditional Safety for Conditional Immigrant Women*, 11 BERKELEY WOMEN'S L.J. 99, 136 (1996).

⁵⁹ *Id.* at 124.

⁶⁰ Susan Schecter & Jeffrey L. Edleson, *Domestic Violence and Children: Creating a Public Response*, developed for the Open Society Institute's Center on Crime, Communities & Culture, p. 5 (2000) (noting that battered women with children must protect themselves from physical danger, risk homelessness and poverty, expose themselves to different and dangerous physical surroundings, face loss of health insurance, and grapple with disrupting their children's lives).

⁶¹ LESLYE ORLOFF ET AL., NEW DANGERS FOR BATTERED IMMIGRANTS: THE UNTOLD EFFECTS OF THE DEMISE OF 245(i) 44 (July 20, 2000), available at <http://www.house.gov/judiciary/orlo0720.htm>.

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in Mexico so he could work in the United States. Jesus stayed in the U.S. for most of the year, returning to visit Nancy once a year for a month or so. Every time he returned, Jesus would beat Nancy. Once, he beat her so severely that she lost feeling in her face. Nancy and Jesus continued to live in this manner for years until Nancy asked Jesus to submit petitions for herself and their children. By this time, they had had five children together. The family moved to Illinois together and the beatings continued. Finally, Nancy obtained a protection order against Jesus. Jesus continued harassing his family in violation of the protective order. Nancy's oldest son is now in high school and suffers from severe depression as a result of the constant violence that took place in their home. The other children exhibit behavioral problems and are in need of long-term counseling. Most of Nancy's relatives live in the United States. If she and her children were forced to return to Mexico, Jesus could continue to harass and abuse them. Additionally, Nancy's children would not have access to the counseling services they desperately need as a result of their father's abusive behavior.⁶²

These stories illustrate how factors such as financial dependence on the batterer, lack of proficiency in the English language, fear of losing custody of children, and lack of opportunities based on employment skills, assist the abuser in utilizing immigration-related threats to inhibit a victim from seeking help. Many immigrant women are unaware that legal recourse is available to help immigrant victims of domestic violence attain legal immigration status.⁶³ This lack of awareness is due chiefly to incorrect or insufficient information provided to battered immigrant women by their abusers.⁶⁴ Legal strategies and law-enforcement services provide many women "a means to escape, avoid, and stop the violence and abuse against them."⁶⁵ However, calling the police, seeking legal services, and obtaining a protection order all require large amounts of courage, especially by undocumented immigrants who must overcome systemic obstacles, including lack of knowledge of the protections available to them.

Battered immigrant women unfamiliar with the ways of a new country may not even realize that domestic violence is against the law in the United States.⁶⁶ These women are often reluctant to access the American justice system because they do not believe the courts or the police will help them.⁶⁷ If a battered immigrant woman is from a country that views the police as repressive, it is only natural that she fears the police.⁶⁸ Additionally, her experiences with the legal system in her native country may make her hesitant to turn to the judicial system for help.⁶⁹ In countries where the judiciary is an arm of a repressive government and does not function independently, those who prevail in court are the people with the most money or the strongest ties to the government.⁷⁰ Against this background, battered immigrant women may have a hard time believing that the legal system will protect or help them.⁷¹

When the justice system allows the victim's immigration status to be raised as a factor in any case, immigrant victims of domestic violence are discouraged from seeking protection and from cooperating in criminal prosecutions of their abusers. These adverse effects, in turn, perpetuate the cycle of violence, a battered immigrant woman's isolation, and continued exposure of the immigrant victim's children to ongoing violence. Since immigration status of a spouse is not pertinent in cases involving child custody, divorce

⁶² *Id.* at 53.

⁶³ Violence Against Women Act of 2000, Title V of the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (see chapters on VAWA self-petitions, VAWA cancellation of removal, and U-visa protections).

⁶⁴ *Id.*

⁶⁵ Mary Anne Dutton et al., *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL'Y 245, 290 (2000).

⁶⁶ *Id.*

⁶⁷ UNITED STATES COMMISSION ON CIVIL RIGHTS, RACIAL AND ETHNIC TENSIONS IN AMERICAN COMMUNITIES: POVERTY, INEQUALITY, AND DISCRIMINATION, VOLUME I: THE MOUNT PLEASANT REPORT 75 (Jan. 1993) [hereinafter CIVIL RIGHTS REPORT].

⁶⁸ See H.R. REP. NO. 103-395, at 26 (1993).

⁶⁹ See CIVIL RIGHTS REPORT at 75; Leslye E. Orloff, Address at the American Medical Association National Conference on Family Violence: Health and Justice, Conference Proceedings (Mar. 11-13, 1994) [hereinafter Orloff Address].

⁷⁰ See National Immigrant Project of the National Lawyers Guild, *New Immigration Relief Under the Violence Against Women Act for Women and Children Suffering Abuse* 16 (1995); See also Orloff Address.

⁷¹ Tien-Li Loke, *Trapped In Domestic Violence: The Impact Of United States Immigration Laws On Battered Immigrant Women*, 6 B.U. PUB. INT. L.J. 589, 591 (1997)..

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proceedings, or the securing of a protection order, when introduced in custody cases, it is contrary to the best interests of the children.

An abuser's attempt to raise the other parent's immigration status, outside of the context of immigration proceedings,⁷² is evidence of on-going abuse. In light of the research demonstrating that immigration-related abuse coexists with or predicts escalation of physical or sexual abuse, abusers' attempts to raise immigration status in custody cases should be viewed by courts as corroborative evidence of abuse. Often, the reason a battered immigrant woman does not have legal status is because the abuser did not file immigration papers for her. Abusers will use the immigration process as a way to maintain his power and control. This tactic underscores the presence of abuse in the household and provides the court with additional evidence in favor of granting custody to the battered immigrant woman. Accordingly, in cases involving domestic violence, courts should carefully evaluate evidence of immigration status in the case as a component of the pattern of power and control in the abusive relationship. The non-abusive parent's immigration status should not be used to justify awarding custody to an abusive parent, betraying the children's best interests.⁷³

THE VIOLENCE AGAINST WOMEN ACT: THE HISTORY, SCOPE AND PURPOSE OF VAWA

Congress passed the Violence Against Women Act in 1994 following years of investigation into the serious domestic violence problem existing in the United States. Its legislative history reflects the serious, pervasive toll that domestic violence takes on society:

- At least 3 to 4 million women in the United States are abused by their husbands each year, and over sixty percent of victims are beaten while pregnant.⁷⁴
- One fifth of all reported aggravated assaults involving bodily injury have occurred in domestic situations.⁷⁵
- One third of domestic attacks are felony rapes, robberies or aggravated assaults. Of the remaining two thirds, involving simple assaults, almost one-half resulted in serious bodily injury.⁷⁶
- More than one of every six sexual assaults per week is committed by a family member.⁷⁷
- One third of all women who are murdered die at the hands of their husbands or boyfriends, and one million women seek medical attention each year for injuries caused by their male partners.⁷⁸

These statistics, relied on by Congress in formulating VAWA, actually underestimate the extent of the problem, as recent research indicates that between 50% to 80% of intimate partner abuse incidents go unreported.⁷⁹

Consistent with its purpose to remedy domestic violence, Congress amended the nation's immigration laws to address the distinct predicament faced by immigrant women who are caught in an abusive relationship.⁸⁰

⁷² Even in immigration proceedings, federal law has limited an abuser's ability to influence USCIS with regard to his spouse's immigration status. Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) of 1996 § 384, 8 U.S.C. § 1367 (2001). This federal law bars USCIS from releasing information about a victim's immigration case to anyone except law enforcement officers who need access to the information for legitimate communication with abusers. Use of information further precludes USCIS communication with abusers and use of information supplied by abusers to harm the victim's immigration case.

⁷³ HOWARD DAVIDSON, THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN: A REPORT TO THE PRESIDENT OF THE AMERICAN BAR ASSOCIATION 20 (Aug. 1994).

⁷⁴H.R. REP. NO. 103-395, at 26 (1993). However, most national estimates are derived from surveys or studies that typically exclude those who are very poor, who do not speak fluent English, whose lives are especially chaotic, or who are hospitalized, homeless, institutionalized, or incarcerated. See Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 809 (1994). Experts taking these factors into account have put the number of women battered each year closer to six million. See id. (citing Senator J. Biden, Remarks in the Rotunda of Russell Senate Office Building at the Opening of an Art Exhibition on Domestic Violence (Oct. 26, 1994)).

⁷⁵STAFF OF SENATE COMM. ON THE JUDICIARY, 102D CONG., VIOLENCE AGAINST WOMEN: A WEEK IN THE LIFE OF AMERICA 32 (Comm. Print 1992).

⁷⁶S. REP. NO. 103-138, at 41(1993).

⁷⁷Id. at 38.

⁷⁸Id. at 41.

⁷⁹ See U.S. DEP'T OF JUSTICE, INTIMATE PARTNER VIOLENCE 49-54 (noting that female respondents to the survey reported only one fifth of all rapes, one quarter of all physical assaults, and one-half of all stalkings by intimates to the police).

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Congress recognized that immigration laws actually fostered the abuse of many immigrant women by placing their ability to gain permanent lawful status in the complete control of the abuser – their U.S. citizen or lawful permanent resident spouse.⁸¹ Congress enacted VAWA’s immigration protections⁸² to alleviate this problem by giving battered immigrant women and children some measure of control over their immigration status.⁸³

Again, in October 2000, bipartisan efforts led to the passing of the Battered Immigrant Women Protection Act as part of the Violence Against Women Act of 2000 (“VAWA 2000”).⁸⁴ These amendments were designed to aid battered immigrants by repairing residual immigration law obstacles impeding immigrants seeking to escape from abusive relationships.⁸⁵ In passing VAWA 2000, Congress recognized that “battered immigrants are again being forced to remain in abusive relationships, out of fear of being deported or losing their children.”⁸⁶ To help ensure that greater numbers of battered immigrants could attain legal immigration status without risking deportation or loss of custody of their children, Congress significantly expanded VAWA’s immigration protections to improve VAWA self-petitioning and cancellation of removal protections, and to offer immigration relief for the first time to immigrant victims of domestic violence whose abusers may not be citizens or lawful permanent residents and who may not be married to their abusers. As a result, many undocumented domestic violence victims, as well as immigrant victims of domestic violence with temporary immigration status will be able to attain legal immigration status. Many immigrant victims who come before courts in custody, divorce, or protection order cases in which custody is an issue will qualify for VAWA self-petitions, VAWA relief from deportation (cancellation of removal) or will qualify for the new crime-victim (U-visa) protections.

It is important for family court judges to follow the lead of Congress and defer to Congress’s decision under federal immigration laws to offer special protection to immigrant victims of domestic violence to help them protect themselves and their children from ongoing abuse. Family court judges can do this by following the recommendations of Congress and the ABA and not allowing abusers to raise the victim’s immigration status as an issue in custody cases. Instead, when abusers attempt to raise this issue in custody cases, courts should use the fact that a party is raising the immigration status of the other party, as direct evidence of abuse. This approach both protects the best interests of children and furthers the goals of Congress in creating federal immigration protections for battered immigrants.

COUNTERING ALLEGATIONS THAT IMMIGRANT VICTIMS ARE LIKELY TO FLEE THE JURISDICTION WITH THE CHILDREN IF GRANTED CUSTODY

Advocates and attorneys seeking to prevent an abuse victim’s immigration status from becoming an issue in court must act strategically. Abusers may try to persuade the court that the victim’s immigration status is relevant in custody cases, using the reasoning that if the victim is undocumented, then she will be more likely to flee the jurisdiction with the child. Research data on immigrants demonstrate that this view is erroneous. Many immigrants who are ultimately granted legal immigration status have lived in the United States for many years in undocumented status. Out of 8.8 million legal permanent residents present in the United States in 1993, almost one-third were formerly present in the United States as undocumented immigrants.⁸⁷ Currently “one in ten American children live in a household where one or more of the parents is a noncitizen and one or more of the children is a citizen.”⁸⁸ Many such families contain a family member who is undocumented. The laws governing which noncitizens will be granted legal permission from the USCIS to live and work legally in the United States are ever-changing. This data confirms that people who are undocumented are not, by virtue of their undocumented immigration status, necessarily any more likely to be

⁸⁰ 146 CONG. REC., S10,195 (daily ed. Oct. 11, 2000).

⁸¹ H.R. REP. NO. 103-395, at 26-27 (1993).

⁸² VAWA § 40703, 8 U.S.C. § 1254(a)(3).

⁸³ H.R. REP. NO. 103-395, at 25 (1993).

⁸⁴ Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified in scattered sections of 8, 18, 20, 28, 42 and 44 U.S.C.) (2000).

⁸⁵ 146 CONG. REC., S10,195 (daily ed. Oct. 11, 2000).

⁸⁶ *Id.* at S10,170 (statement of Sen. Kennedy).

⁸⁷ MICHAEL FIX & JEFFREY S. PASSEL, THE URBAN INST., IMMIGRATION AND IMMIGRANTS: SETTING THE RECORD STRAIGHT 21 (1994), available at <http://www.urban.org/UploadedPDF/setting.pdf>.

⁸⁸ MICHAEL FIX & JEFFREY S. PASSEL, THE URBAN INST., THE SCOPE AND IMPACT OF WELFARE REFORM’S IMMIGRANT PROVISIONS: DISCUSSION PAPERS 17 (2002), available at http://www.urban.org/Uploadedpdf/410412_discussion02-03.pdf.

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interested in leaving or planning to leave the country; on the contrary, many try to remain and improve their lives here.

Further, the statistics cited above underscore the fact that the lack of legal immigration status does not mean that an undocumented immigrant is likely to be deported. The fact that an immigrant may be undocumented does not mean that she does not currently or will not in the future qualify to attain legal immigration status. This is even more true in domestic violence cases, since many immigrant victims of domestic violence will qualify for immigration relief under either the Violence Against Women Act of 1994 or subsequent reauthorizations of VAWA if their abuser is their U.S. citizen or lawful permanent resident spouse, former spouse or parent, or under the VAWA 2000 crime victim visa (U-visa) provisions regardless of the status of the abuser. In fact, deportation will not be an imminent reality for the vast majority of immigrant domestic violence victims who turn to the family courts for help.

Allegations of flight in cases of battered immigrants should be treated like any other family court case in which one parent alleges that another parent is likely to flee the jurisdiction with the children. Since lack of documentation does not equal flight, parents who are in court to seek custody should only be asked the questions that are regularly asked in cases where one party charges the other party with being a flight risk. Generally, the parent alleging that the other parent will flee with the children must prove that flight is imminent. This usually requires proof that may include but is not limited to:

- possession/purchase of airline tickets;
- plans to move to another location;
- proof of contacts, family or a job in another location;
- the economic capacity to make the move; or
- other evidence that the other parent is planning to leave with the children.

It is generally extraordinarily difficult to convince a family court judge that a child's parent is planning to flee with the child, and to get the court to issue orders designed to prevent such flight.⁸⁹ One remedy that can be used when a party believes flight is imminent is the writ of *ne exeat*, which prevents the other parent from leaving the jurisdiction with the children.

Ordinarily, a party seeking to get a writ of *ne exeat* against the other parent must demonstrate that the other parent will probably depart or has threatened to depart the state or country with the general intent to evade jurisdiction (see the evidentiary examples above).⁹⁰ The case of *Roberts v. Fuhr* provides an example of how the writ of *ne exeat* is used to prevent parental kidnapping. In *Roberts v. Fuhr*, an ex-husband who only had visitation rights took the child to Germany during one of his summer visits, where the child was retained.⁹¹ To secure the children's return from Germany, and to prevent future retention of the children in violation of court orders in response to the filing of a writ of *ne exeat*, the ex-husband agreed to a consent order in which he received visitation rights for only one month in the summer, and other specified dates. In addition, the ex-husband had to post a \$20,000 bond to ensure his compliance with the order due to his previous noncompliance.⁹²

In cases where writs of *ne exeat* are requested, the party requesting the writ of *ne exeat* has no reason to inquire regarding the immigration status of the person they are accusing of being a flight risk. The party who is fearful that an abduction might take place should be prepared to show three things: the risk of abduction, what the costs of recovering the child from an abduction would be, and the effect an abduction would have on

⁸⁹ This is generally true when a battered woman claims that her abuser is likely to flee with the children. It is not at all clear however, that all judges will require that an abuser show the same quantum of evidence when he claims that the mother of his children is likely to flee the jurisdiction with her children. Thus, attorneys representing battered immigrants against such charges should muster all the evidence they can to counter the abuser's allegations that a battered immigrant is likely to flee with the children. Attorneys should contact NIWAP for technical assistance in these cases. (202) 274-4457 or info@niwap.org.

⁹⁰ 65 C.J.S. *Ne Exeat* § 4 (1986); 57 Am. Jur. 2d *Ne Exeat* § 9 (2002); see also *People ex rel. B.C.*, 981 P.2d 145 (Colo. 1999).

⁹¹ *Roberts v. Fuhr*, 523 So.2d 20, 22 (Miss. 1987).

⁹² *Id.* at 22-23.

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the child.⁹³ These factors are not spelled out in statutes, but are collected from various cases, such as *State ex rel. Khawly v. Knuck*, which states that “there exists the requirement that the issuance of a writ of *ne exeat* must be supported not only by allegations of a threatened departure from the jurisdiction of the court, but also by an allegation that the effect of such departure will be to enable the defendant to avoid his obligation to the plaintiff and render any ensuing judgment against the defendant ineffectual.”⁹⁴

The risk of abduction has been found to be particularly acute in the case of parental separation and divorce between parents of mixed-culture marriages.⁹⁵ When the separation involves a parent who is a citizen or dual-citizen of another country, or who otherwise has strong ties to his country of origin, he may try to take unilateral action by returning with the child to his family of origin.⁹⁶ Several behavioral indicators include: 1) threats to take the child; 2) has no financial or emotional ties to area; 3) has resources to survive in hiding; 4) rejects or dismisses child’s mixed heritage; 5) feels separation/divorce constitute severe loss or humiliation; and 6) has family and social support in country of origin.⁹⁷ The Hague Convention is an international treaty that provides for the prompt return of wrongfully removed or retained children,⁹⁸ and parents of children abducted to non-Hague Convention countries face potentially higher obstacles to the child’s return than parents of children abducted to Hague Convention countries.⁹⁹

It is crucial to note that many of these factors can easily be dispelled or found irrelevant with respect to particular battered immigrant women. It is important that advocates refer battered immigrants whose abusers will be contesting custody to family lawyers who can represent them and help them counter efforts by the abuser to use immigration status and parental kidnapping allegations as factors in custody cases. Attorneys should do a detailed analysis of how they can best defend their clients when flight or deportation due to the victim’s immigration status is raised. Attorneys representing immigrant victims in cases in which abusers justify raising immigration status as de facto evidence of imminent deportation or flight should counter such allegations in the following ways:

- Urge the court to require evidence that flight is imminent;
- Present evidence to the court that responds to the evidentiary criterion related to flight listed in this chapter demonstrating little or no risk of flight (lack of airline tickets, no plans to leave, no threats to leave, victim established here, has not traveled to her home country in years, etc.).

To counter allegations of deportation:

- Determine whether the immigrant victim qualifies for immigration relief under VAWA or the crime victim U-visa;
- Help her apply for immigration relief before the case is heard by the family court either by handling the case yourself or referring the case to an immigration attorney or advocate with training on domestic violence immigration cases;
- Identify an immigration expert in your community who can be called to testify to explain to the family court judge that the battered immigrant parent qualifies for immigration benefits under existing immigration law or that her deportation is probably not imminent and why.

Attorneys should also be aware that sometimes persons who are ordered to post bonds of *ne exeat* may also be required to post their passport or other necessary travel documents, if the moving party so requests.¹⁰⁰ In such cases, if it appears that the attorney for the battered immigrant will not be able to avoid issuance of a

⁹³ Telephone Interview with Patricia Hoff, Esq. (June 28, 2002).

⁹⁴ *State ex rel. Khawly v. Knuck*, 418 So.2d 1185, 1186 (Fla. Dist. Ct. App. 1982).

⁹⁵ JANET R. JOHNSTON ET AL., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP’T OF JUSTICE, EARLY IDENTIFICATION OF RISK FACTORS FOR PARENTAL ABDUCTION 3-7 (2001), available at <http://www.ncjrs.org/pdffiles1/ojdp/185026.pdf>.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* See OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP’T OF JUSTICE, A FAMILY RESOURCE GUIDE ON INTERNATIONAL PARENTAL KIDNAPPING 47-48 (2002), available at <http://www.ncjrs.org/pdffiles1/ojdp/190448.pdf>, for a list of countries that are treaty partners of the United States for the Hague Convention.

¹⁰⁰ See, e.g., *id.* at 47.

writ of *ne exeat* against the client, the attorney then must establish that the moving party has given a sufficient reason why, in addition to a bond, the victim's passport or travel documents should be posted. Further, in any writ of *ne exeat* case, the moving party "has the burden of demonstrating that this restraint of liberty is a necessary, and not merely coercive and convenient, method of enforcement."¹⁰¹

Finally, in cases in which there is a risk that the abuser might flee the jurisdiction or the country with the children, advocates and attorneys working with battered immigrants should seriously consider using the writ of *ne exeat* to prevent the abduction. Advocates should refer victims in cases in which there is a potential for kidnapping to family law attorneys who can help battered immigrants intervene to prevent the abuser from removing the child from the jurisdiction or the country. Other remedies that can be used to prevent child abductions include getting prevention provisions in custody orders,¹⁰² and asking the Office of Children's Issues in the State Department to flag a U.S. passport application for a child, or to deny issuance of a U.S. passport for a child.¹⁰³ For a more in-depth discussion of these issues see Criminal and Civil Implications for Battered Immigrant Fleeing Across State Lines With Their Children of this manual, which discusses prevention of parental kidnapping.

Case Strategy Recommendations

The information provided in this chapter, the ABA Report on the Impact of Domestic Violence and Children and the published research data can be used to help immigrant victims gain custody of their children in a variety of circumstances. The approach to using these materials to help immigrant victims will vary depending on the circumstances of her case. Many cases will fall into one of the following examples. For each we recommend a strategy that counsel for immigrant victims should explore using.

1. Parties are Married and Victim is Undocumented Because Abuser Controls Her Immigration Status

When the immigrant victim is married or was within the past two years married to a U.S. citizen or lawful permanent resident abuser, the victim will in most circumstances qualify for relief under the Violence Against Women Act's immigration provisions. In these cases if the victim does not have legal immigration status it is because the abusive citizen or lawful permanent resident spouse never filed immigration papers for her. In these cases, counsel for the immigrant victim should consider presenting evidence to demonstrate that the reason that the victim does not have legal immigration status and legal work authorization is because the abuser never filed immigration papers for her. Counsel may want to consider raising this affirmatively even when immigration status is not raised by the abuser. This evidence can be used to demonstrate that immigration related abuse is corroborating evidence of domestic violence to support a finding that the children should not be placed in the custody of an abusive parent. Additionally, evidence of the abuser's failure to file immigration papers for his spouse can be introduced as evidence that he cannot be considered "friendly parent" under state custody laws. It is recommended that counsel representing battered immigrants in custody cases who will be making these arguments prepare and file the VAWA self-petition case and ideally secure approval of that case before raising these issues affirmatively in the custody action. This approach provides the immigrant victims the greatest possible protection against the abuser's retaliatory actions that could include trying to report her to immigration authorities for deportation.

2. Parties are Not Married, Victim is Undocumented and the Abusive Father is a Citizen or Has Another Form of Legal Immigration Status

The first step for counsel for the victim in these cases is to determine whether the victim qualifies for the crime victim U-visa protections of VAWA 2000. When the victim has a strong U-visa case the victim should swiftly file for U-visa interim relief.¹⁰⁴ If the immigrant victim can be awarded U-visa interim relief before

¹⁰¹ 57 Am. Jur. 2d *Ne Exeat* § 4 (2002).

¹⁰² OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, A FAMILY RESOURCE GUIDE ON INTERNATIONAL PARENTAL KIDNAPPING 10-13 (2002), available at <http://www.ncjrs.org/pdffiles1/ojjdp/190448.pdf>.

¹⁰³ *Id.* at 13-14.

¹⁰⁴ U-visa interim relief is made available on to victims of serious crimes. For more information, see BREAKING BARRIERS, U-visa chapter.

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the custody litigation begins, when the abuser raises immigration status in the custody case, counsel for the immigrant victim may want to consider using that fact to demonstrate immigration related abuse as evidence that the abuser should not be awarded custody and that he will not be a “friendly” parent. In the alternative, counsel should object to the abuser raising immigration status in the custody cases using the ABA Report and other materials contained in this chapter. This latter approach should be used in any case, in which the victim is undocumented and has not yet applied for any VAWA-related form of legal immigration status. These same arguments should also be made in cases of immigrant victims whose abusers are undocumented.

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