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NIWAP Newsletter Child Custody in Immigrant Families

In the last decade, the immigrant population has steadily increased in the United States. Currently, almost a quarter of the population under 18 years of age has at least one foreign-born parent. Many immigrant families are mixed status families, with family members ranging from being undocumented, to holding legal permanent residency status, to being U.S. citizens, or holding some other form of temporary immigration status. In families consisting of mixed immigration statuses, particularly when there is a history of domestic violence, the parent with legal immigration status may try to use the other parent's temporary or undocumented immigration status against them to influence the court in a custody case. Custody is often used in abusive relationships by the abuser as a means of coercive control by threatening to cut off or severely limit the abused parent's access to the children.

For immigrant parents, this is exacerbated by threats of deportation and the abuser's control of immigration related paperwork that the abuser can or has filed on the victim's and/or the children's behalf. Immigrant parents seeking custody of children in the United States have the same parental rights and entitlements of U.S. citizen parents. This newsletter will provide an overview of the legal rights of immigrant parents in state custody proceedings, a discussion of common misconceptions about immigration status and child custody including current Department of Homeland Security enforcement priorities for immigrant parents and families, and practice tips on obtaining custody of children for immigrant survivors of domestic violence. Finally it will

cover how to counter the assumption that a parent's immigration status should operate as a negative factor in custody determinations.

Please contact NIWAP (info@niwap.org or 202-247-4457) for free technical assistance on custody cases involving immigrant survivors and addressing immigration status issues that arise in state custody proceedings. More information regarding immigrant families in state courts is available in the [NIWAP web library](#).

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Legal Rights of Immigrant Parents in State Court Custody Proceedings

Parents have a fundamental right in the care and custody of their children without regard to immigration status. Despite this constitutionally protected right, immigration status is often raised in custody proceedings when one party is without legal or permanent immigration status and the other party is a legal permanent resident or U.S. citizen. While it is legally inaccurate, the other parent often argues that it is not in the child's best interests to be placed in the custody of the immigrant parent or the other parent who is an immigrant for a variety of reasons including the other parent's immigration status. These arguments are raised by abusive parents even when the immigrant parent has clearly been the child's primary caretaker. This newsletter addresses many of the most commonly raised myths and misconceptions in the following section along with legally correct information on each. This section will discuss the legal rights and precedent affirming an immigrant parent's constitutional rights and laws supporting the award of custody to non-abusive immigrant parents.

State courts all over the country commonly grant custody to immigrant parents who have temporary immigration status and who are undocumented when the immigrant parent has been the primary caretaker of the children without considering the parent's immigration status. This is particularly true when the parent challenging custody by the non-abusive immigrant parent is a perpetrator of domestic violence. Immigrant parents' constitutional rights to care and custody of their children have been well articulated by the Nebraska Supreme Court in *In*

Re Angelica L. ([277 Neb. 984 \(2009\)](#)) (fact sheet available [here](#)). In this case the Court unanimously overturned a lower court decision to terminate an undocumented mother's parental rights after she was detained by the Department of Homeland Security (DHS) and deported. The state of Nebraska welfare authorities reported an immigrant mother to DHS, took and placed her children in foster care, did not allow the mother to take her children with her to her home country, and sought termination of the mother's parental rights. The court held that an immigrant mother has a constitutional right to care and custody of her children and that it is in a child's best interests to remain in the care of their natural primary caretaker parent absent a finding that the parent is unfit. The opposing side in this case, the state of Nebraska, argued that it was in the immigrant mother's citizen children's best interest to be raised in the United States, with foster parents, rather than in Guatemala with their mother. The Nebraska Supreme Court overturned this ruling and confirmed that the immigration status of the parent should not be considered in a best interest analysis and that the constitutional rights to care and custody apply to immigrant parents including those who are undocumented, detained, or deported.

Other courts have made similar decisions regarding parental rights of undocumented immigrant parents and their children, highlighting the importance of the parent-child relationship. In *In re the Welfare of R. and N. Churape*, 43 Wn. App. 634, the Washington Court of Appeals remanded the case to the trial court with instruction to focus on the legislative intent of family laws designed to keep family units intact.

Opposing parties often raise immigration status when there is a history of domestic violence as a means of power and control and in an effort to turn the court's attention away from the abuser's history of violence, abuse, and coercive control. Domestic violence is a consideration in determining the best interest of the child in all 50 states, while no state domestic relations codes list immigration status as a factor. Immigration status is not relevant to either the core primary caretaker determination or the evaluation of parenting skills.

Common Misconceptions About Immigration Status and Child Custody

Immigration status is often raised in family court proceedings in one of two ways:

- 1) the opposing party will bring up the immigrant parent's immigration status to bias the court against them, to continue

to threaten, abuse and exert coercive control over the immigrant victim when familial violence is present, or to allege that the immigrant parent's lack of permanent status disadvantages the child; or

2) the immigrant parent will provide evidence in the custody case documenting the abuser's use of immigration related abuse to do one of the following:

- Exert power and control over the battered immigrant spouse, intimate partner or child;
- Prove immigration related domestic or child abuse;
- Show the court that the immigrant victim parent has obtained or is eligible to obtain legal immigration status; or
- Explain how the immigration related abuse and the victim's current inability to access public benefits should impact both child/spousal support awards and the level of spousal and/or child support awarded.

Once the court is aware of either party's immigration status, it is crucial they have correct information about DHS policies against removal of crime victims and witnesses and primary caretaker parents as well as information on access to work authorization and benefits that accompany an immigrant parents' crime victim based application for legal immigration status. This information helps courts correctly determine to what extent, if any, immigration status should be considered in custody cases. Below are common misconceptions and facts to counter them if they arise in custody cases.

Myth: Deportation of immigration parent is imminent.

Fact: Department of Homeland Security enforcement and deportation policies aim to prevent the detention/removal of immigrants who are parents of U.S. citizen/lawful permanent resident children and/or are the primary caretaker of minor children without regard to the child's or parent's immigration status. These policies are further explained in our [bench card for state court family judges](#) on DHS policies and memoranda on enforcement priorities.

Additionally, when there is history of domestic violence, sexual assault, or stalking, the immigrant parent is likely eligible for immigration relief. Immigrant victims of crime are protected under federal law and may be eligible for legal permanent residency, visas with a path to legal permanent residency, cancellation of removal, suspension of deportation, and/or deferred action. Each of these forms of immigration relief protect

victims from deportation and include access to legal work authorization and some access to public benefits depending on the state in which the victim resides. For an overview of the public benefits immigrant victims can be eligible for see [Bench Card on Immigrant Crime Victim Access to Public Benefits and Services](#). For an overview of the types of relief available see [Breaking Barriers Ch. 3.1: Introduction to Immigration Relief for Immigrant Victims of Domestic Violence and Sexual Assault and Glossary of Terms](#), [Immigration Protection Screening Checklist](#), [Overview of Types of Immigration Status](#)

Myth: Immigrant parent has no means of income.

Fact: Immigrants with a variety of forms of immigration status have access to legal work authorization. Further, many undocumented immigrants are working and earning income in the United States even though they may not have legal work authorization. It is important to be aware of this because non-custodial immigrant parents who work can be ordered to pay child support. For more information, see [Bench Card on Economic Remedies in State Court](#).

As immigration status progresses from undocumented to legal permanent residence, access to legal work authorization and public benefits increases. Many abused immigrant parents in family court have a path to immigration relief which comes with access to legal work authorization, state, and federal public benefits. Regardless of the parent's immigration status, U.S. citizen, legal permanent resident, and lawfully present children are entitled to public benefits based on the child's own immigration status and need and any parent can apply for the child even if the parent themselves is not additionally eligible. The immigrant parent can have legal and physical custody of the child and the other parent can contribute financially through spousal and/or child support. For more information please see the [public benefits section](#) of NIWAP's web library and for state specific information see the [benefits map](#).

Myth: Legally present parent must have custody in order to file for immigration benefits for child.

Fact: The parent with the legal authority to sponsor their child or step-child for an immigration visa, lawful permanent residency or for immigration benefits that will result in the child attaining lawful presence can do so regardless of where or with whom the child resides and

whether or not the sponsoring parent has legal or physical custody of the child. Immigrant parents who are eligible to apply for crime victim related or other forms of immigration relief (e.g., work visas, diplomatic visas, etc.) can most often sponsor the child themselves by including their children in the immigrant parent's immigration case application. VAWA self-petitioners, U visa, and T visa applicants can include in their immigration applications their children who are under 21 at the time of filing. Attaining legal custody or having physical custody of the child is not a factor that affects either parent's ability to sponsor a child for lawful permanent residency or another form of legal immigration status.

Myth: Immigrant parent is likely to flee the U.S. with the child.

Fact: U.S. citizens, legal permanent immigrants, naturalized citizens, and immigrants with visas that allow them to travel freely to and from the U.S. are more likely to flee with children, especially when there is history of abuse, previous threats of kidnapping children, or the legally present parent is a dual national. Undocumented parents, parents with temporary immigration status and immigrant victims who have received or are pursuing crime victim related legal immigration status are less likely to flee the U.S. because leaving the U.S. can trigger a multiyear or permanent bar to reentry under immigration law. The Department of Justice discusses the factors contributing to parental kidnapping in this [article](#). See also NIWAP's [Family Law Bench Card on Custody Cases](#).

Practice Tips on Addressing Immigration Status in Custody Cases

The impact that the opposing party raising immigration status will have on an immigrant victim's custody case will be largely determined by how the state court judge received, interpreted, and used this information in arriving at a ruling awarding custody. Judges have varying familiarity with federal immigration law. Briefing the court or presenting expert testimony on immigration related issues in custody cases can help ensure that judges receive correct information about immigration law as it pertains to your clients' case. NIWAP has developed training materials and conducts judicial trainings to provide state court with accurate information about immigrant victims, children, and litigants. Our resources for judges are available 24/7 [here](#).

Best Practice: If you believe that the opposing party may raise the immigration status of your client to gain advantage in a custody case, consider raising immigration related abuse, power, and control as part of your case in chief. This is particularly helpful if your client is the plaintiff and will you will present your side of the case first in the family court matter. Evidence of immigration related abuse corroborates evidence of domestic violence that your client has suffered. Evidence of immigration related abuse together with other evidence of abuse can help demonstrate to the court that it is not in the child's best interest to be in the custody of the abuser. Evidence of abuse may trigger state laws that create presumptions or evidentiary rules that mitigate against awarding custody to abusers.

There are two common ways of presenting information to the court about immigration related abuse: 1) present the evidence and then submit bench brief to the judge laying out the social science data immigration related abuse and the effect of witnessing domestic violence on children; and 2) an expert witnesses can provide testimony about immigration related abuse and/or providing legally correct information about immigration law that counters the myths discussed above that the perpetrator has alleged. Experts on the intersection of immigration and violence against women can provide the court with detailed information on the protections for victims, DHS victim protection laws, deportation and removal priorities and policies at DHS, and that civil violation of immigration law will not lead to immigrant parent's removal from the U.S., particularly when the immigrant parent has been victimized.

When immigrant victim clients are eligible, it is best practice to file an immigration petition for your client before the custody case is initiated or litigated. This offers your client protection from deportation of the special DHS "[384 computer](#)" tag that places a red flag on your client's case as one in which DHS should not be seeking removal. See ICE VAWA Guidance pp 2-3 & ICE OPLA Memo 2.1.07 p 5., [here](#) and [DHS Directive # 002-02](#).

If you have already filed a VAWA, U, or T petition, you can present evidence that the application was filed to the court to counter any claims that your client cannot work legally in or is likely to be removed from the U.S. This also protects your client by deterring DHS from responding when the abuser call's DHS to report your client's undocumented status in retaliation following service of process in the custody, divorce, or civil protection order case in which custody will be litigated. Once the case is filed, your client's case will be entered into the computerized "384" DHS system that helps protect her from the abuser or his family member's retaliatory immigration reporting behavior. Additionally, you may also want to consider submitting information to the court through testimony or

a brief explaining the public benefits your client and/or her child will be or are eligible for currently because she has filed a VAWA, T or U visa immigration case (See NIWAP's [public benefits map](#)). You can also use this approach to inform the court that your client is on a path toward receipt of legal work authorization.

If you plan on raising the existence of the victim's VAWA, T or U visa case you should work with your client to do safety planning to be ready for how the perpetrator might respond when he learns about the existence of the victim's VAWA, T, or U visa immigration case. This should include preparation of your response should the abuser attempt to obtain a copy of the victim's immigration case file as discovery in the custody case. Please refer to this [sample brief](#) to prevent such discovery in family court cases.

If you will not be raising immigration related abuse in your case and the perpetrator raises the victim's immigration status be prepared to make a record. The first step is to object to the evidence of immigration status offered on the grounds it is not relevant to the primary care taker and best interest determinations. Second, make the court aware of case law and submit memos on the relevance of immigration status as to the best interest of the child. Third, present evidence to establish the status quo regarding primary caretaker and parenting duties. By evaluating this evidence the court can determine who is and has been the child's primary caretaker. If the child's primary caretaker is the immigrant parent, that parent's immigration status is not a valid reason to strip them of primary physical custody. Fourth, establish that is in the child's best interest to be in your client's custody.

Under the Uniform Marriage and Divorce Act, best interest factors include the wishes of the parents and child, the interaction of the child with parents/siblings, the child's adjustment to home, school, or community, and the mental and physical health of all individuals involved. State best interest determinations consider domestic violence and your state statute may include additional factors. However, immigration status is not included as a factor in any state's best interest laws and is not relevant to the core primary caretaker determination.

Finally, if your immigrant client who has been the child's primary caretaker is not awarded custody, ask for specific findings and conclusion of law from the Court and make objections needed to preserve the record for appeal.

When the abuser raises the victim's immigration status in a custody case go on the offensive. If the opposing party is using immigration status to portray your client as a bad actor based on lack of legal presence, use

his knowledge of the victim's undocumented status against him during cross examination. For example, address his knowledge of her status directly or question him on his authority and decision making power when he decided not to file immigration papers for your client; when he filed and withdrew immigration papers; or when he delayed years before filing papers. Demonstrate through cross examination that his actions or inaction are the reason that your client does not have legal immigration status and legal work authorization and present evidence of immigration related abuse.

The motivation for raising a parent's immigration status is often malicious. If the opposing party or opposing counsel makes threats of criminal prosecution or deportation to elicit a settlement or concession of custody it may be a violation of Rule 11 of the Federal Code of Civil Procedure. The Federal Rule of Civil Procedure Rule 11 deters litigants and attorneys from abusing pleadings. Specifically, Rule 11(b)(1) provides that an attorney or pro se litigant presenting to the court a pleading, written motion, or other papers, certifies to their best knowledge that the claims, defenses, and other legal contentions are not meant to harass, cause unnecessary delay or increase the cost of litigation (for more information please see our sample [Motion in Limine for Federal Rule of Civil Procedure 11](#) addressing a Rule 11 violation in cases protected by VAWA Confidentiality). The rule was designed to deter malicious behavior and abuses of the legal system. If immigration status is raised for the purpose of prejudicing the court against an immigrant party the opposing side's motions, pleadings, or other papers may be stricken from the record and disciplinary sanctions can be sought. Additionally, the contents of an open immigration case are confidential and should not be discovered in state court. VAWA Confidentiality is a federal law that protects victims of domestic violence, sexual assault, stalking, dating violence, and other crimes from their abusers using the court to discover information about their immigration case, for a full discussion of this protection see NIWAP's [VAWA Confidentiality newsletter](#).

Additional Resources on Immigration and Family Law

- Family Quarterly, Vol. 47, No. 2 (Summer 2013), Soraya Fata, Leslye E. Orloff, Andrea Carcamo-Cavazos, Alison Silber, & Benish Anver, [Custody of Children in Mixed-Status Families: Preventing the Misunderstanding and Misuse of Immigration Status in State-Court Custody Proceedings](#)

- [Justice for All: How Attorneys Can Successfully Win Custody Cases for Immigrant Survivors When There Is a Clash of Laws, Cultures, Custody and Parental Rights](#)
- Breaking Barriers: A Complete Guide to Legal Rights and Resources for Battered Immigrants, Leslye Orloff, Joyce Noche, Cecilia Olavarria, Laura Martinez-McIntosh, Jennifer Rose, and Amanda Baran [Chapter 6.1: Countering Abuser's Attempts to Raise Immigration Status of the Victim in Custody Cases](#)
- Breaking Barriers: A Complete Guide to Legal Rights and Resources for Battered Immigrants, Leslye Orloff, Jennifer Rose, Laura Martinez, and Joyce Noche [Chapter 6.5: Immigration Status and Family Court Jurisdiction](#)
- [In Re Interest of Angelica L. and Daniel L. \(N.W.2d\)](#), & [Fact Sheet](#)
- Bench Card: [Common Immigration Issues that Arise in Custody Cases Involving Immigrant Crime Victims and Their Children](#)
- Bench Card: [DHS Enforcement Priorities: Policies and Memoranda. Information for State Court Judges](#)
- [Bench Card: Quick Guide For State Court Judges On Common Issues That Arise From Parties' Immigration Status: Economic Remedies](#)

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NIWAP offers technical assistance to advocates, attorneys, Judges, court staff, police, prosecutors, social services and health care providers, and others working with immigrant victims of domestic violence, sexual assault, stalking, and human trafficking. To submit your questions email info@niwap.org or call us at 202-274-4457.

NIWAP addresses the needs of immigrant women, immigrant children and immigrant victims of domestic violence, sexual assault, dating violence, stalking, human trafficking and other crimes by advocating for reforms in law, policy and practice.

NIWAP is a national provider of training, legal and social science research, policy development, and technical assistance to advocates, attorneys, pro bono law firms, law schools, universities, law enforcement, prosecutors, social service and health care providers, justice system personnel, and other professionals who work with immigrant women, children and crime victims. Our work supports those in the field and in government who work to improve laws, regulations, policies, and practices to enhance legal options and opportunities for immigrant women and children.

NIWAP provides training and technical assistance on a broad range of issues of importance to immigrant women and children, including VAWA immigration and confidentiality, family law, protection orders, public benefits, language access, cultural competency, and access to services, including shelter, transitional housing, health care, and education.

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