

# **Myths, Misconceptions, and Barriers Regarding Custody and Family Matters for Immigrant Litigants**

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# Introductions

- Judge Rosemary Collins
  - Rockford, IL
- Leslye E. Orloff
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# Learning Objectives

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

- Understand how accurate immigration law information affects just and fair outcomes in state family court cases
- Know where to access legally correct information when litigants raise immigration issues in court
- Issue just and fair orders in custody, protection order, divorce and child support cases involving immigrant children and immigrant crime victims

# Small group discussion:

- What are you seeing with regard to immigrant survivors, children, litigants in New Mexico courts?
- List questions you have that you would like answered during this training.

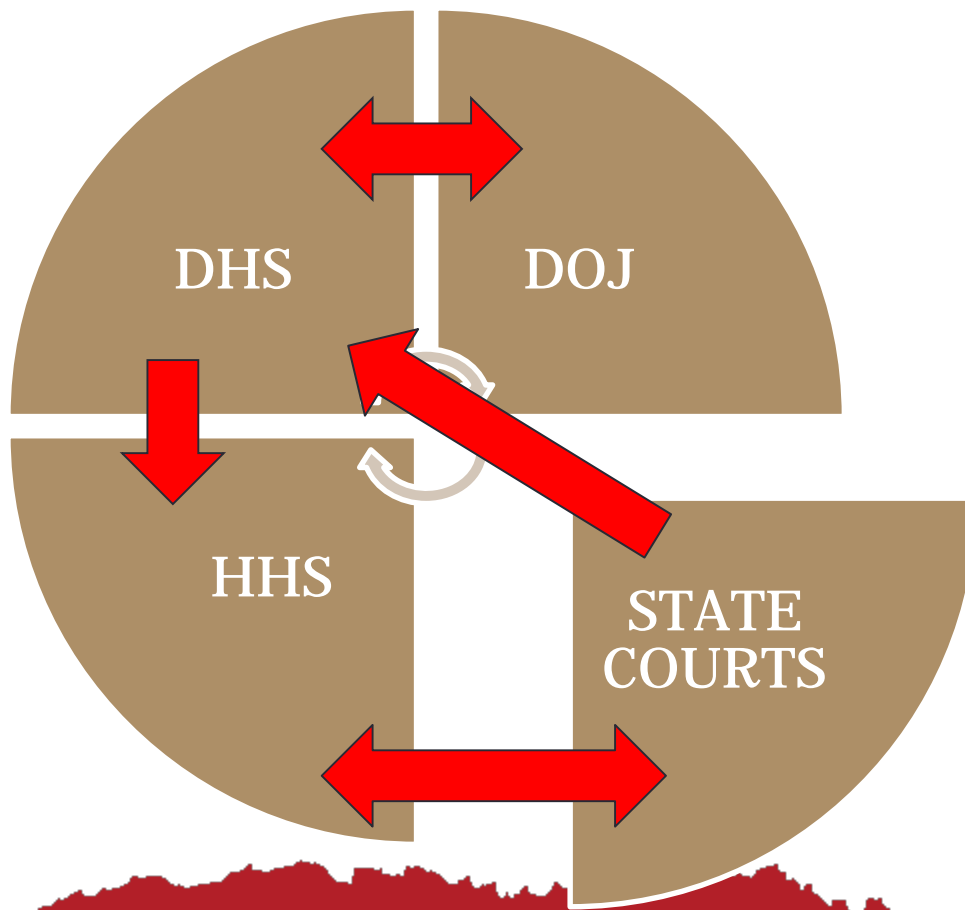
Large group report back

**When litigants and their children learn about and pursue immigration relief legally available to them might this improve access to justice in family courts?**



Large group discussion

# Relationships that benefit victims and children



# Legal Immigration Status Options for Non-citizen Crime Victims and Children

## VAWA self-petition

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

## VAWA cancellation of removal

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

## Battered spouse waiver

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

## Asylum

- Well founded fear of persecution on account of race, religion, nationality, political opinion, social group
- Domestic violence as gender based asylum

## U visa

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

## T visa and Continued Presence

- Victims of severe forms of human trafficking

## Special Immigrant Juvenile (SIJS)

- Children abused, battered, abandoned or neglected by one or both parents

## Deferred Action (DACA)

- Deferred action for child arrivals including Dreamers

# **Immigration Issues that Arise in Family Court: Importance of Accurate Information**



# Opportunities to Enhance Just Outcomes for Immigrant Victims, Children and Litigants

- In a range of cases
  - Protection orders
  - Custody
  - Abuse, neglect, abandonment
  - Child support
  - Divorce



# A Starting Principle for Analysis

- A person's immigration or citizenship status per se
- Is irrelevant to the determination of
  - Family law rights including
    - Divorce
    - Custody
    - Protection orders
    - Child support

# **Knowledge of immigration issues is important in family matters**

- ▶ Addressing immigration status issues early can
  - ▶ Improve outcomes in family court cases
  - ▶ Prevent or delay family court orders that cut a party and their children off from immigration relief
- ▶ Family court actions can assist with
  - ▶ Helpful evidence for an immigration case
  - ▶ Obtaining from family court judges
    - ▶ Court SIJS findings for abused immigrant children
    - ▶ Certifications in immigrant crime victim's U visa case
  - ▶ Creative protection order remedies

# Impact of State Court Orders on the Immigration Case

- Specific written orders are helpful to immigration adjudicators and immigrant parties
- Court orders contain evidence of
  - Abuse, abandonment, neglect
  - Family relationships including marriage
- Divorce can result in an immigrant family member being denied immigration relief
  - Tactic used by perpetrators of spouse, child, elder abuse
- Annulment instead of divorce can set up a spouse for a federal marriage fraud prosecution

# Immigration Law's Domestic Violence Definition “Battering *or* Extreme Cruelty”

- Any state crime committed against a family member sufficient for issuance of a protection order including sexual abuse, stalking, threats, attempts *AND/OR*
  - Emotional abuse,
  - Economic abuse,
  - Using children,
  - Deportation threats and immigration related abuse,
  - Intimidation,
  - Social isolation,
  - Degradation,
  - Possessiveness,
  - Harming pets,
  - Coercive control

# DHS Adjudications Examine Patterns of Coercive Control

- Setting the stage
  - Creating and exploiting existing vulnerabilities
  - Wearing down resistance
  - Facilitating attachment
- Coercive demand
- Credible threat
- Surveillance
- Delivery of consequences



# Family Court Jurisdiction and Divorce

# Immigration Status Not Relevant to Jurisdiction in Family Court Cases

- Protection order case
  - Domestic violence crime committed in state or
  - Victim needs protection in state
- Divorce case
  - Residency of party in state
  - Legal immigration status not required to establish residency under state family laws



# Immigration Status Not Relevant to Jurisdiction in Family Court Cases

- Custody and Guardianship case
  - (UCCJEA, Federal PKPA, Hague Convention)  
usually the home state of children
- Child abuse, neglect, and termination of parental rights
  - Where an abused or neglected child is located
- Child support case
  - Where child or non-custodial parent lives

# Impact of Divorce

- VAWA self-petitioners:
  - Spouse must file within two years of final divorce
  - Step-children must file before divorce
- Ends legal immigration status for spouses and children of visa holders:
  - Students, Work Visa Holders, Diplomats
- Divorce cuts off access to lawful permanent residency for spouses and children of people seeking lawful permanent residency based on:
  - Employment
  - Asylum
  - Family relationships
  - Cancellation of removal

# Annulment Instead of Divorce

- Annulment can lead to a marriage fraud finding that:
  - Permanently bars approval of any visa petition
  - Is a ground for deportation
  - Can lead to an unfavorable exercise of discretion by an immigration judge not to grant immigration relief
- Impacts
  - Spousal support
  - Property division

# Custody of Children in Immigrant Families

Tool: Immigrant Victims and Custody Bench Card

# Protecting Immigrant Mothers Protects Children

- Immigrant victims who receive help, including immigration relief, child abuse likelihood drops significantly (77% to 23%).
- Children of help seekers 20% less likely to have abuser threaten them
- One third less likely to have abuser threaten to take them away from their mother

# Is Immigration Status Relevant to Custody?

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



# ABA Center on Children & The Law

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

# Myth vs. Fact:

## Parents Without Legal Immigration Status

### Myth

1. Deportation is imminent
2. Parent is likely to flee U.S. with child
3. The parent has no livelihood
4. Legally present parent must have custody in order to file for benefits for child

### Fact

1. DHS policies prevent detention/removal of immigrant parents who are crime victims
2. Legal immigrants/naturalized citizens are more likely to flee with children, especially when
  - There have been threats of kidnapping children
  - They are dual nationals
  - They travel freely to and from U.S.
3. Abused immigrant parents in family court have a path to immigration relief, work authorization & some benefits
4. Custody does not affect parent's ability to file for or gain immigration benefits for their children.



# Immigrant Parents and Child Custody

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

- Parents have a Constitutional right to custody (absent unfitness)
- Applies to all families without regard to:
  - Undocumented immigration status
  - Immigration detention
  - Deportation
- Overriding presumption that:
  - Parent-child relationship is constitutionally protected
  - In children's best interest to stay with/be reunited with their parent(s)
- Child's best interests is most important
  - A comparison of natural vs. adoptive parent's cultures, countries or financial means is not to be made

# How to Secure a Detained Parent's Participation in Court (Aug 2013)

- Parental Interest Directive
  - Bring parents to family court to participate in cases involving children
  - Make parents available to participate by video conference
  - NIWAP brochure
- Detainee locator system

# Case Study

Duncan is a naturalized citizen who had been married to Rosa for 5 years. They have two children ages 7 and 3. Rosa fled to the local shelter after Duncan held her against her will for weeks, and broke her arm when she tried to flee. The neighbors called police and when Rosa spoke to police, they took her to the shelter. The children were present during the latest incident of violence and are afraid of their father. Rosa is an undocumented immigrant who has been the primary caretaker of the children, particularly when Duncan leaves the country for extended work. Duncan has filed for custody alleging that Rosa is an unfit mother, because she is an “illegal alien” and unable to provide for the children because she is unable to work or obtain a driver’s license.

# Large Group Discussion

- What immigration remedy or remedies might the Rosa be eligible for?
- What factors would the court consider in the custody case?
- How might having information on immigration relief DHS offers available at the courthouse be helpful to Rosa?

# PROTECTION ORDERS



# NIJ Funded CPO Study Found

With support immigrant victims will use and benefit from justice system assistance

- 60.9% did not know about CPOs
- 81% got CPO with help from advocate/attorney
- 96% found them helpful
- 68.3% of violations immigrant related

# Protection Orders

- All persons are eligible to receive civil protection orders without regard to the immigration status of any party or child
- Protection order issuance = no effect on immigration status
- A conviction *or finding* of violation of the “*protection against* abuse provisions” of a protection order is a deportable offense
- Immigrant victims and their children often need creative protection order remedies using the state catch all provisions

**What harms, if any, could occur if the court issues protection orders against both parties?**

Large Group Discussion



# Effect of Protection Order Issued Against Immigrant Victims

- Increases perpetrators power and coercive control
  - Victim is one step away from deportation
  - A violation of a protection order is a deportable offense
    - Findings enough – conviction not required
- Perpetrators who are successful in convincing courts to issue protection orders are often also successful obtaining findings that the victim violated the order
- This can pose serious safety concerns for victims

# How Immigrant Victims End Up As Defendants In Protection Order Proceedings

Police arrive at domestic violence incident, perpetrator speaks English

- Perpetrator speaks to and/or interprets for the police
- Outcome A
  - Police see victims injuries but take no action and advise the parties about protection order
  - Perpetrator files for a protection order against the victim
  - Victim is served and then also seeks a protection order
- Outcome B
  - Perpetrator convinces the police to arrest the non-English speaking victim

# Issue Jurisdictionally Sound and Enforceable Protection Orders

- Perpetrators will ask courts to issue No-Findings protection orders arguing that needed to prevent deportation due to the protection order –
  - *This is legally incorrect*
- Protection orders issued must be jurisdictionally sound
  - Based on abuse finding or
  - Uncontested affidavit of the victim in a civil case
- *Tool: Jurisdictionally Sound Civil Protection Orders*

# Lack of Subject Matter Jurisdiction

- Agreements of parties cannot confer subject matter jurisdiction on a court that does not have it
- Orders issued without subject matter jurisdiction are subject to challenge on appeal as not legally valid

# Effects of “No Findings” Protection Orders

- Can allow the abuser to keep his firearms
- Increase danger to a survivor and her children
- Undermine state laws regarding domestic violence and custody

*Small Group Activity:*

What Creative Protection  
Order Remedies Might  
Help an Immigrant Victim?



# Use Creative Remedies to...

- Stop immigration related abuse
- Protect victims still living with their abusers
- Obtain documents the victim needs for an immigration case or for care of child
- Deter parental kidnapping
- Child/Spousal support
  - Affidavit of support
- Health insurance

# Creative Protection Order Remedies

- Catch all provisions in civil protection order statutes, opportunity to offer relief designed to help:
  - Curb future abuse, harassment
  - Interfere with abuser/perpetrators ability to exert power and/or coercive control
  - Offer victim remedy-relief for past abuse
  - Help victim overcome victimization and build new post abuse life
- Nexus with victimization
- Opportunity for courts to counter immigration related abuse and order culturally helpful remedies



# Victims Who Stay: Full Contact Protection Orders

- No state's protection order statute requires separation of the parties
- In virtually every state victims cannot violate their own protection orders
  - Contrary to statutory intentions; and
  - Against public policy to prosecute abused women for complicity in violating their own orders.
- Provisions
  - No abuse
  - Counseling

# Using Catch-all Provisions to Stop Immigration Related Abuse

- Defendant must obtain prior court approval before contacting any government agency (immigration officials, CPS, IRS, Welfare, etc.) concerning the petitioner except
  - Police emergency
  - Subpoena
- Cooperate in and not withdraw any case he has filed for petitioner with immigration authorities (e.g. work visa holders, I-130s)

# Remedies That Help a Victim's Immigration Application

- Turn over documents/evidence in abuser's control needed for the victim's immigration case.
- What might some of those documents be?



# Helpful Evidence

## Evidence of Legal Marriage

- Marriage certificate
- Wedding/family pictures
- Health insurance

## Good Faith Marriage

- Children birth certificates
- Love letters
- Copies of joint leases/utility bills
- School records
- Letters and other mail addressed to the victim and to the abuser at the same address

## Evidence of Abuse or Extreme Cruelty

- Police, medical, court documents about the relationship
- Protection order
- Affidavits of neighbors, relatives, friends

## Evidence of Abusers Legal Status

- Abuser's green card or passport
- Copy of I-130 petition
- Social security number

# Provisions that Deter Parental Kidnapping

- Not remove the children from the court's jurisdiction
- Turn over passports of parties and/or children
- Sign statement that no visa or passport should be issued to children absent court order
- Supervised visitation
- Bond

# Important Economic Provisions

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

# Important Economic Provisions

- Maintain and/or pay for health care for victim and children
- Provide one time emergency monetary relief
  - Money to repair locks or broken windows
  - Obtain an unlisted telephone number
  - Relocation assistance
- Pay house insurance, mortgage, rent, utility and/or debt payments
- Taxes
  - Turn over income tax statements
  - Respondent ordered to pay victim ½ of refund
  - Victim named trustee for receipt of tax return funds
  - Respondent ordered to sign over check
  - Victim awarded exclusive right to claim children as tax exemptions

# Economic Relief



# Importance of Child & Spousal Support for Immigrants

- Spousal control over immigration case filing affects:
  - Work authorization
  - Driver's licenses
  - Access to health care exchanges
- Many immigration visas do not allow work authorization for spouses/children
  - Employment, student, diplomatic, international organization and investor visas
  - Exception abused spouses of A (foreign gov't), E (investor), G (int'l org & gov't employees), H (work visas)

# Affidavits of Support

- Under provisions introduced in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, each person who petitions for a family member to immigrate to the United States must execute a legally enforceable affidavit of support.
- 8 U.S.C. § 1182(a)(4)(C)(ii)

# Affidavits of Support

- Enforced as contract or used as evidence of ability to pay support
- These affidavits are of increasing importance in resolving support issues in immigrant families, sometimes decades after the act of immigration is complete.

# Evidence in Affidavit of Support

- 3 years of tax returns
- Evidence of employment including self-employment
- Proof of income sufficient to sustain the immigrant at 125% of poverty

# Immigration Issues Arising in Child Support Cases

- Payment of child support through the court provides a non-citizen parent with a history of child support payments that will be helpful evidence of good moral character for immigration cases
  - Cancellation of removal
  - Naturalization
  - Relief in immigration court can be used to show hardship to family members

# Immigration Issues Arising in Child Support Cases

- Criminal convictions for willful failure to pay child support can be deportable theft/fraud related crimes of moral turpitude
- Lack of legal work authorization is not a valid defense to non-payment of child support
- Employers who willfully violate wage withholding orders have been held liable to the custodial parent for court ordered child support not withheld.

# Proof of Non-Custodial Immigrant Parent's Income

- Undocumented workers can be ordered to pay child support based on Child Support Guidelines and
  - Actual earnings
  - Employer's statements
  - Evidence of earning capacity
  - Attributed income (e.g. minimum wage)
- Undocumented workers can pay state and federal taxes on income earned using an IRS issued Tax ID number

# Bench Cards

- Immigrants and protection orders
- Public benefits and services
- Immigration rights of crime victims
- Custody issues and immigrants
- Economic options
- VAWA confidentiality



# Resources for Courts

- U Visa Certification Toolkit
- Visa chart by immigration status
  - Who can sponsor children
  - Work authorization
  - Benefits access
- Legal and social science bibliographies

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# Technical Assistance and Materials

- Power Point presentations and materials for this conference at [www.niwap.org/go/JFFNM](http://www.niwap.org/go/JFFNM)
- Judicial Training Manual at [www.niwap.org/go/sji](http://www.niwap.org/go/sji)
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**Thank you!**