



Immigration and Child Welfare

Maryland C.A.N.D.O.
Conference

October 15, 2018

ABA Center on Children and the Law



- Ensures that those who work on children's law matters in the field every day have the resources and support they need to do their jobs at the highest level.
- Overarching goals: improve legal representation and the legal systems that affect children and families.
- Child Welfare & Immigration Project

Varied Legal Status of Immigrants in U.S.

1. Citizen
2. Lawful Permanent Resident
3. Temporary Visa
4. Undocumented

Key Statistics: Immigrant Children and Children of Immigrants



There are 70 million children under age 18 in the U.S.



26% (more than 18 million) live with at least one immigrant parent



Nearly 16 million of these children were born in the U.S.



More than 5 million children in the U.S. have at least one undocumented parent

- 79% are U.S. citizens
- 19% are undocumented
- 2% are lawfully present non-citizens

Key Statistics: Maryland



There are 1,283,590 million children under age 18 in Maryland



28.3% (363,336) live with at least one immigrant parent



85% of these children (311, 915 total) were born in the U.S.

Case Example: Marco

Marco, who just turned 17, came from Honduras fleeing gang violence approximately one year ago. He had been living on his own for several years, mostly on the street. He has never known his father and his mother died three years ago. He was apprehended at the border, transferred to an ORR shelter, and placed in deportation (removal) proceedings before the Immigration Court.

At the ORR-funded shelter, Marco shared the name of an uncle who he had not seen in many years. The uncle agreed to be Marco's sponsor and Marco was released to the uncle and his family. As is standard with ORR sponsor arrangements, Marco's uncle did not have a formal legal order of custody or guardianship. Although he helped Marco enroll in school, soon after Marco's arrival, it became clear the uncle did not have space for Marco or a desire to care for him.

Marco began couch surfing with different friends he met at school and sometimes sleeping outside or in an area youth shelter. One of the staff at the shelter learned about Marco's background and contacted CPS to report that he should be taken into care. The CPS hotline worker suggested that perhaps he could be "sent back" to the ORR shelter.

Unaccompanied Children

- An unaccompanied child:
 - Has no lawful immigration status in the U.S.
 - Has not attained 18 years of age
 - With respect to whom— (i) there is no parent or legal guardian in the U.S.; or (ii) no parent or legal guardian in the U.S is available to provide care and physical custody
- In FY18 to Aug. 31, over 45,000 unaccompanied children apprehended at Southwest border

What Happens When a Child is Apprehended at the Border?

- Apprehended by Customs and Border Protection (CBP)
- Transported to CBP processing center, 48 hours to determine if UC
- Different procedures for children from contiguous countries and non-contiguous countries
- Eligible UCs should be transferred to HHS Office of Refugee Resettlement (ORR) within 72 hours
- Transported by Immigration and Customs Enforcement (ICE) to ORR shelter

ORR Shelters

- While in shelter, child may access classes, recreation, religious services, medical services
- May be able to contact family
- ORR locates and screens sponsors
- Maryland has 2 ORR shelters for UC

Release of UC to Sponsor

- Released to sponsor screened by ORR.
 - ❖ 1,578 children released to sponsors in Maryland 10/17-8/18
- No order of custody or guardianship involved
- Child's immigration proceeding continues
- May 2018 MOA between DHS and HHS increases sponsor risk of being placed in removal proceedings (sponsor raids)

Separated Children

- Term used to describe children apprehended with a parent or legal guardian at the Southwest border
- Separated from their caregiver by U.S. immigration officials, rendered unaccompanied, and placed in ORR care
- Primarily from El Salvador, Guatemala, and Honduras, and escaping violence
- Since “zero tolerance” policy took effect in May 2018, between 2,600 and 3,000 children were separated at the Southwest border

Separated Families: Child Welfare Litigation

- “Absent a finding the parent is unfit or presents a danger to the child, it is unclear why separation...would be necessary” & family separation has expanded “beyond its lawful reach.” *Ms. L., et al. v. ICE. et al.*, Case No. 18cv0428, 13, 14 (S.D. Cal. Feb. 26, 2018).
- Government violated the children’s constitutional rights by forcibly removing them from their parents without due process of law. *J.S.R. v. Sessions, et al.*, Case No. 3:18-cv-01106, 16 (D. Conn. July 13, 2018)
- Maryland, 16 other states, & D.C. allege that zero-tolerance policy is an attack on state sovereignty that, *inter alia*, renders States unable to comply with their own requirements to respect family integrity absent a finding that a parent is unfit or unavailable to care for a child. *State of Washington, et al. v. United States, et al.*, Case No. C18-939-MJP (W.D. Wash. June 26, 2018)

From *State of Washington* Complaint

214. The **State of Maryland** has longstanding policies affirming the importance of family integrity and of protecting the wellbeing of children to the greatest extent possible. Maryland's Legislature has declared that “it is the policy of this State to promote family stability, [and] to preserve family unity[.]” Md. Code Ann., Fam. Law § 4-401(1). Maryland's statute governing custody proceedings for children in need of assistance is intended to “conserve and strengthen the child's family ties and to separate a child from the child's parents only when necessary for the child's welfare,” and to “provide for the care, protection, safety, and mental and physical development of” children. Md. Code Ann., Cts. & Jud. Proc. § 3-802(a)(3), (1). And under state law, various social programs must be administered to “preserve family unity” or “preserv[e] family integrity.” Md. Code Ann., Health-Gen. § 7-702(b); Code of Md. Regs. 07.02.01.01; Code of Md. Regs. 11.02.13.01.

215. Maryland also has a public policy prohibiting discrimination against any of its inhabitants because of their race, age, color, creed, or national origin, and has enacted anti-discrimination laws in a wide array of contexts, ranging from public accommodations, see Md. Code Ann., State Gov't §§ 20-304, to employment, *id.* § 20-602, to residential housing, *id.* § 20-702. Maryland law also prohibits any person from retaliating against any person because he or she has exercised or enjoyed the rights granted or protected by Maryland's anti-discrimination laws, *id.* § 20-708(2).

216. It is the policy of the State of Maryland, “in the exercise of its police power for the protection of the public safety, public health, and general welfare, for the maintenance of business and good government, and for the promotion of the State's trade, commerce, and manufacturers,” to “assure all people equal opportunity in receiving employment” regardless of race, color, religion, age, ancestry, or national origin. Md. Code Ann., State Gov't § 20-602.

What
Immigration
Relief Is
Available to
UC?

Options include:

- Special Immigrant Juvenile Status
- Asylum
- T Visa
- U Visa

Special Immigrant Juvenile Status

Provides a path to lawful permanent residency for unmarried non-citizens under age 21, who are under the jurisdiction of a State juvenile court, for whom the court has made these findings:

- the child has been declared dependent on a juvenile court or the court has placed the child in the custody of a state agency, individual, or entity appointed by a state or juvenile court;
- the child's reunification with one or both parents is not viable due to abuse, neglect, abandonment, or a similar basis under state law; and
- the child's best interest would not be served by being returned to his or her country of nationality/last habitual residence.

Jurisdiction of Maryland Courts for SIJS Purposes

- Extended foster care to 21, including re-entry
- As of 2014, Equity Court has jurisdiction over custody or guardianship of an immigrant child up to age 21 pursuant to a motion for SIJ factual findings requesting a determination that the child was abused, neglected, or abandoned before the age of 18 years. Md. Code, Family Law, § 1-201.

Case Example: Fatima and Ami

- Fatima is originally from Haiti and has lived in the United States for 20 years. She is a Lawful Permanent Resident (LPR) of the United States who has a 10-year-old U.S. Citizen daughter named Ami. When Ami was eight, Ami's father died and Fatima was left to support the family. In her job as a maintenance worker at a local office building she has not been able to earn enough to support her family, and she has begun to fall short on her rent.
- Desperate, one night she stole a laptop from the office building to sell it. Caught on surveillance video, she was arrested and subsequently convicted of theft and sentenced to one year in jail. Though her sentence was suspended in exchange for three years probation, her conviction constituted an "aggravated felony," which can result in LPRs losing their immigration status. When the police arrested Fatima at her home they called CPS to take custody of Ami. Ami told CPS she had never been mistreated by her mother. She said she has an aunt who might be willing to care for her but she did not have her number.
- Following her criminal conviction, Fatima was put into removal proceedings and transferred to immigration detention. Fatima had never imagined she could be arrested or face deportation and had not designated a potential guardian for Ami.

ICE Detention & Resources

- *Detention and Removal of Alien Parents or Legal Guardians* <https://www.ice.gov/parental-interest>
- <https://locator.ice.gov> – To find a detained parent, use Alien Number & country of birth or exact name, country of birth, and date of birth
- Detention Reporting Information Line (DRIL): 1-888-351-4024
- **New ICE webform forthcoming** → will be primary ICE point of contact when detained parent involved in child welfare system

Frequently Asked Questions

ICE Directive on Detention and Removal of Alien Parents or Legal Guardians (ICE Policy Number 11064.2)

On August 29, 2017 Immigration and Customs Enforcement (ICE) issued Policy Number 11064.2 on Detention and Removal of Alien Parents or Legal Guardians. This Directive was not made public until April 2018. This new Directive replaces ICE's 2013 Parental Interests Directive,¹ and eliminates certain key pieces of the 2013 policy, specifically the emphasis on applying prosecutorial discretion to parents and primary caregivers and the use of humanitarian parole to assist parents in returning to the U.S. to participate in proceedings that would lead to termination of their parental rights.

This document is a preliminary analysis of the new Directive current as of April 17, 2018 and may be updated as additional information becomes available. Women's Refugee Commission does not provide legal services and this document does not constitute legal advice.² Affected persons should consult a qualified immigration attorney for guidance on using the Directive in their individual case.

For more WRC resources to help you serve children and families see:

<https://www.womensrefugeecommission.org/rights/resources/1409-resources-for-families-facing-deportation-separation>

Old vs. New ICE Directives

2013

- Prosecutorial discretion highlighted
- Facilitation of return for TPRs
- Detain parent/guardian near pending child welfare or family court case
- Arrange & ensure parent's participation in case

2017

- Prosecutorial discretion section deleted
- Facilitation of return section deleted - but parole possibility still exists
- Limits language on location of parent
- Adds language on parent/child visitation
- New section on Minor Children

5.1. Minor Child(ren) Encountered During Enforcement Actions.

- 1) ICE personnel should not take custody of or transport a minor child(ren) they encounter during an enforcement action who is either a USC or LPR, or who is otherwise not removable from the United States.
- 2) Absent indications of child abuse or neglect, ICE personnel should accommodate, to the extent practicable, an alien parent or legal guardian's efforts to make alternative care arrangements for his or her minor child(ren). ICE personnel should document the alien parent or legal guardian's request for transfer of custody of a USC or LPR minor child(ren) to a verifiable third party.
- 3) If the alien parent or legal guardian cannot make an alternative care arrangement for the minor child(ren), or if there is an indication that the minor child(ren) has been subject to abuse or neglect by a parent or other adult who may be asked to take custody of the minor child(ren), ICE personnel should contact the local child welfare authority or law enforcement agency to take custody of the minor child(ren).
- 4) Once a detained alien has been determined to be a parent or legal guardian of a USC or LPR minor child(ren), ICE personnel should enter this information in ENFORCE Alien Removal Module (EARM), or its successor system.

Must Ami Enter Foster Care?

- Maryland standby guardian law expanded in May 2018 to include an “adverse immigration action” as a triggering event. Md. Code, Estates and Trusts, § 13-901 *et seq.*
- Prevention services

Can Ami be Placed with her Aunt?

- May depend on aunt's immigration status.
- 20 states, including Maryland, have explicit foster licensing standards that require U.S. citizenship or some form of authorized immigration status. Md. Code Regs. 07.02.25.04.B.
- Can exceptions or alternative approval procedures be applied for kin caregivers? Or by court order?

How Can Fatima Engage in Child Welfare Case?

- Visits while detained by attorney, case worker, Ami
- Court engagement and continued access by phone or Skype
 - WhatsApp
- Tailored case planning
 - If any safety concerns, how can they be addressed in Haiti?
 - How can Ami visit her in Haiti?
 - Service providers abroad and in U.S.
- Foreign consulate involvement
- Continued communication with Ami

Foreign Consulates

- The Vienna Convention on Consular Relations requires child welfare agencies to inform the relevant foreign consulate when any foreign national child comes into state custody. Article 37, 21 U.S.T. 77; T.I.A.S. No. 6820
 - Safety exception of parent/child seeking asylum
- Sample MOUs between agencies/courts and Foreign Consulates:
<http://cimmcw.org/resources/state-specific-resources/>
- HHS ASPE Issue Brief, *Emerging Child Welfare Practice Regarding Immigrant Children in Foster Care: Collaborations with Foreign Consulates* (December 2013),
http://aspe.hhs.gov/hsp/14/MOUsWithConsulates/ib_MOUsWithConsulates.pdf

Potential Role of Consulates in Cases

Consulates can assist with:

- Locating parents or relatives in the U.S. or abroad
- Locating a detained parent
- Identifying service providers in the parent's country of origin
- Facilitating reunification for parents in other countries
- Working with U.S. immigration officials to secure a temporary parole to the U.S. of a parent for participation in dependency court proceedings or to meet case plan requirements
- Bridging language and other communication barriers with the family in U.S. to find parents or relatives in the other country
- Accessing documentation for child
- Assisting with process for dual citizenship of child

Selected State Caselaw

- *In re Doe*, 281 P.3d 95 (Idaho 2012). In this case, the lower court had terminated the parental rights of a father residing in Mexico when his child was born in the U.S. The Idaho Supreme Court reversed the termination of parental rights (TPR) decision because the agency never asserted the father had abused or neglected his child, and no evidence suggested he was unfit as a parent. As a result, the court explained that under the U.S. Constitution, he maintained a fundamental liberty interest in maintaining a relationship with his child.
- *In re Oreoluwa O.*, 139 A.3d 674 (Conn. 2016). The Connecticut Supreme Court found the agency had not made reasonable efforts to reunify a father in Nigeria with his infant son because the agency presumed that the father must be present in the U.S. to engage in reunification efforts and presumed the child could not travel to Nigeria. In finding reasonable efforts had not been made, the court accepted that the agency was uncertain about the medical care available to the child in Nigeria but raised a concern that the agency had never attempted to investigate what the options were there.
- *In re E.N.C., et al*, 384 S.W.3d 796 (Tex. 2010). This case involved a father who had been deported. The child welfare agency sought to terminate his parental rights based on allegations he had endangered his children by engaging in conduct before their birth that created a risk of future deportation. The Texas Supreme Court rejected this basis for TPR and reasoned that the father had Constitutional rights to parent his children and finding child endangerment based on the risk of future deportation would cause countless immigrants to potentially lose their children and would violate the Fourteenth Amendment's Due Process Clause.

Arizona Committee to Support Transnational Families

- Partnership between Pima County (Tucson) & Santa Cruz County (Nogales) Juvenile Court judges, attorneys, child welfare agency administrators and staff, Florence Project, Mexican Consulate, DIF, et al.
- Mission: To improve communication for families impacted by immigration enforcement when one or more minors is in the care of the state, and to facilitate reunification of these families.
- Created toolkit on transnational cases for child welfare judges and stakeholders:
http://www.azcourts.gov/Portals/46/Resources/TOOLKIT_FINAL_WORD_NATIONAL_5-10-18.pdf

Other Resources

- ABA Center on Children and the Law: https://www.americanbar.org/groups/child_law/
 - *Immigrants and the Child Welfare System: Case Studies*
 - Other resources and articles
- The Center on Child Welfare and Immigration: <http://cimmcw.org/>
- Immigrant Legal Resource Center: <https://www.ilrc.org/immigrant-youth>
- Women's Refugee Commission parental rights toolkit:
www.womensrightscommission.org



Questions?

Thank you!

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