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Family Courts and Immigration Status

By David B. Thronson and Judge Frank P. Sullivan

ABSTRACT

Immigration issues can complicate the already difficult decisions that face family courts, and immigration law is a real and substantial element in the lives of many persons properly before family courts for protection and resolution of family issues. Yet there are not established parameters for evaluating the appropriateness and scope of the consideration of immigration issues in family court. This article explores principles and approaches regarding immigration issues in family courts, developing rationales for engaging or not in immigration issues, and providing a foundation for thoughtful consideration of the ways in which immigration law interacts with core family law functions.

INTRODUCTION

Families transcend borders and cross divides of immigration status. Immigration laws which regulate the migration of people consider family connections in only a limited fashion, and the ability to achieve lawful immigration status in the United States diverges greatly from any notion that having close family connections provides a reliable path to lawful immigration status. Given this chasm, when immigration law and family laws inevitably collide, children routinely are caught in the middle. The interaction is not simply a clash of practical realities, but often a clash of values. On the most fundamental levels, the motivating forces of immigration law and family law differ. The vindication of immigration law goals often compromises family integrity and the best interests of children, and achievement of family integrity often can be accomplished only by violating immigration laws.

Given the prevalence of immigrant families in the United States, immigrants and issues of immigration often cross the threshold of family court. Yet the appropriateness of and parameters for the consideration of immigration issues in family court decision making are not simple matters. Some courts seek to avoid immigration issues altogether, yet other "judges and advocates are all too eager to attach exaggerated legal significance to immigration status with little explanation

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and no analysis."[1] Immigration issues can complicate the already difficult decisions that face family courts, and immigration law is a real and substantial element in the lives of many persons properly before family courts for protection and resolution of family issues. This article lays out some principles and considerations related to immigration issues in family courts, articulating rationales for engaging or not in immigration issues and identifying frameworks for thoughtful consideration of how immigration matters interact with core family law principles and functions.

THE DEMOGRAPHICS OF IMMIGRANT FAMILIES

Demographic details of the U.S. population reflect our national inability to reach consensus regarding enforcement and reform of our immigration laws. The ongoing stalemate leaves in place immigration laws that provide potential immigrants a strong disincentive to leave the United States yet strand individuals and families in a limbo where family members cannot achieve a common immigration or citizenship status.[2] The numbers are sufficiently large that even with record immigration enforcement activities that impact thousands of families,[3] millions of unauthorized migrants continue to live stable lives in the United States.[4] Yet despite long periods of residence and strong equities in the United States, including ties with close family members in this country, they are unable to regularize their immigration status.[5]

As a result, the United States is home to a large and rising number of mixed status families, that is families in which all members do not share the same immigration or citizenship status.[6] A mixed family status can include families whose members have different forms of lawful immigration status, but many include some family members who are not authorized to remain in the United States.

Children in immigrant families now account for nearly one fourth of all children in the United States.[7] The majority of children in immigrant families, 59%, have at least one parent who is a U.S. citizen.[8] Still, more than five million children have at least one parent who lacks

1 David B. Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11 Tex. Hisp. J.L. & Pol'y 45, 45 (2005) (surveying family court decisions and developing a classification of the approaches that family courts adopt when presented with immigration status issues).

2 *See* David B. Thronson, *You Can't Get Here From Here: Toward a More Child-Centered Immigration Law*, 14 Va. J. Soc. Pol'y & L. 58, 72-76 (2006) (detailing barriers to obtaining legal immigration status for families living in the United States).

3 Immigration Customs and Enforcement, *FY 2011: ICE announces year-end removal numbers, highlights focus on key priorities including threats to public safety and national security* (Oct. 18, 2011) (reporting a record 396,906 removals in fiscal year 2011), *available at* http://www.ice.gov/news/releases/1110/111018washingtondc.htm.

4 See discussion below.

5 *See generally* David B. Thronson, *Entering the Mainstream: Making Children Matter in Immigration Law*, 37 Fordham Urb. L.J. 393 (2010) (debunking the myth "that parents are afforded easy and unwarranted pathways to U.S. citizenship through their U.S. citizen children").

6 Michael E. Fix & Wendy Zimmermann, All Under One Roof: Mixed-Status Families in an Era of Reform 2 (Urban Institute, 1999).

7 Donald J. Hernandez & Wendy D. Cervantes, Children in Immigrant Families: Ensuring Opportunity for Every Child in America at 6 (First Focus, 2011).

8 Donald J. Hernandez, Generational Patterns in the U.S.: American Community Survey and Other Sources (2009), *available at* http://www.brown.edu/Departments/Education/paradox/documents/Hernandez.pdf.

authorization to remain in the United States.[9] This group grew by approximately 1.2 million children between 2003 and 2008.[10] Many children in immigrant families are U.S. citizens by birth, and "of the 5.5 million children of unauthorized immigrants, 4 million, or 73%, were born in the United States."[11] Even without legal analysis, numbers alone make it apparent that having a child in the United States is not a ready means of obtaining lawful immigration status for parents, as indicated by the 3.8 million parents of U.S. citizen children who remain unauthorized.[12] Parents of U.S. citizen children, therefore, make up 37% of the adult population of unauthorized immigrants.[13]

Of course, some children are themselves immigrants, arriving lawfully or otherwise. Unaccompanied children arrive in the United States by the tens of thousands each year.[14] Many more children arrive as dependents of their parents, some as lawful migrants and others outside the frameworks of lawful immigration.[15] In 2008, approximately 1.5 million children lived without immigration authorization in the United States with their parents,[16] with "little change in the number of unauthorized children since 2003."[17] As a result of these flows of child immigrants outside the frameworks of immigration law, about 13% of unauthorized immigrants living in the United States are children.[18] Including adults along with children, almost 9 million people live in families with at least one unauthorized immigrant.[19]

THE INTERACTION OF IMMIGRATION LAW AND FAMILY LAW

Given the unauthorized family members found in so many families, it is inevitable that immigration enforcement will directly impact immigrant families. The Department of Homeland Security's Office of Inspector General reported that it does not require the collection of

9 Aaron Terrazas & Jeanne Batalova, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, Migration Policy Institute, Oct. 2009, http://www.migrationinformation.org/USfocus/display.cfm?ID=747#7.

10 Jeffrey S. Passel & D'Vera Cohn, A Portrait of Unauthorized Immigrants in the United States 7 (Pew Hispanic Center, 2009), *available at* http://pewhispanic.org/files/reports/107.pdf.

11 *Id.*

12 *Id. See also*, David B. Thronson, *Thinking Small: The Need for Big Changes in Immigration Law's Treatment of Children*, 14 U.C. Davis J. Juv. L. & Pol'y 239 (2010) (explaining how "having a child in the United States does nothing to alter the parents' immigration status and in all but the most extreme situations it has no impact on parents' immigration options").

13 Passel & Cohn, *supra* note 10.

14 Approximately 80,000 unaccompanied children are apprehended annually. *See* Chad C. Haddal, Cong. Research Serv., RL 33896, Unaccompanied Alien Children: Policies and Issues 1 (2009). Many of these are turned back, while others are detained. *See id.* at 18 (noting that in fiscal year 2007, the Department of Homeland Security detained 8,227 unaccompanied children).

15 In fact, children in immigrant families are significantly more likely to live with two parents than are children in native families. Hernandez, *supra* note 8.

16 Passel & Cohn, *supra* note 10, 6-7.

17 *Id.* at 4. The population of undocumented children was estimated at 1.8 million in 2005. Jeffrey S. Passel, The Size and Characteristics of the Unauthorized Migrant Population in the U.S.: Estimates Based on the March 2005 Current Population Survey 7 (Pew Hispanic Center, 2006), *available at* http://pewhispanic.org/files/reports/61.pdf.

18 Passel, *id.* at 5.

19 Passel & Cohn, *supra* note 10.

data on the status of children of those removed, which is remarkable in itself.[20] But the Department's Inspector General reported that existing data indicate that at least 108,434 parents of U.S. citizen children were deported between fiscal years 1998 and 2007.[21] A more recent independent study indicates a much higher rate of removal, documenting that in "the six months between January and June 2011, Immigration and Customs Enforcement removed 46,486 parents of U.S.-citizen children from the United States."[22] That study also finds "there are at least 5,100 children in foster care whose parents have been deported or detained."[23]

Yet immigration status perhaps has even more widespread impact on family matters outside the context of immigration enforcement. For example, when parents in a child custody dispute do not share the same immigration or citizenship status, it is not unusual that the parent holding a status he or she perceives as superior attempts to highlight the status of the other. Parties and courts often reflexively assume there is legal significance or advantage in the distinction, and even where this mistake is avoided, raising immigration issues can still be a form of intimidation.[24] At other times, parties without legal immigration status seek to raise concerns related to immigration in family courts, asking courts to understand the way immigration status shapes an abusive family dynamic. Still others request the court to issue special findings to establish eligibility for immigration relief, such as that provided for court dependent children under immigration provisions for special immigrant juvenile status.[25] When children of immigrant families are involved with child welfare systems, issues as central as seeking placements for children can create struggles as child welfare workers grapple with the difficulties, both practical and legal, that arise in the vetting of possible transnational placements, potential placements with undocumented caregivers, and resource limitations related to immigration status that impact reunification planning.

There is tremendous tension and potential for inconsistency as immigration law and family law intersect. As noted above, immigration and family law reflect different values and priorities. The tension is especially apparent when immigration law reaches different conclusions about the legal rights of parents and children to remain in the United States. Even when less apparent, it can subtly influence a number of actions that family courts must undertake. Uncovering and analyzing the role of immigration status issues in family courts is an important first step to ensuring that family proceedings do not compromise core family values and rights when immigrant families and children are involved. A preliminary step, however, is uncovering the different values at play in immigration law and family law contexts.

20 Department of Homeland Security, Office of Inspector General, Removals Involving Illegal Alien Parents of United States Citizen Children 5 (Jan. 12, 2009).

21 *Id.*

22 Seth Freed Wessler, Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System 11 (Applied Research Center, Nov. 2011).

23 *Id.* at 22.

24 *See* Leslye Orloff et al., *Countering Abusers' Attempts to Raise Immigration Status of the Victim in Custody Cases*, Ch. 6.1 at 6, Legal Momentum. Courts "have generally recognized the *in terrorem* effect of inquiring into a party's immigration status when irrelevant to any material claim." *Topo v. Dhir*, 210 F.R.D. 76, 78 (S.D.N.Y. 2002). *See also* Thronson, *supra* note 1 at 55.

25 *See generally,* Katherine Brady & David B. Thronson, *Immigration Issues—Representing Children Who Are Not United States Citizens*, *in* Child Welfare Law and Practice: Representing Children, Parents and State Agencies in Abuse, Neglect and Dependency Cases (Donald N. Duquette & Ann M. Haralambie eds., 2d ed. 2010) at 415.

DEVALUING CHILDREN IN IMMIGRATION LAW

At first glance, U.S immigration law appears oriented toward advancing children's interests and general notions of family unity.[26] It supports family relationships through its system of family-sponsored immigration, derivative immigration for the family members of some immigrants, and waivers of bars of admissibility and cancellation of removal based on hardship to certain family members.[27] Substantial numbers of children do legally immigrate under the provisions of immigration law.[28] Upon closer inspection, however, immigration law's limited and often antagonistic approach to children is revealed.

First, immigration law employs a highly technical and restrictive definition of who qualifies as a "child," which emphasizes the conceptualization of children as passive objects in the functioning of immigration law. In immigration law, a "child" is defined with circularity as a "child" who meets other qualifying conditions, such as being born in wedlock or having a father who has taken specified steps to "legitimate" the child.[29] For a child born out of wedlock, a biological relationship with a father that is not accompanied by a "bona fide parent-child relationship" is insufficient for recognition as a child for immigration purposes.[30] Similarly, an adopted child is not a child for immigration purposes if the adoption is finalized after the child reaches age 16.[31] As such, not all children are children for immigration purposes, and parents have great control over and responsibility for whether immigration law will recognize their children as children. Children are "by definition passive objects subject to parental control."[32]

Even when a parent-child relationship is satisfactorily established under immigration law, children are treated less favorably than adults in their ability to exercise agency and extend status to other family members. Under immigration law's statutory framework, parent-child relationships receive favored treatment, but only if the parent holds legal immigration status. In contrast to citizen and legal permanent resident parents who can petition for their children,

26 Carol Sanger, *Immigration Reform and Control of the Undocumented Family*, 2 Geo. Immigr. L.J. 295, 296-97 (1988). "Families composed of aliens and citizens have received special attention as '[t]he legislative history of the Immigration and Nationality Act clearly indicates that the Congress intended to provide for a liberal treatment of children and was concerned with the problem of keeping families of United States citizens and immigrants united.' " *Id.* (quoting House Judiciary Comm., Facilitating Entry Into the United States of Certain Adopted Children, and Other Relatives of United States Citizens, H.R. Rep. No. 1199, 85th Cong., 1st Sess. 7, *reprinted in* 1957 U.S. Code Cong. & Admin. News 2016, 2020).

27 *See* INA § 203(a), 8 U.S.C.A. § 1153(a) (setting forth preference allocation for family-sponsored immigrants); INA § 201(b)(2)(A)(i), 8 U.S.C.A. § 1151(b)(2)(A)(i) (excluding "immediate relatives" of U.S citizens from direct numerical limitations on immigrant visas); INA § 201(c), 8 U.S.C.A. § 1151(c) (setting worldwide levels of family-sponsored immigrants); INA § 203(d), 8 U.S.C.A. § 1153(d) (defining who may receive accompanying or following to join immigration visas based on a family member's immigrant visa); INA § 240A, 8 U.S.C.A. § 1229(b) (allowing cancellation of removal for lawful permanent residents or nonpermanent residents based on, among other things, a qualifying familial relationship with a U.S citizen or lawful permanent resident).

28 *See* Thronson, *supra* note 5 at 397 ("[I]n fiscal year 2009 children as beneficiaries by parents or as derivatives of parents granted immigration visas constituted about 26.6% of all family sponsored immigration.").

29 INA § 101(b)(1), 8 U.S.C.A. § 1101(b)(1).

30 INA § 101(b)(1)(D), 8 U.S.C.A. § 1101(b)(1)(D).

31 INA § 101(b)(1)(E-G), 8 U.S.C.A. § 1101(b)(1)(E-G). A small exception exists for the siblings under age 18 of children adopted while under age 16. *Id.*

32 David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 Ohio State L.J. 979, 992 (2002).

children may never petition for their parents. In fact, U.S. citizens are permitted to petition for their parents only after they reach age 21 and are no longer children.[33]

Immigration law thus subordinates children's status to that of their parents. When parents successfully navigate the immigration system, they may include their children with them or may petition later for their children to join them. But when parents' attempts to immigrate fail, the attempts of their derivative children fail with them. Children are objectified, passively advanced through the process by successful parents and held back by unsuccessful parents.[34]

In contrast to its treatment of parents, immigration law does not permit children with legal immigration status, such as children who are U.S. citizens based on their births in the United States, to extend family-based immigration benefits to a parent or other family members. Immigration law assimilates children's status to that of their parents, but does not allow the assimilation of parents' status to that of a child.

Given that the same family relationship may allow an extension of immigration status if the legal status holder is the parent and not the child, this asymmetry is not a reflection of the value placed upon the parent-child relationship.[35] Rather, it demonstrates a central characteristic of immigration law, i.e., the asymmetry ensuring that children who hold legal immigration or citizenship status are not permitted to extend that status to other family members in the manner that adults can extend status to family members. For example, a child cannot include a parent as a derivative if the child obtains legal immigration status through a family petition.[36] Similarly, there are no statutory provisions for children granted protection from removal pursuant to the other avenues, such as asylum or the Convention Against Torture, to extend that status to parents.[37] Indeed, young parents who qualify as derivatives cannot even extend that immigration status to their own children because derivative status extends only one generation.[38] While adult asylees and refugees may obtain derivative status for their spouses and children, child asylees and refugees cannot petition for derivative status for their parents.[39]

Similarly, U.S. immigration law fails to give weight to the interests of the children in the context of waivers of inadmissibility grounds. Even if an immigration visa is available, grounds of inadmissibility may preclude a beneficiary from being able to immigrate to the United States.[40] In some instances, grounds of inadmissibility may be overcome by showing hardship

33 INA § 201(b)(2)(A)(i), 8 U.S.C.A. § 1151(b)(2)(A)(i).

34 *See* Bridgette A. Carr, *Incorporating a "Best Interests of the Child" Approach into Immigration Law and Procedure*, 12 Yale Hum. Rts. & Dev. L.J. 120, 133 (2009) (noting children's "invisibility is due to the fact that in most cases there is no avenue for immigration decision-makers to take their interests into account").

35 *See* Jacqueline Bhabha, *The "Mere Fortuity" of Birth? Are Children Citizens*, 15(2), Differences: J. Feminist Cultural Stud., Summer 2004, at 91, 95 (discussing the "striking asymmetry in the family reunification rights of similarly placed adults and minor children").

36 INA § 203(d), 8 U.S.C.A. § 1153(d).

37 *See generally* Lori A. Nessel, *Forced to Choose: Torture, Family Reunification and United States Immigration Policy*, 78 Temp. L. Rev. 897 (2005).

38 INA § 203(d), 8 U.S.C.A. § 1153(d).

39 *See* INA §§ 207(b)(3), 208(c)(2), 8 U.S.C. A §§ 1158(b)(3), 1157(c)(2).

40 INA § 212, 8 U.S.C.A. § 1182.

to adult family members, i.e., spouses and parents.[41] But the immigration statutes make hardship to children irrelevant.[42] Children's interests are consciously excluded from the equation.

This failure to provide meaningful consideration of children's best interests extends to immigration removal proceedings and cancellations of removal. In this context, an individual facing removal may seek cancellation of the removal based partly on "exceptional and extremely unusual hardship" to his or her legal permanent resident or U.S. citizen spouse, parent, or child.[43] This standard, in practice, is remarkably difficult to meet. To qualify for relief, parents must demonstrate hardship to children "substantially different from, or beyond, that which would normally be expected from the deportation of an alien with close family members here."[44]

Parents facing removal generally can argue hardship to their children in two ways. First, they can assert that if children are left behind, separation will cause hardship. But courts are unlikely to find "exceptional and extremely unusual hardship" because harm is a typical result of removal as "[d]eportation rarely occurs without personal distress and emotional hurt."[45] Moreover, separation from family members is "simply one of the 'common results of deportation or exclusion [that] are insufficient to prove extreme hardship.'"[46] Second, parents can argue that if children leave the United States with the parent, the children will face hardship in the destination country. Such hardship, however, generally is insufficient for relief simply on grounds that children will not have the same levels of education, health care, and economic opportunities that they would have in the United States.[47] Whether children stay behind or accompany parents abroad, the interests of the children involved are not relevant to the immigration law determination unless the circumstances of hardship at stake rise to the level of exceptional and extremely unusual. This is, as a practical matter, difficult to prove. Family separation and a potentially significant level of harm to children thus are an expected and accepted part of immigration law.

The peculiar treatment of children in immigration law, diverging from mainstream consideration of the best interests of children, generally means that parental decisions to seek a better life in the United States for their children will not assist parents in obtaining lawful immigration status. By stripping immigration law of consideration for the best interests of children, immigration law guarantees that actions we generally expect and applaud from parents to advance their children's interests are ignored in making immigration determinations. This results in a misalignment of U.S. immigration law and policy with the motivations of unauthorized migrants to arrive and remain in the United States. Indeed, it creates a structural imbalance in immigration law that virtually guarantees the perpetuation of a large block of unauthorized migrants who will stay for their children's interests, yet not be able to legalize their own status. This theme that children's interests in family integrity do not serve as a basis for possible extension of immigration status thus contributes directly to the

41 INA § 212(a)(9)(B)(v), 8 U.S.C.A. § 1182(a)(9)(B)(v).
42 *Id.*
43 INA § 240A, 8 U.S.C.A. § 1229b.
44 *In re Monreal-Aguinaga*, 23 I & N Dec. 56, 65 (B.I.A. 2001).
45 *Sullivan v. INS*, 772 F.2d 609, 611 (9th Cir. 1985).
46 *Jimenez v. INS*, No. 96-70169, 1997 WL 349051 at *1 (9th Cir. June 25, 1997) (unpublished decision).
47 *Id.*

perpetuation of mixed status families in the United States. Preventing the legalization of parents has far-reaching effects as it hampers the integration of immigrant children and the children of migrants into U.S. society.

Understanding the ways in which immigration and nationality law devalue children gives reason to exhibit caution in mixing immigration and family law in determinations regarding children. At its extreme, immigration law can function as family law by providing a de facto determination of where family members may live, yet immigration law does so in a manner that does not take children's interests into account. Family law provides a counter to this devaluation of children only if its own principles and values regarding the centrality of the integrity of family and child's interests are preserved.

PROTECTING CORE VALUES: KEEPING IMMIGRATION STATUS IN PERSPECTIVE

Perhaps the most high-profile immigration case involving a child in recent memory was the matter of Elian Gonzalez, a six-year-old boy whose father sought to return with him to Cuba in the face of massive opposition from extended family and the public. Notably, Elian's case was not really decided on immigration law principles. Despite the intense federal involvement and a rare public example demonstrating what home raids by immigration officers are like, the resolution ultimately turned not on any immigration determination on the merits of whether Elian qualified for asylum or other immigration relief. At its core, the case was resolved on well established family law principles, a straightforward validation of "the interest of a parent in raising his child as he sees fit" while seeking to balance "the independent and separate interest that a child may have, apart from his parents. . . ."[48] Whatever one thinks of the father's choice, he was determined to be a fit parent who was permitted to speak for and return home with his child.

The intense litigation and media spotlight on immigration status in Elian's case is a highly public illustration of the manner in which an immigration overlay on a family law matter can obscure and distract from core family law values. Yet while few cases share the media attention directed at Elian, the underlying issues inherent in deciding where a child will live, complicated by whether a child or other family members have rights to remain in the United States, arise routinely. As in Elian's case, in many instances in which immigration issues are raised in family court, courts must take great care that immigration issues not overwhelm and distract the court from family law.

At such times, the family court plays a critical role in protecting family rights in difficult circumstances. As the U.S. Supreme Court has noted, the "interests of parents in the care, custody and control of their children . . . is perhaps the oldest of the fundamental liberty

48 *Gonzalez v. Reno*, 212 F.3d 1338, 1351-2 (11th Cir. 2000). The absence of meaningful consideration of Elian's voice in the decision process is among the critiques commonly advanced in analyzing this matter. *See, e.g.,* discussion in Berta Esperanza Hernandez-Truyol, *On Becoming the Other: Cubans, Castro, and Elian: A Latcritical Analysis*, 78 Denv. U. L.Rev. 687, 714 (2001).

interests recognized by the Court."[49] Although family law is generally a state realm, "the U.S. Constitution provides parameters that limit the states' ability to define and regulate family rights and obligations."[50] The U.S. Supreme Court's "decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to the companionship, care, custody, and management of his or her children is an important interest that undeniably warrants deference."[51]

Though "nobody argues that [noncitizens] are treated identically with citizens in every circumstance,"[52] popular conceptions that parents without authorized immigration status have lesser interests in the parent-child relationship[53] are unfounded. As the Supreme Court has stated:

> There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.[54]

The fact that "a person's initial entry into a State, or into the United States, was unlawful, and that he may for that reason be expelled, cannot negate the simple fact of his presence within the State's territorial perimeter."[55]

The few courts that have directly commented in published decisions on whether immigration status per se might impair parental rights have rejected the notion, tersely yet uniformly and unequivocally. For example, dismissing the argument that a father "should be denied custody solely because of his immigration status," an appellate court in Washington observed that the "due process and equal protection provisions prevent denying an illegal immigrant custody based on that ground."[56] In a similar vein, the Supreme Court of Nevada concluded that among the "fundamental interests [that] apply to individuals regardless of their immigration status" is "the interest of parents in the care, custody, and control of their

49 *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *see also Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Santosky v. Kramer*, 455 U.S. 745 (1982). *See also Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (finding that it is "cardinal . . . that the custody, care and nurture of the child resides first in the parents"); *Kelson v. City of Springfield*, 767 F.2d 651, 654 (9th Cir. 1985) ("[P]arents have a fundamental liberty interest in maintaining a relationship with their children which is protected by the Fourteenth Amendment.")

50 Annette Ruth Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J.L. REFORM 683, 688 (2001).

51 *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18, 27 (1981).

52 Linda S. Bosniak, *Membership, Equality and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1064 (1994). In the United States, the law is "deeply divided about the significance of the status of alienage for the allocation of rights and benefits in our society." *Id.* at 1055.

53 *See* John Brummet, *Can't We All Meet at the Border?* Arkansas News Bureau, April 3, 2006 ("We'll put the illegal parents in the van bound for Mexico and the American kids in the van bound for the social services agencies.").

54 *Matthews v. Diaz*, 426 U.S. 67 (1976); *see also Plyler v. Doe*, 457 U.S. 202, 210 (1982) (recognizing that "even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments.").

55 *Plyler v. Doe*, 457 U.S. 202, 215 (1982).

56 *In re Parentage of Florentino*, 113 Wash. App. 1002, 2002 WL 1825422 at *5, n.11 (Wash. App. Div. 2 Aug. 9, 2002).

children."[57] As such, without regard to their immigration status, parents stand "on equal footing . . . when asserting their right to custody of their children."[58] In sum, "[a]gencies and courts working with global families caught up in the child welfare system work with the same constitutional requirements, federal statutes, and state law that apply to purely domestic cases."[59]

When immigration concerns intrude, both parents and children have strong interests in maintaining the parent-child relationship. To protect these interests, parents generally have "the *affirmative* right to determine the country, city, and precise location where the child will live. This is one of the primary rights of . . . parent[s]."[60] Even in the context of deportation, parents retain this constitutional role in determining where their children will live. For example, when parents of a U.S. citizen child argued that their deportation would "deny [their child] the right which she has as an American citizen to continue to reside in the United States,"[61] the court rejected this argument, noting that the parents could simply take the child with them.[62] On the other hand, the court noted, the parents could "decide that it would be best for her to remain with foster parents, if such arrangements could be made. But this would be their decision involving the custody and care of their child, taken in their capacity as her parents."[63] In virtually every federal circuit, across a wide spectrum of procedural variations, courts have rejected similar constitutional claims premised on forced separation by reaffirming the ongoing vitality of the parents' role in making decisions for and about their children even as they face deportation.[64] Certainly, as children gain in maturity and autonomy their own voices become important, but the impact of the child's voice is not determined by the parent's immigration status or any limitation on parental rights associated with immigration status.

57 *Rico v. Rodriguez*, 120 P.3d 812, 818 (Nev. 2005).

58 *Id.*

59 Ann Laquer Estin, *Global Child Welfare: The Challenges for Family Law*, 63 Oklahoma L.Rev. 693 (2011).

60 *Gonzalez v. Gutierrez*, 311 F.3d 942, 949 (9th Cir. 2002). *See also Kelson v. City of Springfield*, 767 F.2d 651, 654 ("[P]arents have a fundamental liberty interest in maintaining a relationship with their children which is protected by the Fourteenth Amendment."); *In re Marriage of Burgess*, 13 Cal. 4th 25, 35 (1996) (noting presumptive right of parent to change residence of children).

61 *Acosta v. Gaffney*, 558 F.2d 1153, 1157 (3d Cir. 1977).

62 *Id.* at 1157 (asserting that the child "must remain with her parents and go with them wherever they go").

63 *Id.* at 1158. *See also Newton v. INS*, 736 F.2d 336, 343 (6th Cir. 1984) ("the deportation order against Dr. and Mrs. Newton does not compel them to take the children with them. . . . So if the parents consider it more important for their children to grow up in America and attend American schools, they could conceivably make arrangements for the children to stay."); *Ayala-Flores v. INS*, 662 F.2d 444, 446 (6th Cir. 1981) ("we presume [parents] wish [child] to reside with them, in Mexico or elsewhere").

64 *See, e.g., Emciso-Cardozo v. INS*, 504 F.2d 1252 (2d Cir. 1974); *Acosta v. Gaffney*, 558 F.2d 1153 (3d Cir. 1977); *Gallanosa v. United States*, 785 F.2d 116 (4th Cir. 1986); *Gonzalez-Cuevas v. INS*, 515 F.2d 1222 (5th Cir. 1975); *Newton v. INS*, 736 F.2d 336, 343 (6th Cir. 1984); *Mendez v. Major*, 340 F.2d 128 (8th Cir. 1965), disapproved on other grounds sub nom. *Cheng Fan Kwok v. INS*, 392 U.S. 206 (1968); *Urbano de Malaluan v. INS*, 577 F.2d 589 (9th Cir. 1978); *de Robles v. INS*, 485 F.2d 100 (10th Cir. 1973). The First and District of Columbia Circuits rejected similar claims made by spouses. *Silverman v. Rogers*, 437 F.2d 102 (1970), *cert. denied*, 402 U.S. 983 (1971) and *Swartz v. Rogers*, 254 F.2d 338 (1958). The Seventh Circuit has rejected similar arguments raised in slightly different contexts. *See Oforji v. Ashcroft*, 354 F.3d 609, 617 (7th Cir. 2003) (rejecting argument that would in effect "allow deportable aliens . . . to attach derivatively to the right of their citizen children to remain in the United States."). For a fuller discussion of this issue, *see* David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 Nev. L.J. 1165 (2006).

Moreover, immigration law operates on the assumption that this framework of unimpaired parental rights is in place. For example, the government routinely presumes the removal of children, including U.S. citizen children, together with parents who face removal from the United States pursuant to immigration law.[65] Indeed, Board of Immigration Appeals case law explicitly presumes that parents removed from the United States will continue as their caretakers after removal.[66] Thus even when immigration law has reached its harshest judgment and imposed removal from the United States upon a parent, immigration law provides no reason that a parent's relationship to his or her child warrants any less respect due to lack of immigration status.

BRIGHT LINES AND BURDENS OF PROOF

A bright line prohibition against any consideration of immigration status in child custody and welfare proceedings would stand as a firewall against discrimination and the intimidation inherent in parties' attempts to raise immigration status matters. The need to prevent bias and discrimination does not necessarily mean, however, that a call for an absolute bar on the consideration of immigration status is the answer. While a strict prohibition on any mention of immigration status admittedly has appeal as one way of avoiding discrimination, it has significant downsides as well. One of these is the possibility that discrimination is silently swept under the rug and courts' true rationales are obfuscated.[67] More broadly, and quite apart from impermissible bias, it is undeniable that immigration status does sometimes have real, tangible, and immediate impacts on the lives of children.[68]

Moreover, parties without legal immigration status sometimes seek to raise concerns related to immigration status in family courts, asking courts to accommodate realities related to their situations or to tailor findings to facilitate desired immigration outcomes, as in the instance of court-dependent children who might be eligible for special immigrant juvenile status.[69] More generally, immigration status is an influential force that shapes the life experiences of many

65 *Acosta v. Gaffney*, 558 F.2d 1153, 1158 (3d Cir. 1977) (determining that parents can decide where the child will live after parents' deportation and assuming that parents generally will decide to keep their children with them). "In order to economize on its limited resources, the INS usually does not bother to institute a formal deportation proceeding against an alien who is likely to depart anyway, such as the minor child of parents who are being deported." *Salameda v. INS*, 70 F.3d 447, 451 (1995).

66 "The claim that the child will remain in the United States can easily be made for purposes of litigation, but most parents would not carry out such an alleged plan in reality. Therefore we will require, at a minimum, an affidavit from the parent or parents stating that it is their intention that the child remain in this country, accompanied by evidence demonstrating that reasonable provisions will be made for the child's care and support (such as staying with a relative or in a boarding school)." *In re Ige*, 20 I. & N. Dec. 880, 885 (B.I.A. 1994).

67 *See* Thronson, *supra* note 1 at 67-72 (providing examples of courts obfuscating importance actually placed on immigration considerations).

68 *Rico v. Rodriguez*, 120 P.3d 812 (Nev. 2005) (recognizing the propriety of considering a parent's immigration status, but only "to determine its derivative effects on the children").

69 The federal statutory scheme to obtain special immigrant juvenile status specifically requires that some factual findings be made in state court. *See* Brady & Thronson, *supra* note 25 at 415. The factual findings concerning the child that are required "may only be made by the juvenile court." Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court, Final Rule, Department of Justice, Immigration and Naturalization Service, Supplementary Information, 58 Fed. Reg. 42,847 (Aug. 12, 1993). Specifically, the federal government has noted that in implementing the special immigrant juvenile statutory scheme it "does not intend to make deter-

immigrants and immigrant families, and the immigration status of parents and children forms an understandably tempting area of inquiry for family judges struggling to make difficult determinations about the interests of children.

A strict prohibition on raising immigration status issues in child custody matters would be difficult to maintain because immigration status does affect the experiences of many immigrants and their families. This impact is especially important for mixed-status families that face daily conundrums as they interface with societal institutions unsure of the implications associated with the array of statuses that such families present. The influence of immigration status in shaping daily life can be logistical and practical, or it can be much more significant. In some cases, the influence of immigration status is vitally relevant to determining a child's interests. Sorting out the real implications of immigration status from the misconceptions and stereotypes that abound is not an easy task.

For example, immigration status can play a central role in establishing and perpetuating dynamics of family violence. In such instances, ignoring the power and influence of immigration status may be among the least appropriate choices. Any examination of families where exploitation and control based on immigration status is a strong negative force would be incomplete and misleading without reference to concerns related to immigration. Indeed, as the American Bar Association has noted, "Offering battered immigrant parents and their children a way out of violent homes requires that attorneys, judges, police, child protective service workers and advocates develop an understanding of immigrant parents' life experience, so that they may craft legal relief that will be effective in stopping violence while being respectful of their cultural experiences."[70]

It is important for family court judges to realize that "[i]n many instances, the fact that battered immigrant women have no legal immigration status or documentation in the U.S. is a result of the batterer's use of the victim's immigration status as a weapon of abuse."[71] Moreover, it may well be the case that in some instances an "abuser's attempt to raise the other parent's immigration status . . . [itself] is evidence of on-going abuse."[72] If this is the case, a court's inquiry into the abuser's motives and rationale for attempting to inject the issue of immigration status into the proceeding may be especially telling. Further, the strategic decision of a party or attorney in a particular case to educate a judge regarding the true impact of immigration status ought to not be prohibited or even discouraged.[73] Contrary to attempts to introduce irrelevant status concerns to intimidate a party, in such instances it may well be a person lacking immigration authorization who seeks to bring immigration concerns that are highly relevant to the child's best interests to the court's attention.

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minations in the course of deportation proceedings regarding the 'best interest' of a child for the purpose of establishing eligibility for special immigrant juvenile classification." *Id.*

70 Howard Davidson, *The Impact of Domestic Violence on Children, A Report to the President of the American Bar Association*, at 19 (Aug. 1994).

71 Leslye E. Orloff, Mary Ann Dutton, Giselle Aguilar Hass, Nawal Ammar, *Battered Immigrant Women's Willingness to Call for Help and Police Response*, 13 UCLA Women's L. J. 43, 55 (2003).

72 Orloff et al., *supra* note 24 at 6.

73 The "pervasive lack of understanding of the life experiences of battered immigrant women by the systems designed to protect battered women and immigrant victims greatly reduces the likelihood that immigrant victims will be able to escape the violence in their lives." Orloff et al., *supra* note 71 at 46.

The appropriate line in child custody matters cannot be, or at least cannot always be, drawn to enforce absolute silence about immigration status. This conclusion extends outside the realm of domestic violence, as immigration status unquestionably influences the lives of many immigrants and immigrant families in a variety of predictable and unpredictable ways. To argue that concerns related to immigration never impact the interests of children in any situation is not credible, and it is unrealistic to think that judges will or should completely ignore the persistent and pervasive collateral impact of immigration status on some children and families. Practically significant examples include establishing levels of child support or enforcing child support when parties are not unauthorized to work.[74] Eligibility restrictions for important benefits, such as Supplemental Security Income, food stamps, and Temporary Assistance for Needy Families may be highly relevant to some families.[75] If an affidavit of support is executed to support an immigration application, this affidavit may have relevance to support issues.[76]

As such, an important criterion emerges that limits the consideration of immigration issues in family court and prevents the introduction of immigration status to promote bias in outcomes. Restricting the consideration of immigration issues to instances where immigration concerns are demonstrably relevant on an individualized basis prevents the introduction of material for discriminatory purposes. The proponent of considering immigration status or concerns must establish specific facts and their relevance to the legal determination at hand. Forcing the proponent to articulate a rationale for the consideration of immigration status brings transparency to the reasoning and reduces opportunities for discrimination and obfuscation. At the same time, this approach maintains flexibility in responding to the myriad unseen ways in which immigration law impacts lives.[77] The rejection of irrelevant bias based on immigration status per se does not preclude carefully delineated factual analysis of the collateral consequences of the workings of immigration law on children.

AVOIDING STEREOTYPES

It is important, however, to limit the court's consideration of immigration concerns to prevent the introduction of irrelevant stereotypes. Stereotypes are ill equipped to replace the case-by-case inquiries about the lives of children required to promote children's best interests. Millions of immigrants, with and without authorization, have unique experiences of life in the

74 *See Gomez v. Fernandez*, No. R-120399 (Nev. Eighth Jud. Dist. Ct. Fam. Div. hearing Mar. 22, 2004) (copy on file with author).

75 *See In re Kittridge*, 714 N.Y.S.2d 653, 654 (N.Y. Fam. Ct. 2000). *See also,* National Immigrant Law Center, *Overview of Immigrant Eligibility for Federal Programs*, http://www.nilc.org/immspbs/special/overview-immeligfedprograms-2011-10.pdf.

76 *See* 8 U.S.C. § 1182(a)(4)(C) (requiring affidavits of support in the context of family-sponsored immigration); Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 Minn. L. Rev. 1625, 1700-07 (2007) (discussing enforceability of affidavits of support in the context of immigration based on marriage).

77 Given the many ways, some of which are unpredictable, that immigration issues can impact the lives of children and families, a flexible approach to the introduction of immigration status is more in line with the general ability of family courts to craft equitable responses to peculiar situations. *But see* Kerry Abrams, *Immigration Status and the Best Interests of the Child Standard*, 14 Va. J. Soc. Pol'y & L. 87, 98 (2006) (proposing "a presumption that immigration status is not relevant in child custody disputes, coupled with specific classes of cases in which the presumption could be rebutted").

United States. Constant vigilance is required to combat attempts to essentialize their experiences and replace individualized fact finding with assumption and stereotypes. One of the most pervasive stereotypes regarding immigrants is that they lead unstable and precarious lives.

Assertions related to the insecurity and precariousness of immigrants' continuing presence in the United States are easily overstated.[78] Millions of immigrants, without regard to immigration status, have regular employment and established homes in the United States. As the Supreme Court has remarked, the presence of a population lacking authorized immigration status in the United States is quite established.[79] In overturning the termination of a father's parental rights, one appellate court noted:

> Essentially, the termination of the father's parental rights was based on the possibility that the father could someday be deported and, . . . [the child] might be returned to DFAC's custody or sent to Mexico. When we wield the awesome power entrusted to us in these cases, our decisions must be based on clear and convincing evidence of parental misconduct or inability and that termination is in the best interests of the child, and not speculation about the vagaries or vicissitudes that beset every family on its journey through the thickets of life.[80]

Despite spikes in the enforcement of immigration laws, most unauthorized immigrants are unlikely to face removal.[81] Even those in removal proceedings may be eligible for relief, such that "a State cannot realistically determine that any particular undocumented [person] will in fact be deported until after deportation proceedings have been completed."[82] And of course, immigrants in removal proceedings are entitled to due process protections that provide time from the initiation of removal proceedings to avenues of appeal to possible removal.[83] Presence in the United States without authorized immigration status is not in and of itself evidence of instability.

The relative stability among immigrant populations is true not only for parents, but also for other relatives and potential caregivers. Yet routinely, "[c]hild welfare departments and agencies are turning away family members and family friends who wish to care for their young kin because of their immigration status."[84] Even if workers assume that such placements are possible, "the dearth of policy means that biases of caseworkers or the internal policies of case

78 *In re Margarita T.*, No. A-95-530, 1995 Neb. App. LEXIS 397, at *3 (Neb. Ct. App. Dec. 19, 1995) (finding that a father's "illegal immigration status in the country renders his presence here to supervise his child temporal, at best"). For a more grounded review of the possibilities of immigration enforcement, *see* WESSLER, *supra* note 22 at 52).

79 In 1980, the U.S. Supreme Court noted testimony of the U.S. Attorney General that "[w]e have neither the resources, the capability, nor the motivation to uproot and deport millions of illegal aliens, many of whom have become, in effect, members of the community." *Plyler v. Doe*, 457 U.S. 202, 219 n.17 (1982); *See In re B. del C.S.B.*, 559 F.3d 999, 1012 (9th Cir. 2009) (noting that "the likelihood of deportation of law-abiding aliens . . . is small, both because of the sheer number of undocumented immigrants and because the government has set a priority to deport those with criminal records").

80 *Interest of M.M.*, 587 S.E.2d 825, 832 (Ga. Ct. App. 2003) (internal citations omitted).

81 In fact, for some demographic groups, the statistical probability of immigration removal generally is significantly less than the probability of incarceration for a crime. Abrams, *supra* note 77 at 93.

82 *Plyler v. Doe*, 457 U.S. 202, 226 (1982).

83 Persons "who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness, encompassed in due process of law." *Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206, 212 (1953).

84 WESSLER, *supra* note 22 at 54.

management agencies can derail the maintenance of extended families."[85] In some jurisdictions, such as Illinois, policies establish explicitly that as long as other criteria are met, the "[i]mmigration status of a relative caregiver should not hinder the placement of a relative child in the home."[86] Looking past stereotypes and unfounded assumptions regarding the instability of immigrants provides children with more options and enhances the prospects of non-institutional placements.

EXPLORING ALL OPTIONS

When family members, social workers, and courts assume that U.S. citizen children must remain in the United States, they have essentially decided that a parent or caregiver forced by immigration law to leave the country can no longer care for that child.[87] In individual cases this conclusion may turn out to be true, but the general proposition that children cannot flourish in other lands is plainly unsustainable. The need to consider options related to life in other countries holds true regardless of the immigration or citizenship status of the children involved.[88]

Immigration and citizenship laws determine who is permitted to legally remain in the United States, but these laws do not determine who is permitted to leave. Generally, "[e]veryone has the right to leave any country, including his own, and to return to his country."[89] Children who are not citizens of the United States, even those with permanent permission to reside in the United States, can hardly be thought unable to return to their country of citizenship. Moreover, U.S. citizens have a constitutionally mandated right to leave the United States. The "right to travel is a part of the 'liberty' of which the citizen cannot be deprived without the due process of law under the Fifth Amendment. Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage."[90] Travel within the United States and "[t]ravel abroad . . . may be as close to the heart of the individual as the choice of what he eats, or wears, or reads."[91]

When family courts have been asked to review the possibility of assigning the custody of a child in a manner that might result in the child leaving the United States, they have not balked at ordering children to leave the country. Well over 100 years ago writing for the Kansas Supreme Court, future Supreme Court Justice Brewer wrote that "I cannot agree with counsel that it is never the province of the court to expatriate a citizen. In some cases I think the duty

85 *Id.*

86 Illinois Department of Children and Family Services, Policy Guide 2008.01, Licensing, Payment and Placement of Children with Undocumented Relatives (noting that "[p]lacement practices shall be consistent with the child's best interest and special needs").

87 *See In re D.R.*, 204 Conn. Super. LEXIS 325, at *34, 2004 WL 423993 (Conn. Super. Feb. 9, 2004) (stating without support that a mother's "return to Honduras renders her effectively unable to serve as a responsible parent").

88 Importantly, many children in immigrant families may hold citizenship of other countries, sometimes along with U.S. citizenship. On the other hand, the child's ability to lawfully reside in a parent's country of citizenship cannot be presumed.

89 Declaration of Human Rights art. 13(2), G.A. Res. 217A, at 71, U.N. GAOR, 3d sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

90 *Kent v. Dulles*, 357 U.S. 116, 125 (1958).

91 *Id.* at 125-26.

so to do is clear and absolute. As, for instance, where parents moving to a foreign country, and leaving their little child here for awhile, come back to claim it, and are hindered by those who have it in possession."[92] The U.S. citizenship or legal immigration status of children is no impediment to their leaving the United States.[93]

The real issue, then, is not whether children may leave the United States but rather how to decide whether they leave or stay, especially when children are too young to exercise agency in influencing this decision. As discussed above, in the immigration context courts have overwhelmingly turned to parents to make this difficult decision. Parents may adamantly resist the de facto deportation of their children to join them outside the United States, and if so their wishes deserve due consideration. But a parent's wish for a child to remain in the United States cannot be confused with a belief that the child must remain due to her citizenship or immigration status. Similarly, family courts are the best forum to consider the voices and desires of children in decisions about where they will live. An immigration overlay on a case does not override the complex work that courts do in integrating children's wishes into decision making as children gain in maturity and autonomy.

PRACTICAL CHALLENGES AND ENSURING DUE PROCESS

When parents actually are deported or detained, proceedings related to child welfare become more difficult, but fundamental procedural rights to notice and participation persist. A parent's "location abroad presents many challenges for any child welfare agency assigned by the state to oversee the welfare of the child."[94] There are "many unavoidable obstacles, including information disadvantages, financial limitations, cultural differences, communication barriers, and the involvement of multiple judicial systems."[95] When immigration law prohibits a parent from returning to the United States, these cross-border difficulties are compounded. Yet these barriers are not insurmountable, and certainly the imperative to preserve the parent-child relationship requires efforts to overcome them. Notably, the ABA House of Delegates recently resolved that "the length of one's status as a immigration detainee, or one's removal or pending removal from the country, can not be the sole basis for a state not to provide legally mandated reasonable efforts to reunify children with their parent, legal guardian, or primary caretaker."[96]

92 *In re Bullen*, 28 Kan. 781, 1882 WL 1125, at *3 (1882).

93 *See Lane v. Lane*, 186 S.W.2d 47 (Mo.App. 1945) (finding no obstacle to mother's decision "to take the child out of the state and to a foreign country [Mexico]"); *State ex rel. Graveley v. Dist. Ct. 3d Jud. Dist.*, 174 P.2d 565, 572 (Mont. 1946) ("the court may properly permit a parent . . . to take it [a child] to another state, or even to a foreign country"); *Church v. Church-Corbett*, 625 N.Y.S.2d 367 (N.Y. App. Div, 1995) (permitting parent to take child to Italy during three-year Naval assignment abroad); *Blackwell v. Blackwell*, 12 Cal. Rptr. 201 (Cal. Ct. App. 1961) (finding no error in trial judge's decision allowing parent to move with children outside United States); *Viltz v. Viltz*, 384 So.2d 1348 (Fla. Dist. Ct. App. 1980) (allowing parent to take children to Venezuela); *Tamari v. Turko-Tamari*, 599 So.2d 680 (Fla. Dist. Ct. App. 1992) (granting permission for parent to relocate with child to Israel); *Byers v. Byers*, 370 S.W.2d 193 (Ky. 1963) (permitting parent to permanently relocate to South Africa with children).

94 Amity R. Boye, *Making Sure Children Find Their Way Home: Obligating States Under International Law to Return Dependent Children to Family Members Abroad*, 69 Brook. L. Rev. 1515, 1517 (2004).

95 *Id.*

96 *See* American Bar Association, House of Delegates, Resolution 103B (Aug. 8, 2011).

Parents detained by immigration authorities pending removal proceedings face particular obstacles. A recent study found that "[i]n none of the accounts shared by detained parents with children in foster care or by attorneys, caseworkers and judges was a detained parent allowed to physically appear at their dependency proceedings."[97] Access to proceedings by phone was also limited.[98] Distance is sometimes an obstacle, as detainees "are transferred an average of 370 miles from their homes."[99] Yet distance cannot explain every failure to find means for parents to participate.

In one egregious case, "despite knowledge of the social workers, the guardian ad litem and ultimately the judge that [the mother] was held next door by immigration officials, the county court proceeded in her absence with hearings to adjudicate the fate of the children."[100] Although overturned on appeal, such cases "send a strong message to immigrant parents that however unassailable their parental rights may be, as a practical matter they are not secure in their relationships with their children in the face of immigration law."[101] Appellate "vindication of family rights will not counteract perceptions that immigrants are disadvantaged in child custody matters until frontline practices align with appellate articulations of the rights of immigrant children and parents."[102] This change "will require social service agencies and family courts to commit resources and question existing routines, but the preservation of fundamental family rights requires no less."[103]

The barriers to parent participation in such instances are often created by immigration detention policies and practices. That said, family courts enable immigration actors by failing to demand means to communicate with and ensure the participation of detained parents. Change is unlikely without strong leadership from family courts requiring efforts on the part of child welfare workers and demanding cooperation of immigration officials in vindicating parents' constitutional rights to participation in proceedings regarding their children.[104]

UNDERSTANDING THE IMPACT OF FAMILY LAW OUTCOMES ON IMMIGRATION STATUS

Sometimes, an awareness in family court of immigration law and sensitivity to its requirements is important. "In some instances, involvement with family courts and child welfare systems provides unique, often fleeting, opportunities for children to achieve legal immigration status. Recognizing immigration opportunities and seeking timely assistance

97 Wessler, *supra* note 22 at 36.

98 *Id.* at 37.

99 *Id.* at 39.

100 David B. Thronson, *Creating Crisis: Immigration Raids and the Destabilization of Immigrant Families*, 43 Wake Forest L. Rev. 391, 408 (2008) (describing the proceeding in *In re Mainor T.*, 674 N.W.2d 442 (Neb. 2004) which overturned the termination of mother's parental rights).

101 *Id.* at 410.

102 *Id.* at 416-17.

103 *Id.* at 417.

104 *See* American Bar Association, House of Delegates, Resolution 103C (Aug. 8, 2011) (calling for detained parents to have access to attorneys and representation in state court custody, dependency, and other legal actions related to their children, together with the opportunity to participate meaningfully in all state judicial proceedings involving their children and to access court-mandated services related to their parenting).

from immigration experts may change a child's life."[105] This is especially true for court-dependent children, including children with court-approved guardians, who may qualify for special immigrant juvenile status.[106] In such cases, federal immigration law expressly requires findings that may only be made by state courts empowered to make decisions about the care and custody of children.[107]

In other situations, the requested accommodation for immigration purposes might be less direct, but equally important. For example, parties might request that an adoption proceeding be expedited because an adoption that is finalized after the child reaches age 16 is not recognized for immigration purposes.[108] Victims of domestic and sexual violence are often eligible for special visas for victims of crimes and human trafficking, and child welfare systems and family courts are among the institutions most likely to flag potential eligibility and leverage resources in the pursuit of such options.[109]

CONCLUSION

Immigrant children and families in the family courts are a reality that cannot be ignored.[110] Opening the door to the consideration of the collateral consequences of immigration status creates a tremendous challenge for immigrants, their advocates, and the courts to combat stereotypes and assumptions. Taking on these difficult issues is in accord with a growing consensus that the potential complications of immigration law in the lives of children and families must be acknowledged, understood, and, when appropriate, affirmatively addressed in legal representation.[111] Nothing less will ensure that the fundamental rights of immigrant children and parents are preserved.

105 Brady & Thronson, *supra* note 25 at 415.

106 *See id.* at 416-422. *See also* American Bar Association, House of Delegates, Resolution 103C (Aug. 8, 2011) (urging that unaccompanied and undocumented children "be screened promptly upon apprehension by immigration authorities or placement in foster care, or upon other entry to a child welfare system, to determine whether the child is eligible for immigration relief . . . .").

107 8 U.S.C. § 1101(a)(27)(J).

108 8 U.S.C. § 1101(b)(1)(E)-(G).

109 *See* Brady & Thronson, *supra* note 25 at 422-24 (discussing the Violence Against Women Act, T visas, and U visas).

110 *See In the matter of D.M.T.-R, M.C.* (June 27, 2011, Minn. Ct. of App.).

111 *See*, *e.g.*, *Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham*, Nev. L.J. 592 (2006) ("In juvenile justice and child welfare proceedings, children's attorneys should understand the interconnections to other related substantive areas, such as health, housing, public benefits, education, domestic violence, immigration, and transnational issues.").