

IMMIGRATION STATUS IN THE COURTS

NATIONAL CONSORTIUM ON RACIAL AND
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Immigration Status and Families

A **mixed status family** is one in which all family members do not share the same immigration or citizenship status.

A mixed family status can include families in which some family members are authorized to remain in the United States while others are not.

Children in Mixed Status Families

Children in immigrant families now account for approximately one-fourth of all children in the United States.

Donald J. Hernandez and Wendy D. Cervantes, *Children in Immigrant Families: Ensuring Opportunity for Every Child in America* (Washington, DC: First Focus and Foundation for Child Development, 2011).

Children in Mixed Status Families

The majority of children in immigrant families, 59%, have at least one parent who is a U.S. citizen.

Donald J. Hernandez, *Generational Patterns in the U.S.: American Community Survey and other Sources*,
<http://www.brown.edu/Departments/Education/paradox/documents/Hernandez.pdf>.

Children in Mixed Status Families

5.5 million children have at least one parent without lawful immigration status.

Jeffrey S. Passel and D'Vera Cohn, *Unauthorized Immigrant Population: National and State Trends* (Washington, DC: Pew Research Center, 2011).

Children in Mixed Status Families

82% of all children in families with parents lacking lawful immigration status are U.S. citizens.

Jeffrey S. Passel and D'Vera Cohn, *Unauthorized Immigrant Population: National and State Trends* (Washington, DC: Pew Research Center, 2011)

Mixed Status Families in the United States

3.8 million parents of U.S. citizen children lack lawful immigration status.

Almost 9 million people live in families with at least one unauthorized immigrant.

Jeffrey S. Passel and D'Vera Cohn, *A Portrait of Unauthorized Immigrants in the United States*, (Pew Hispanic Center, April 2009) at 8.

Mixed Status Families in the United States

In 41% of mixed status families, parents have different citizenship statuses.

Valerie Leiter, et al, Challenges to Children's Independent Citizenship: Immigration, Family and the State, 13 Childhood 11, 17 (2006).

Children as Immigrants

About 6% of authorized immigrants and 13% of unauthorized immigrants in the United States are children.

Jeffrey S. Passel and D'Vera Cohn, *A Portrait of Unauthorized Immigrants in the United States*, Pew Hispanic Center, April 2009) at 5.

Children as Immigrants

In 2010, approximately 1 million children without authorized immigration status lived in the United States with their parents.

Jeffrey S. Passel and D'Vera Cohn, *Unauthorized Immigrant Population: National and State Trends* (Washington, DC: Pew Research Center, 2011).

Children as Immigrants

Children in immigrant families live with two parents 82% of the time, compared with 71% of the time for native families.

Donald J. Hernandez, *Generational Patterns in the U.S.: American Community Survey and other Sources*,
<http://www.brown.edu/Departments/Education/paradox/documents/Hernandez.pdf>

Children as Immigrants

More than 60,000 unaccompanied children will be detained in the United States in fiscal year 2014, more than double the rate in 2013.

Kids in Need of Defense (KIND) and Center for Gender and Refugee Studies, *A Treacherous Journey: Child Migrants Navigating the U.S. Immigration System* (Washington, DC and San Francisco: KIND and Center for Gender and Refugee Studies, University of California Hastings College of the Law, 2014).

Enforcement is Up

In Fiscal Year 2011, ICE reported a record 396,906 removals.

Press Release, FY 2011: ICE announces year-end removal numbers, highlights focus on key priorities including threats to public safety and national security (Oct. 18, 2011).

Enforcement and Families

Data from U.S. Immigration and Customs Enforcement show that about 90,000 parents of U.S.-born citizen children were deported between July 2010 and September 2012.

Seth Freed Wessler, “Primary Data: Deportations of Parents of U.S. Citizen Kids,” *Colorlines*, December 17, 2012.

Left Behind

It is estimated that there may be as many as 5,100 children in foster care whose parents have been deported or detained at some time.

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

De Facto Deportation

The total number of U.S.-born children of Mexican parents counted in the 2010 Mexican census was about 500,000, compared with about 240,000 in 2000.

Immigration Between the U.S. and Mexico,
<http://www.pewhispanic.org/2012/04/23/immigration-between-the-u-s-and-mexico>

Interaction is Inevitable

On a fundamental level, immigration law and family law both deal with where people can live and who can live with whom.

Family law and immigration law constantly and inevitably interact.

Family Law as Immigration Law

- ▣ Family laws create and enforce relationships that have great relevance in immigration and nationality law
- ▣ Family laws often are determinative of immigration and nationality rights
- ▣ Importantly, this interaction can happen **without regard to intention**

Immigration Law As Family Law

Immigration law can have tremendous impact on family integrity as it intrudes into, and sometimes conflicts with, family or family court decisions

In determining which family members can live together, immigration law functions as a form of family law

What's wrong with this analysis?

“If the child was born in Mexico, . . . alright, and mom's here illegally, alright there'd be no doubt in the court's mind. Then the child is here illegally and I'd have to grant the U.S. citizen plaintiff custody.”

Nuñez v. Alonso, No. 04-D-311872-C (Nev. Eighth Jud. Dist. Ct. Fam. Div. hearing Feb. 25, 2004) (rev'd).

Fundamental Family Rights Transcend Immigration Law

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 children.... As such, **without regard to their immigration status, parents stand[] on equal footing ... when asserting their right to custody of their children.**”

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

Immigration Status Not An Indication of Parenting Ability

- “[C]hildren of immigrants are considerably underrepresented among children who become involved with the child welfare system, given their proportion of the U.S. population.”

Alan Dettlaff, *Immigrant Children and Families and the Public Welfare System: Considerations for Legal Systems*, 63 *Juv. & Family Ct. J.* 19, 21 (2012).

A Starting Principle for Analysis

A person's immigration or citizenship status per se is irrelevant to the determination of family law matters, including child custody

Question

Does immigration status ever matter in family court?

Should immigration status be raised in family and juvenile proceedings?

Sunshine as Protection Against Misinformation and Bias

- Litigants often seek to raise immigration issues despite lack of relevancy
- Veiled and not so veiled appeals to bias are common
- Many immigrants are wrongly convinced they have no rights and are scared to appear and assert rights in court

Question

What if parents face
deportation?

Facing Enforcement Still Unlikely

- 396,906 represents only 3.6% of the estimated population of 11 million undocumented immigrants.
- Priorities for removal include persons with criminal involvement, but many others are swept in by enforcement actions.

Transactional Records Access Clearinghouse, *ICE Seeks to Deport the Wrong People*, available at <http://trac.syr.edu/immigration/reports/243> (last visited July 30, 2012).

Country of Residence Does Not Alter Parental Rights

- “But unless Maria is found to be unfit, the fact that the State considers certain adoptive parents, in this case the foster parents, ‘better,’ or this environment ‘better,’ does not overcome the commanding presumption that reuniting the children with Maria is in their best interests—no matter what country she lives in.”

In re Angelica L., 277 Neb. 984, 1009, 767 N.W.2d 74, 94 (2009).

Children Can Be Raised Abroad

- “However, whether living in Guatemala or the United States is more comfortable for the children is not determinative of the children's best interests. We reiterate that the ‘best interests’ of the child standard does not require simply that a determination be made that one environment or set of circumstances is superior to another.”

In re Angelica L., 277 Neb. 984, 1009, 767 N.W.2d 74, 94 (2009).

Children Can Be Raised Abroad

- “Instead, the record demonstrates that the State made no efforts to reunify Maria and the children largely because DHHS thought the children would be better off staying in the United States. But so long as the parent is capable of providing for the children's needs, what country the children will live in is not a controlling factor in determining reunification.”

In re Angelica L., 277 Neb. 984, 1010, 767 N.W.2d 74, 94 (2009).

Question

What if parent already has
been deported?

Deportation Is Not Desertion

“We agree with the family court that respondents' involuntary deportation to Guatemala did not constitute desertion of the children for purposes of MCL 712A.19b(3)(a)(ii).”

In re B and J, 279 Mich.App. 12, 19 n.3 (2008).

De Facto Deportation

“When an alien-parent's child is a United States citizen and the child is below the age of discretion, and if the alien-parent is deported, it is the parent's decision whether to take the minor child along or to leave the child in this country.”

In re B and J, 279 Mich.App. 12, 20 n.5 (2008).

Challenges by Children to Expatriation Have Failed

Leaving "Harald . . . in the care, custody and control of his mother necessarily implies some restriction upon Harald's own preferences, such as his desire to live in the United States. But . . . the tradeoffs implicit within family life do not necessarily deny Harald his constitutional rights."

Schleiffer v. Meyers, 644 F.2d 656, 662 (7th Cir. 1981).

Keeping Immigration Law in Perspective

- When the issue of parents taking children abroad has arisen in family courts, they often have done what no immigration court ever could: order U.S. citizens to leave the United States.

Keeping Immigration Law in Perspective

- Children's citizenship or immigration status does not override parental decisions to take children out of the country.
- In the broader context of the parent-child relationship and the child's emerging autonomy, immigration and citizenship status alone play a limited role in determining whether children remain in the United States.

Choiceless Choices

- Children's valid immigration or citizenship status alone is insufficient to overcome the removal of a parent from the United States
- Decisions upholding de facto deportations simultaneously validate the notion that fundamental rights in the parent-child relationship are not weakened by parents' lack of immigration status or even the parents' deportation

Question

What if a parent or other caregiver lacks lawful immigration status?

Caregivers Lacking Lawful Immigration Status

- There generally is no reason that a person lacking lawful immigration status cannot be recognized or appointed as a caregiver.
- “Immigration status of a relative caregiver should not hinder the placement of a relative child in the home.”

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”).

Question

Do courts have an obligation to report unauthorized immigrants to ICE?

Making a Complicated Situation More Complicated

“Petitioner was not entitled to seek termination of respondents' parental rights under § 19b(3)(g) in this case because petitioner, itself, intentionally set out to create that very ground for termination.”

In re B and J, 279 Mich.App. 12, 19 (2008).

Informing foreign authorities?

- If the relevant information is available to the competent authorities of the receiving State, such authorities shall have the duty: ...
 - (b) to inform the competent consular post without delay of any case where the appointment of a guardian or trustee appears to be in the interests of a minor or other person lacking full capacity who is a national of the sending State.
- Vienna Convention on Consular Relations, art. 37(b), Apr. 24, 1963, 21 U.S.T. 77, 102.

Question

Situations where immigration issues are important to consider?

Impact on Timing

- **Adoptions** - to establish a parent-child relationship for immigration purposes, adoptions must be completed before age 16
- The deadline of age 16 is relaxed only where more than one sibling is adopted. When the adoption of at least one sibling is completed before the age of 16 the adoption of siblings completed before the age of 18 will create a parent-child relationship

Divorce

Nature of immigration status important – lawful permanent resident, conditional permanent resident, non-immigrant derivative, unauthorized (with or without pending petitions)

Derivative status may end upon dissolution of the marriage

Timing often is important

Conditional Permanent Residency

Persons who enter the United States as or adjust status to legal permanent residents on the basis of a marriage that is less than two years old receive “conditional” residency.

Two years after acquiring this conditional status, the wife and husband are required to file a joint petition to remove the condition.

If it is not possible to petition jointly, the conditional resident may or may not qualify for a hardship waiver of the requirement.

Non-Immigrant Derivative Visas

- Many non-immigrant visas permit close relatives to obtain “derivative” status
- Ending qualifying relationships generally ends eligibility for derivative status
- Note that ending a marriage via divorce does not end parent-child relationships, but **MAY** end step parent-child relationships

Domestic Violence



Immigration law and differences in immigration status can become tools of power and control

Domestic Violence

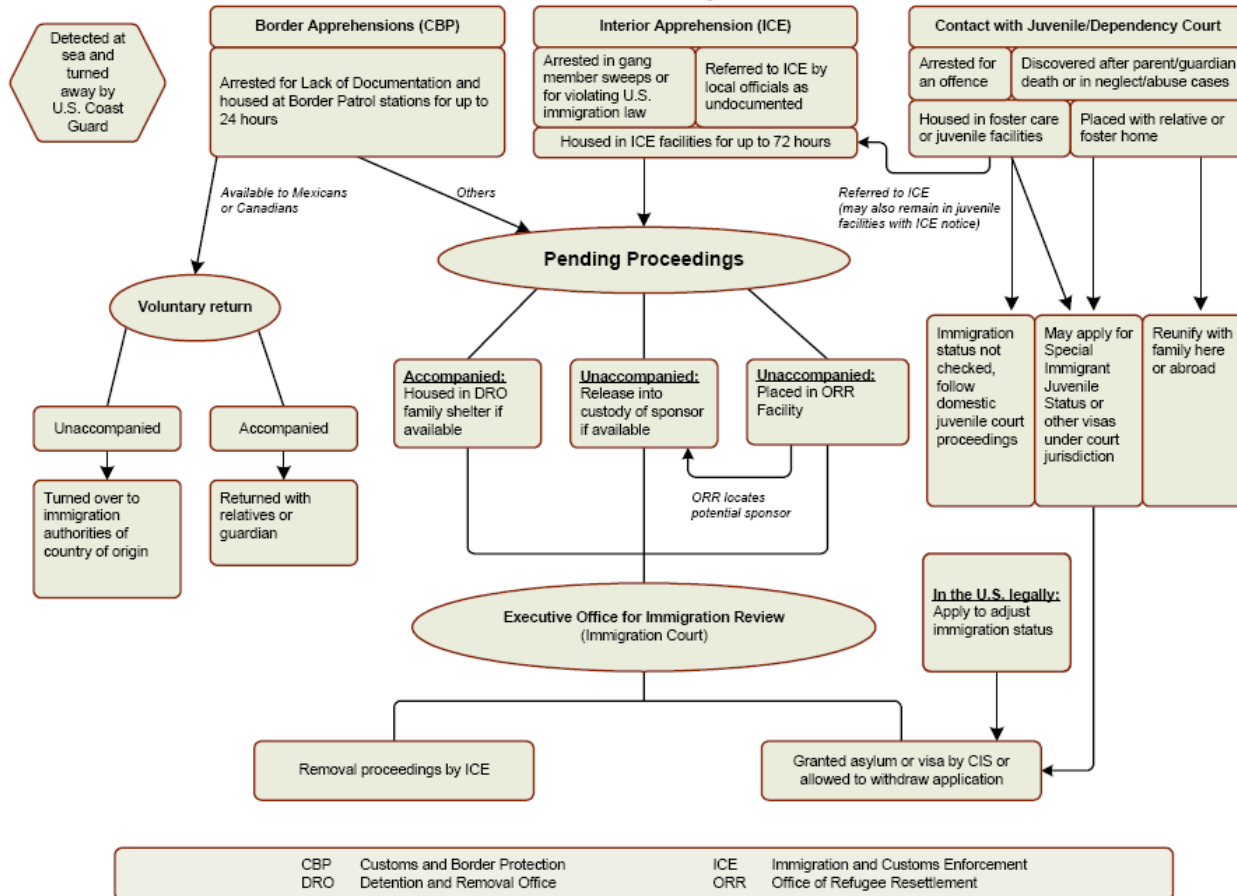
- Some forms of immigration relief, waivers of certain immigration requirements, are available to victims of domestic violence
- Perpetrators of domestic violence may be barred from or delayed in obtaining immigration status or naturalization
- Even U.S. citizen perpetrators of domestic violence may lose immigration related rights

Domestic Violence and Losing Immigration Status

- Grounds of deportation include:
 - ▣ Crimes of domestic violence
 - ▣ Crime of stalking
 - ▣ Crime of child abuse, neglect or abandonment
 - ▣ Court determination of violation of the portion of a court issued protective order that involves protection against credible threats of violence, repeated harassment, or bodily injury.

It can get complicated

Figure 1. General Process for Juvenile Aliens Involved with the Immigration and Juvenile Justice System



Source: CRS Presentation of chart from National Juvenile Justice Network, "Undocumented Immigrant Youth: Guide for Advocates and Service Providers," Policy Brief No. 2, November 2006.

Juvenile Delinquency and Immigration

- Adjudications in juvenile proceedings are not considered “convictions” for immigration purposes

See Matter of Devison-Charles, 22 I. & N. Dec. 1362, 1365-66 (BIA 2000); Matter of Ramirez-Rivero, 18 I. & N. Dec. 135 (BIA 1981).

Juvenile Delinquency and Immigration

- But anyone the Attorney General has “reason to believe” is a controlled substance trafficker is inadmissible. INA § 212(a)(2)(C)
- Juvenile adjudications may be sufficient to create reason to believe
- Juvenile delinquency may impact moral character determinations

Juvenile Delinquency and Immigration

- Juvenile delinquency that results in state dependency may serve as the basis for an application for special immigrant juvenile status.

Language Access

- Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, and the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3789d(c), both prohibit national origin discrimination by recipients of federal financial assistance.
- Failing to take reasonable steps to ensure meaningful access for LEP persons is a form of national origin discrimination. *Lau v. Nichols*, 414 U.S. 563 (1974).

Language Access

- DOJ explains that “court systems receiving federal financial assistance, either directly or indirectly, must provide meaningful access to LEP persons in order to comply with Title VI, the Safe Streets Act, and their implementing regulations.”

Thomas E. Perez, Assistant Attorney General, Letter to Chief Justices/State Court Administrators, August 16, 2010.

DOJ's Common Concerns

- Must provide access to ALL court proceedings.
- Title VI and its regulations “prohibit practices that have the effect of charging parties, impairing their participation in proceedings, or limiting presentation of witnesses based upon national origin.”
- “DOJ expects that, when meaningful access requires interpretation, courts will provide interpreters at no cost to the person involved.”

Thomas E. Perez, Assistant Attorney General, Letter to Chief Justices/State Court Administrators, August 16, 2010.

Immigrant Eligibility for Benefits

- Immigration status often affects eligibility for public benefits
- Mixed status families often have family members with different eligibility statuses
- Children of immigrant parents often do not receive all the benefits to which they are eligible

Ongoing Challenges

- Don't allow immigration issues to undermine critical values and principles
- Creatively use the flexibility and equitable powers of family law
- Question assumptions
- Guard against bias and misinformation

Conflicting Values

- Immigration law and family law have fundamentally different conceptions of “child” and “family”
- In particular, immigration law and family law attach vastly different importance to the best interests of the child

Conflicting Values

- Though immigration and family laws serve different functions and values, they inevitably interact
- Understanding the interaction of immigration and family law can help ensure that agencies and courts working with immigrant families preserve and honor important family law values

Knowledge of immigration issues is important

- Understanding and resolution of immigration status issues early can have important consequences in planning for custody, family reunification or independent living
- Family court involvement may provide a basis for obtaining immigration status that should not be missed
- Understanding of family dynamics may turn on knowing about family immigration issues