

CHILD CUSTODY AND PLACEMENT

The immigration status of one or both parents and the immigration status of the child may serve to limit the options available to the family judge or affect the ability of one parent to provide for the health, education, emotional well-being, or physical needs of the child. In some cases a key parent may be out of the country with no ability to obtain legal entry. The immigration status of a parent may affect:

- The options for where and with whom the child will be able to live;
- The stability of the child's relationships;
- The stability of the child's home environment; and
- The visitation rights of parents.

Immigration status can also affect the ability of the parents to access services that the court deems necessary for the child's return home and what constitutes reasonable efforts by the social service agency to provide services before a parent's parental rights are terminated.

Questions regarding the immigration status of a party or other person of importance to a case that may affect the outcomes of a child custody or placement decision include the following:

- What is the person's possible exposure to removal and potential eligibility for relief from removal?
- What avenues might be available for the person to obtain legal immigration status?
- Will a key person presently outside the U.S. be admissible into the U.S.?
- How does the person's immigration status affect eligibility to work and eligibility for services?

In some circumstances, such as assuring that a parent or juvenile will be eligible to receive court-ordered services as a condition of reunification, the judge may need to be aware of an individual's immigration status.

At the same time, immigration issues should not be allowed to override the basic tenets of family law. Courts have made it clear that parents have an equal right to the custody and care of their children without regard to their immigration status, so judges must guard against bias against a parent solely based on immigration status. The judge may thus want to leave it up to the parties to decide whether to raise immigration status as an issue.

Further, family and juvenile court judges are charged with protecting the best interests of the child, while immigration law has no such concept.

Issues in Achieving Family Unity for Mixed Families

It is common for different children in a single family to have different immigration status, with the younger children of undocumented immigrants being far more likely to be U.S. citizens than the older children. These mixed families face a number of problems that affect a family or juvenile judge's ability to achieve family unity.

It is clear that judges cannot automatically assume in making custody or placement determinations that it is in the best interests of the child to remain in the U.S. Still, where a judge determines that allowing a child to be removed will be detrimental to the child's welfare, the judge may need to recognize and work within the limitations imposed by immigration status. The following are some of the limitations that may arise.

- Immigration courts cannot prevent a deported parent from taking a child with him or her. What happens to the child is the parent's decision, even if the child is a citizen. Thus, where a judge determines that allowing a child to be removed by a parent will be detrimental to the child's welfare, the only way to prevent the child from being taken out of the country due to removal of an illegal immigrant parent may be to provide custody arrangements in the U.S.
- A parent who is a lawful permanent resident does not need to have custody in order to petition for legal status for his or her children, as long as the child falls within the definition of a child under Federal immigration law.
- A condition for custody that a parent obtain legal immigration status may not be achievable. Imposing such a condition on the assumption that it will prevent a child from being removed from the country will be ineffective where the parent has no legal ability to achieve legal status.
- A child adopted after the age of 16 is not recognized as a child for immigration purposes, with one exception – a person under age 18 adopted along with a sibling under age 16 qualifies as a child. As a result, courts have sometimes sped up adoption proceedings to assure that an adopted child has the legal right to remain in the U.S.

- A U.S. citizen or LPR parent can be the source of a family visa for a child. The converse, however, is not true; a U.S. citizen child cannot be the source of a family visa for an alien parent.

Placements In Other Countries

Many immigrant families and even U.S. citizen families have family members who live in another country, and in some cases such a family member may be the best placement for a child.

There are major obstacles to placements in other countries, and they are thus very underutilized. First, courts and social service agencies are often unaware that such family members exist, and most do not even think to ask. Second, there are obstacles to conducting home studies and assessments in other countries, including finding appropriate agencies that the court feels it can trust. Third, continuing monitoring can be difficult.

There are resources available to help with all of the above, most notably International Social Services. It is located in Baltimore, Maryland, and its website is www.iss-usa.org.

Eligibility of Unauthorized Alien for Cancellation of Removal

One concern that family and juvenile court judges may have in placement decisions is that illegal immigrant parents may not be able to assure enough stability in their lives to maintain the ability to care for a child. Instability, however, cannot be presumed from status alone. Being in the country illegally does not necessarily mean that a person will be deported. A recent Pew study found that nearly two-thirds of the unauthorized adult immigrants in the U.S. have been present for 10 years or more, and over a third have been here for 15 years or more.

Further, even an unauthorized immigrant who is in removal proceedings may be eligible to have an order of removal cancelled. Cancellation of removal is a discretionary benefit adjusting an alien's status from that of deportable alien to one lawfully admitted for permanent residence. Application for cancellation of removal is made during the course of a hearing before an immigration judge.

The following are conditions that must be met for unauthorized aliens subject to a removal order to be eligible for cancellation of the order.

- Physical presence in the U.S. for ten years;
- Good moral character;
- Not inadmissible or deportable for certain enumerated crimes and offenses;
- Not deportable for failure to register or for the falsification of documents; and
- Removal would cause "exceptional and extremely unusual hardship" to the citizen or LPR spouse, parent, or child.

The immigration courts have interpreted "exceptional and extremely unusual hardship" in a way that makes it extremely difficult to establish. The hardship must exceed the normal hardships that are inherent in moving a child to another country. The mere fact that the child is a U.S. citizen is not enough.