

IN PRACTICE

## Keeping Immigrant Families in the Child Protection System Together

by Ann Park

**Y**ou are an attorney appointed to represent a mother in a child welfare case. The caseworker tells you he has heard your client is held at a federal immigration detention center pending deportation proceedings. He also mentions there may be relatives

willing to care for your client's child, but they are undocumented immigrants or they live outside the U.S.

Your client's child is placed in foster care and the case plan calls for continued placement, services for your client, including parenting classes, and a concurrent plan of adoption.

- How can you effectively represent your client's interests?
- How do you find your client?
- What services can or should she be expected to participate in? Can she come to court hearings or otherwise participate in them?
- What about options for relative placement if she can't care for her child?
- If your client is deported, how can you help her reunify with her child?

Recent developments have highlighted issues immigrant families face in the child welfare system. A 2011 report by the Applied Research Center, "*Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System*" revealed shortcomings of the child welfare and immigration systems. These

shortcomings increase the chances that children will be removed from their parents' custody and be unable to reunify when immigrant parents are detained or deported.<sup>1</sup> The report urges advocacy and legislation that prioritize keeping immigrant families intact and out of the child welfare system.

This article discusses legislation enacted in California that addresses some of these questions, as well as recent federal policy that helps safeguard the parental rights of undocumented immigrants involved in federal immigration enforcement proceedings. Additionally, this article reviews federal child welfare law and policy that support best practices for working with immigrant families.

### Problem

When a child in foster care has a detained or deported parent, the child welfare system and immigration enforcement must work together to meet the child's needs. Yet, studies find that child welfare departments and courts often move to terminate the parental rights of a deported parent even though the child could be safely reunified.<sup>2</sup> Even when undocumented parents are not detained, some child welfare

agencies and attorneys object to placing children with them because of the possibility of the parent's deportation.<sup>3</sup>

Federal immigration and child welfare policy prioritize reunifying families when possible. In *Fiallo v. Bell*, the U.S. Supreme Court affirmed that the federal Immigration and Naturalization Act "establishes that congressional concern was directed at the problem of keeping families of United States citizens and immigrants united."<sup>4</sup> Further, the federal Bureau of Immigration Appeals also held that a parent, upon deportation, can decide whether to take their minor child along or leave the child in the U.S.<sup>5</sup>

Although research shows reunification with parents or placement with relatives results in better outcomes for children,<sup>6</sup> children of deported

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parents are at risk of extended and even permanent separation.<sup>7</sup> Detained or deported parents may not have access to reunification services and may have difficulty taking part in child welfare proceedings like family court dependency hearings or child welfare agency case planning.<sup>8</sup> Studies find the top challenges to reunification are:<sup>9</sup>

- **Locating detained and deported parents.** Child welfare workers, lawyers, judges, and family members face difficulty locating parents when they have been transferred without notice to an ICE detention center.<sup>10</sup> ICE created an Online Detainee Locator System in 2010 to track an individual detainee, but it is reported that few child welfare personnel are familiar with it.<sup>11</sup> The parties involved in the case often have trouble communicating with parents. It is often incorrectly assumed that parents are uninterested in reunifying with the child.<sup>12</sup>
- **Complying with case plans.** Detained or deported parents face difficulty abiding by child welfare case plans, including making regular phone calls and visits.<sup>13</sup> A report by the Women's Refugee Commission noted that "immigration detention significantly impairs parents' ability to comply with reunification plans..."<sup>14</sup> ICE detention facilities do not provide parents access to classes required for reunification plans or adequate access to phone calls.<sup>15</sup>
- **Strict reunification timelines.** The Adoption and Safe Families Act (ASFA) requires that child welfare agencies file for termination of parental rights (TPR) when a child has been in care for 15 of the previous 22 months.<sup>16</sup> Although this can be extended when there is a compelling reason, a parent's detention or deportation is not explicitly listed.<sup>17</sup>
- **Lack of access to services and family court proceedings.** Ac-

ording to "Shattered Families," before the Parental Interests Directive (discussed below) detained parents were almost universally denied access to services required for reunification plans because ICE did not provide access to any services.<sup>18</sup> Further, ICE lacked a formal policy to help a parent attend state court hearings, either by phone or in person.<sup>19</sup> When a parent is not present at these hearings, the court often concludes the parent is unwilling or unable to reunify with her children.<sup>20</sup>

- **Systemic bias in the child welfare system against undocumented immigrant parents and relatives.** "Shattered Families" noted that systemic bias against undocumented immigrant parents and family members prevents reunification.<sup>21</sup> Child welfare agency administrators, caseworkers, judges, and attorneys may believe children are better off in the U.S. with American adoptive (or even long-term foster) parents.<sup>22</sup> The report further explains that this bias often supersedes the law that prioritizes family reunification.<sup>23</sup>
- **Lack of policy on reunification with deported parents.** Unlike California and New York, most child welfare agencies lack clear policies on reunifying children with deported parents, making decisions case by case.<sup>24</sup> In some jurisdictions, the concern has not risen to a level that generates the need for policies.<sup>25</sup> In other jurisdictions, the child welfare agency prefers not to have explicit policies to avoid controversy with anti-immigrant politicians and groups.<sup>26</sup>
- **Lack of consulate involvement.** Some foreign consulates have the capacity to complement your state agency's efforts to help families outside the U.S.; they can locate deported parents, provide parents with case plan services, facilitate

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home studies, accommodate visits between children and parents, and process passports for children leaving the U.S. to meet with their parents.<sup>27</sup> Yet, few child welfare agencies routinely contact foreign consulates when a custody issue arises involving noncitizen parents.<sup>28</sup>

## Affected Population

A growing number of U.S. deportees are parents.<sup>29</sup> More than 5,100 U.S. citizen children of undocumented immigrants were living in foster care as a result of their parents' detention or deportation in 2011.<sup>30</sup> In 2010, approximately 5.5 million children, 4.5 million of whom were U.S. citizens, lived with at least one undocumented parent.<sup>31</sup>

## Legislation

Below is a discussion of the major federal child welfare laws and proposed legislation that impact immigrant children and families involved in the child welfare system. California is the first state to enact legislation explicitly promoting family reunification for detained or deported parents. Debates are occurring about the need for similar legislation at the federal and state levels. For example, last year, the U.S. Senate passed the Border Security, Economic Opportunity, and Immigration Modernization Act of 2013. Further, an ongoing movement is underway to establish the "New York State Reuniting Families Act," which replicates the California bill (now pending).<sup>32</sup>

## Existing Federal Legislation

### ASFA

The Adoption and Safe Families Act (ASFA) requires funded jurisdictions to make reasonable efforts to prevent removal and work toward permanency. The initial goal is generally reunification. Because ASFA does not provide an exception for immigrant parents, they are entitled to reunification efforts.

Especially if you represent a parent, be aware of ASFA's emphasis on timely permanence. The agency is required to consider termination after the child has been in care for 15 of 22 months, but there are categorical exceptions including when the family did not receive services that were part of their case plan, when the child is placed with relatives, and when there are "other" compelling reasons that termination is not in the child's best interests.<sup>33</sup>

Thus, the primary way to protect your parent client's rights is to ensure the parent is provided services to ensure a "safe" return home.<sup>34</sup> These services should be tailored to the individual needs of the family, and as such, should be directed at overcoming the unique issues out-of-country or undocumented families face. It is important to emphasize that, in a custodial dispute between parents and the state, the requirement is that they provide a "safe" home, not the best home, and considerations such as the quality of schools or services in another country do not generally have much weight versus a parents' constitutional rights.<sup>35</sup> As one court noted the "fact that a child may enjoy a higher standard of living in the United States than in the country where the child's parent resides is not a reason to terminate [their] parental rights...."<sup>36</sup>

Ideally, the case plan and services are effective and the case can be resolved before 15 months. If not, a failure to provide services is an exception to a termination filing.

Second, especially if a parent's detention will last for an extended period, relative placements should be considered. Aside from the benefits of keeping the family together, a relative placement is a listed exception that could protect against termination if the case remains open.

### Fostering Connections

The Fostering Connections to Success and Increasing Adoptions Act (Public Law 110-351) requires that child welfare agencies notify adult relatives of children removed from their parents'

care within 30 days of removal. There is no mention of this requirement being limited to relatives within the United States. Thus, notice should be provided to relatives outside the U.S.

### MEPA

Additionally, the Multiethnic Placement Act (Public Law 103-382) provides that states cannot delay or deny placement of a child for adoption or into foster care based on the national origin of the adoptive or foster parent, or the child.<sup>37</sup>

### Foster Care Payments under IV-E

Finally, federal guidance related to Title IV-E foster care payments makes clear that federal law does not prohibit undocumented adults providing foster care from receiving federal foster care payments.<sup>38</sup>

## California's "The Reuniting Immigrant Families Act" SB 1064

California has the most foreign-born residents in the nation.<sup>39</sup> Also, nearly a quarter of the estimated 5,100 children in foster care whose parents have been detained or deported are California residents.<sup>40</sup> California's Reuniting Immigrant Families Act, signed into law on September 30, 2012, aims to address some challenges to reunification that immigrant families in the child welfare system face. The law:<sup>41</sup>

- permits the court to make placement and custody decisions regardless of the immigration status of the parent, legal guardian, or relative, and affirms that immigration status alone is not a disqualifying factor in making placement and custody decisions;
- grants the court discretion to provide an extension in the family reunification period for parents who may be detained or deported;
- requires the court to consider barriers detained or deported parents may experience in accessing court-ordered services and keeping contact with the child;

- requires the California Department of Social Services (CDSS) to provide guidance to social workers on referring children eligible for Special Immigrant Juvenile Status (SIJS) and other immigration relief options to receive assistance acquiring protective status;
- requires CDSS to provide guidance to counties and municipalities to establish Memoranda of Understanding (MOUs) with appropriate foreign consulate in child custody cases;
- requires the court to grant preferential consideration to a placement request by a child's relative regardless of the immigration status of the relative.

### **The Proposed "Border Security, Economic Opportunity, and Immigration Modernization Act of 2013"**

On June 27, 2013, the U.S. Senate passed "The Border Security, Economic Opportunity, and Immigration Modernization Act of 2013" (S744).<sup>42</sup> It is still not known whether this bill will pass in the House. Note that several provisions reflect improvements in California's SB 1064.<sup>43</sup>

The bill grants states discretion to consider a parent's detention or deportation in delaying filing a TPR petition. Further, the bill mandates state child welfare agencies to make reasonable efforts to meet certain conditions before filing for TPR in those cases.<sup>44</sup> The bill also includes provisions that ensure states identify, locate, and contact detained or deported parents and relatives, and notify them of the state's intent to file for TPR.<sup>45</sup> It ensures that state child welfare agencies reunify children with relatives whenever appropriate, regardless of their immigration status, and provide and document services to the parent or relative.<sup>46</sup>

### **U.S. Immigration and Customs Enforcement (ICE) Parental Interests Directive**

On August 23, 2013, U.S.

Immigration and Customs Enforcement (ICE) issued a directive that supplements existing ICE directives and other detention standards and policies dealing with immigrant parents.<sup>47</sup> The directive establishes ICE policy and procedure to address "the placement, monitoring, accommodation, and removal of certain alien parents or legal guardian."<sup>48</sup> The directive emphasizes that "ICE personnel should ensure that the agency's immigration enforcement activities do not unnecessarily disrupt the parental rights of both alien parents or legal guardians of minor children."<sup>49</sup>

The ICE Directive encourages ICE offices to:

#### **Appoint personnel to implement the directive.**

- Designate specially trained coordinators as Field Points of Contact to communicate with the central ICE Parental Rights Coordinator and to receive and address public inquiries from all parties involved in the process related to the parental rights or family ties of detained parents or legal guardians.

#### **Place or transfer detained parents.**

- Whenever possible, place or transfer the detained parent as close as practicable to the location of the child and/or family court or dependency court.

#### **Arrange parent's court participation.**

- When possible, arrange for the detained parent or legal guardian's in-person appearance at family or dependency court, when their presence is required and:
  - the detained parent or legal guardian requests an opportunity to participate in private custody or dependency hearings with reasonable notice;
  - the court is located within a reasonable distance of the detention facility where the parent or legal guardian is housed;
  - transportation can be reasonably arranged without security

and/or public safety concerns.

- When in-person appearance is impractical, work with the detained parent or legal guardian and the family court or child welfare authority to arrange other means, such as video or teleconferencing.

#### **Arrange parent-child visits.**

- Facilitate visitation between the detained parent or legal guardian and child to the extent practicable if visitation is ordered.
- Permit visitation through video or teleconferencing from the detention facility or the field office, if feasible and approved by the court.

#### **Coordinate care or travel of minor children.**

- When a parent or legal guardian is subject to a final order of removal, to the extent possible, accommodate the parent or legal guardian's efforts to make provisions for children. This could include arranging guardianship for the children to remain in the U.S. or obtaining travel documents for the children to accompany their parents to the country of removal.
- Help a detained parent or legal guardian access counsel, consults, and consular officials, courts and/or family members to help execute signed documents in the weeks preceding removal.

#### **Help parents appear at state court proceedings.**

- Facilitate the return of a removed parent or legal guardian if an order or documents show a TPR hearing will occur in family or dependency court and the parent or legal guardian must be physically present (although this is phrased to limit case return for TPR proceedings, a lawyer should argue that earlier dependency hearings are just as important, as they can be used to form the basis for later TPR petitions).
- Aid the return of a removed parent or legal guardian when the parent

or legal guardian confirms that:

- their sole purpose in traveling to the U.S. is to attend their TPR hearings (the lawyer should make the same argument as above);
- the grant of parole can be terminated any time;
- they are not traveling to the U.S. to pursue immigration benefits or relief, protection from removal, or to circumvent visa and immigration proceedings;
- they will depart the U.S. promptly at the end of the final TPR hearing;
- they understand they may be subject to removal from the U.S. if they do not leave right after their TPR hearing.

#### **Provide training.**

- Develop training materials to assist relevant field office personnel.

### **Practice Tips**

#### **Child welfare agencies and dependency courts should:**

- Set the right tone in court by making clear to the involved attorneys and parents that the parent's immigration status alone does not prohibit reasonable efforts to reunify or constitute a basis for TPR.
- Make sure that immigrant parents receive assistance from competent counsel and to translators/interpreters as needed.
- Track parents' whereabouts by closely working with a relevant foreign consulate or using tools such as the Online Detainee Locator System.
- Ensure parents can effectively participate in case planning and hearings.
- Make policy changes.
  - Create a taskforce composed of child welfare and immigration advocates. Charge the taskforce with identifying policy changes or clarifications for immigrant families in the

child welfare system.

- Adopt policies that prioritize reunification with parents and placement with relatives regardless of their immigration status.
- Support training and specialized skill development.
  - Host trainings on immigration law and immigration enforcement policies, and their impact on child welfare cases, for all caseworkers, attorneys, and judges working in child protection courts (the ABA Center on Children and the Law has helped develop and participated in such trainings in several states).
  - Contact foreign consulates and sign MOUs to ensure timely involvement and assistance of consulates when children of noncitizen parents are taken into protective custody of the child welfare system.<sup>50</sup>
  - Designate staff within child welfare agencies who specialize in working with immigrant children and families.
  - Encourage child welfare agency attorneys and children's attorneys to explore immigration relief options, including SIJS, T-Visa, U-Visa, etc.

#### **Parent attorneys should:**

- Track parents' whereabouts by closely working with a relevant foreign consulate or using tools such as the Online Detainee Locator System.
- Upon notice of court hearings, promptly notify parents of the hearing date, time, and location.
- Ensure parents receive family reunification services while in detention, or after deportation, and help parents complete required services.
- Ensure parents communicate their ideas, concerns, and issues with a caseworker and their attorney through reliable translation/

interpretation services if needed. If locating the services is challenging, reach out to the relevant foreign consulate.

- Understand challenges parents have visiting with children or successfully completing court-ordered services, and address them in court.
- Work closely with the relevant foreign consulate.
- Be aware of parents' immigration proceedings and status updates that can affect the child welfare case and provide the information to parents.

#### **Children's attorneys should:**

- Ensure a child's wishes and best interests are reflected in their case plan, including visitation with parents and services to be provided.
- Help the child maintain contact with their parent through regular visits, video conferences, phone calls, letters, etc., and maintain close contact with the parent's attorney.
- Ensure translation/interpreter services for the child as needed.
- Ensure the child is fully aware of all options, pros and cons of applicable plans and placements in and outside the U.S.
- If the child plans to remain in the U.S., find out if the child is eligible for immigration relief options, such as SIJS, T-Visa, or U-Visa.

### **Conclusion**

Efforts to improve the response to immigrants in the child welfare system are in the early stages. Notable achievements have occurred on the federal and state levels. Practitioners can play important roles:

- implementing state policies aimed at addressing challenges faced by immigrants in the child welfare

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## A Different Approach: Illinois Taskforce on Immigrant Children and Families

The Illinois Taskforce on Immigrant Children and Families works to improve treatment of immigrant children and families in child welfare cases. Read on to learn about the taskforce's approach.\*

### A Taskforce Forms

At the symposium, *Growing Up Undocumented in America*, on October 12, 2012, hosted by the *Children's Legal Rights Journal* of Loyola University Chicago School of Law, participants discussed whether Illinois needed legislation like California's SB 1064. A taskforce was created to evaluate the state system to better answer this question.

### Evaluation Efforts

The taskforce focused on what was happening with immigrant children and families who enter the child welfare system. It assessed the strengths and weaknesses in dealing with immigrant families and exchanged information with stakeholders. The taskforce met with the Illinois Department of Children and Families (DCFS) and reached out to attorneys representing children and parents to learn about their experiences. It contacted the Office of the Cook County Public Guardian for statistics and information. It also worked with immigration advocacy centers to identify issues.

### DCFS Policies

The Illinois DCFS has worked to address challenges immigrants face and ensure parents' immigration status does not negatively affect permanency. DCFS policies 1) address placement with relatives; 2) instruct caseworkers on identifying an undocumented immigrant child; and 3) reinforce Memorandums of Understanding (MOUs) between DCFS and the Mexican consulate. While the policies apply statewide,

their implementation has not been evaluated.

DCFS has an unwritten policy not to inquire about the immigration status of the child or parent. This ensures the status does not affect services the child receives or create more issues for the child and parent. As a result, DCFS lacks consistent data on immigrant families. However, DCFS conducts internal reviews every six months and flags parents' immigration status when it has been raised.

### Timeframe Restrictions

Detaining or deporting parents can add time to the reunification process. ASFA lacks language addressing how a parent's detention or country of residence should affect reunification or ASFA timeframes. In Cook County, ASFA timeframes have not been raised as a concern affecting immigrant parents. There have been few reports of cases in which parents are deported or detained, and the parent's detention or deportation status is not usually the reason children are not sent home.

### Language Accommodations

In Illinois, there is a preference for placing a Spanish-speaking child in Spanish-speaking home and assigning the parent a Spanish-speaking caseworker.

### Children Eligible for SIJS

Illinois has had a few cases involving children eligible for Special Immigrant Juvenile Status (SIJS). Once DCFS discovers an undocumented child, a DCFS officer fills out an application for SIJS. Because of the

policy of not asking about immigration status of the child, it is assumed many children eligible for SIJS are not captured in the system. DCFS generally identifies SIJS for teenagers when they struggle applying for a driver's license or college because they lack key documentation. More training for stakeholders on SIJS may help.

### Why No Legislation?

Unlike California, the Illinois taskforce decided not to pursue separate legislation. In Illinois, it has been difficult to identify ongoing issues related problems facing immigrant families and children in the child welfare system. Also, good policies are in place and DCFS is committed to enforcing them for the interest of immigrant children and parents. Therefore, the benefit of raising this to the legislature is uncertain.

### Does Your State Need a Taskforce?

In your state, how does immigration status of a child or family play a role in dependency proceedings? Creating a taskforce to closely assess the system is key to recognizing immigrant children and families and finding gaps. No matter where your state stands, it is essential to raise awareness and provide training for judges, attorneys, and caseworkers to create stable, long-term improvements.

\* Information provided by Anita Weinberg, clinical professor and director of ChildLaw Policy Institute and Alexandra Fung, Salisbury clinical teaching fellow, at the Civitas ChildLaw Center, University of Chicago School of Law.

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system;

- raising awareness of issues facing immigrants in the child welfare system;
- providing training to stakeholders;
- encouraging cooperation among parties in child welfare and immigration proceedings; and
- aiding efforts to collect data and identify systemic challenges and solutions.

Even in states without legislation like California's, federal child welfare laws and policies promote practice, advocacy, and policy actions that prioritize family reunification for immigrants in the child welfare system. Practitioners can leverage these laws and policies to help maintain immigrant families who enter the child welfare system.

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#### Endnotes

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