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Howard Davidson

ABA Center on Children and the Law

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Children’s Legal Rights Journal Symposium: Growing Up Undocumented in America
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IMPROVING HOW OUR CHILD WELFARE SYSTEM ADDRESSES CHILDREN, YOUTH, AND FAMILIES AFFECTED BY THE U.S. IMMIGRATION PROCESS

Howard Davidson*

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I want to first thank Loyola University School of Social Work, which hosted, just six years ago, the first national meeting on connections between immigrants and government child welfare intervention into the lives of their families. As a result, I became aware of an area of law that had somehow mostly escaped me for almost 35 years of child welfare legal system involvement. My general unfamiliarity with the impact of immigration on the work of the child welfare system extended over three decades as director of

* Howard Davidson, J.D., is the Director of the ABA Center on Children and the Law in Washington, D.C. This Keynote speech was given on October 12, 2012, at the Children’s Legal Rights Journal’s 2012 Annual Symposium at Loyola University of Chicago School of Law, the subject of which was “Growing Up Undocumented in America.” Mr. Davidson also became the first recipient of the Civitas ChildLaw Center’s Leadership in Child Advocacy award, which was presented in conjunction with the Symposium.


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the ABA Center on Children and the Law\(^2\) and five years representing children while directing the Children's Law Project at Greater Boston Legal Services.\(^3\) In fact, the only time prior to 2006 that I examined any issue related to an unaccompanied and undocumented immigrant child on American soil was when seven-year-old Elián Gonzales managed to get from Cuba to Florida on a raft, and media inquiries came into the ABA during 2000 about his rights and those of his father living in Cuba.\(^4\)

Although I was among those who had personally failed to look at child and family immigration issues through the lens of child welfare law and policy, we did present workshops on immigrant children at several biannual \textit{ABA National Conferences on Children and the Law,}\(^5\) and our monthly \textit{ABA Child Law Practice} journal\(^6\) has published several articles on immigration relief for children and parents (most recently in June 2012, \textit{An Advocate’s Guide to Protecting Unaccompanied Minors};\(^7\) and November 2012, Meeting


\(^3\) Children’s Disability Project, GREATER BOS. LEGAL SERVS., http://www.gbls.org/our-work/childrens-disability-project (last visited Feb. 21, 2013). Although GBLS no longer has a Children’s Law Project, it does have a Children’s Disability Project.


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the Citizenship and Immigration Needs of Foster Children). Yet immigration law and policy have for too long remained a topic that my Center colleagues and fellow child advocacy attorneys knew far too little about.

We were not alone. It was not until the 2010 second edition of what I consider the “Bible” of child welfare legal representation, Child Welfare Law and Practice, published by the National Association of Counsel for Children, that there was an added chapter on representing children who are not U.S. citizens, authored by Katherine Brady and David Thronson. That chapter described the process of obtaining for an undocumented child the form of immigration relief known as Special Immigrant Juvenile Status, described several other applicable types of immigration relief, and discussed how immigration issues related to child custody disputes.

I. The Climate of Change: A Shifting Legal Landscape for Undocumented Youth

Although there was a lack of legal focus on child and family immigration issues for several decades, this did not mean the American Bar Association had not been addressing immigrant child and family issues for many years. In 1995, the ABA Commission on Immigration sponsored an ABA-approved resolution that noted

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8 Pamela Kemp Parker, Meeting the Citizenship and Immigration Needs of Foster Children, 31 CHILD L. PRAC. 129 (2012).

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the rights of immigrant children as articulated in the United Nations Convention on the Rights of the Child,13 and called for governments to not discriminate against any child based on that child's citizenship or immigration status, or the status of his parents.14 That resolution put the ABA on record as opposing efforts to restrict or deny any child in the U.S. equal access to education, health care, foster care, or social services.15

Before the federal care and custody of apprehended unaccompanied and undocumented immigrant minors was transferred to the U.S. Department of Health and Human Services (Office of Refugee Resettlement),16 the ABA Immigration Commission developed, and the ABA approved, humane standards for children’s immigration detention. In over 100 pages the ABA addressed the needs of immigrant minors and called for their legal representation at government expense.17

For many years, that ABA Commission has sponsored pro bono legal projects providing representation and other assistance to unaccompanied immigrant minors.18 The ProBar Children’s Rights

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14 1995 A.B.A. SEC. REP., supra note 12; see also Convention on the Rights of the Child, supra note 13, at arts. 2, 7, 8, and 22 (provisions that address citizenship or nationality status).
17 ABA COMM’N ON IMMIGRATION, ABA CIVIL IMMIGRATION DETENTION STANDARDS (2012), http://www.americanbar.org/content/dam/aba/administrative/immigration/abaimmdetstds.pdf.
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Project in South Texas\(^{19}\) serves more than 700 detained minors at shelters, providing “Know Your Rights” presentations and coordinating their legal representation.\(^{20}\) ProBar recruits volunteer attorneys, law students, and legal assistants to help identify and secure appropriate immigration relief for many undocumented children.\(^{21}\) Another ABA-supported program is Volunteer Advocates for Immigrant Justice in Seattle,\(^{22}\) the first pro bono legal aid program supported by Microsoft.\(^{23}\) It is now affiliated with a larger, nationwide volunteer legal services program for unaccompanied immigrant minors called Kids in Need of Defense (“KIND”). The Seattle program’s Children’s Legal Orientation Program also provides “Know Your Rights” presentations for detained immigrant youth in Washington State, and I am pleased that their work is

\(^{19}\) See South Texas Pro Bono Asylum Representation Project (ProBAR), A.B.A. COMM’N ON IMMIGR., http://www.americanbar.org/groups/public_services/immigration/projects_initiatives/south_texas_pro_bono_asylum_representation_project_probar.html (last visited Feb. 15, 2013);


\(^{21}\) See South Texas ProBAR, supra note 19.


\(^{23}\) Id.; See also Brad Smith, KIND: KIDS IN NEED DEF., http://www.supportkind.org/about-us/board-members/136-brad-smith (last visited Feb. 15, 2013) (detailing some of the activities performed in partnership with Microsoft in support of immigration issues).
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Given all the work surrounding immigration and children, I think it was inevitable that I would have to become familiar with the immigration-child welfare nexus. The statistics alone illustrate the significance of this connection. Of the total undocumented population in the U.S., approximately sixteen percent, or 1.8 million, are estimated to be children.\footnote{Angie Junck, Special Immigrant Juvenile Status: Relief for Neglected, Abused, and Abandoned Undocumented Children, 63 JUV. & FAM. CT. J. 48, 49 (2012), http://www.throughtheeyes.org/files/2012_ncs_materials/B3_handout18.pdf.}


The Women’s Refugee Commission interviewed 150 of such youths in June 2012, youths who had crossed the border in Texas.\footnote{Jessica Jones, Fleeing Life-Threatening Violence, Children Risk Their Lives to Come to the United States, WOMEN’S REFUGEE COMM’N BLOG (Oct. 18, 2012), http://womensrefugeecommission.org/blog/1502-fleeing-life-threatening-violence-children-risk-their-lives-to-come-to-the-united-states.} Most said they were seeking to escape increasingly violent gangs and drug traffickers aggressively recruiting them at home.\footnote{Id.}

Those dangers suggest another important area of legal reconsideration and greater advocacy: addressing these children’s unique plight through a more
youth-sensitive asylum process.

For me, and also many of my child welfare law colleagues, the legal challenges facing these children and families were, until just a few years ago, largely unknown to us. Thanks to the 2006 and follow-up 2008 Loyola University conferences, I met stellar Chicago-area legal advocates for these children, including Maria Woltjen,31 Jeannie Ortega-Piron,32 and Julie Sollinger.33 I learned that the Illinois Department of Children and Family Services takes seriously its role as an advocate for immigration relief for children in its custody, and that immigration advocates in Chicago helped create one of the country’s first Memoranda of Understanding (“MOU”) between a state child welfare agency and the Mexican Consulate,34 which I first read about in the Summer 2005 issue of our quarterly Children’s Legal Rights Journal, a Loyola University Chicago School of Law publication produced in partnership with our Center.35 The MOU, in the child welfare context, formally establishes relationships and expectations when a child welfare agency takes custody of a child who is a citizen of

33 Julie Sollinger, J.D., is a Supervising Attorney with the Office of the Cook County Public Guardian in Chicago, Illinois.
34 See CHILD WELFARE INFO. GATEWAY, SITE VISIT REPORT: CULTURALLY RESPONSIVE CHILD WELFARE PRACTICE WITH LATINO CHILDREN AND FAMILIES: A CHILD WELFARE STAFF TRAINING MODEL (2008), https://www.childwelfare.gov/pubs/site_visit/illinoisfinal.pdf. This Memorandum has been hailed as an exemplary model for other jurisdictions. See also Sample Forms from Public Child Welfare Agencies, Including MOUs with the Mexican Consulate, FAM. TO FAM. CAL., http://www.2f.ca.gov/sampleMOUs.htm (last visited Feb. 15, 2013) (providing sample forms and MOUs used by various California counties for working with the Mexican Consulate on appropriate child welfare cases).
another country, or whose parents are citizens of another country. The MOU also delineate the assistance that a foreign consulate can provide to the child welfare agency, including assistance in locating parents or relatives abroad.

Even though Congress created the Special Immigrant Juvenile Status, or SIJS, immigration relief option in 1990, as an amendment to the federal Immigration and Nationality Act, until 2006, I probably would not have been able to describe its provisions to my fellow child welfare attorneys. As I look back, that is amazing considering that this 1990 law specifically provided legal relief for abused, neglected, and abandoned children.

In 2011, I first learned about the magnitude of the problem faced by children born in the U.S. whose undocumented parents, often their sole caretakers, were detained by immigration authorities or deported. In the first six months of federal fiscal year 2011, the U.S. deported a record number of 397,000 individuals, of whom 46,000 were parents of U.S. citizen children.
It was estimated, in the recent *Shattered Families* report, that at least 5,100 children were then living in state foster care because their parents had either been detained or deported. It has also been estimated that children living with a foreign born parent comprise as much as 9.6 percent of all children who come to the attention of the child welfare system, many of them who have been living in mixed status families, where at least one family member is undocumented. Four out of five of these children are U.S. citizens; two-thirds are Hispanic.

The significance of this report to child welfare agencies is that it highlighted a generally hidden problem: large numbers of children were entering foster care because of their parent or caretaker’s immigration-related detention or deportation. It also led several state child welfare agencies to request assistance in educating their attorneys and others about immigration issues.

**II. Recommendations for Addressing the Immigration-Child Welfare Nexus**

As I studied the implications for child welfare agencies handling the influx of cases involving immigrant children and families, I noted that, other than in a few states, there is a complete absence of child welfare agency policy and law on the immigration-child welfare nexus.

**A. Critical Areas of Child Welfare Law**

In one of my first conference presentations on this topic, I suggested seven critical areas of child welfare law and policy reform: (1) serving child immigrant abuse and neglect victims; (2) placing children with undocumented family members; (3) developing written

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42 SHATTERED FAMILIES, *supra* note 41, at 6.

43 Id. at 64 n.50.

44 Id.
protocols related to immigration; (4) using culturally sensitive approaches; (5) applying the Vienna Convention on Consular Relations; (6) addressing repatriation considerations; and (7) providing protections in termination of parental rights proceedings. These are still relevant principles.

1. **Serving child immigrant abuse and neglect victims**

   Child welfare agencies should be required to serve child immigrants victimized by abuse, neglect, or abandonment, or otherwise fleeing violence in their families, as a child protection case. This should be done without constraints on the state or county agency, the private agencies they work with, or their caseworkers’ ability to provide all services and referrals a child needs that would otherwise be available to U.S. citizen children. Lack of a child or parent’s eligibility for federally-supported programs or services should not be a bar to providing what the family requires to adequately protect its child, and should also help facilitate family reunification.

2. **Placing children with undocumented family members**

   State and county child welfare agencies should not have barriers, unrelated to child safety, to the placement of children with undocumented family members and relatives, regardless of their immigration status. When children need to be placed, agencies should accept prompt custody for the purposes of facilitating foster and kinship placement of unaccompanied or separated children. They should also give the same attention to the child’s safety, permanency, and well-being that is supposed to be afforded to U.S. citizen children, and provide the same “reasonable efforts” to reunify families. Unfortunately, we have learned of situations where undocumented adults are passed over as possible placements for a child, or children are removed from the home of an undocumented caretaker.

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3. Developing written protocols related to immigration

The work of child welfare agency attorneys, in cases involving undocumented immigrant children, should be guided by written agency legal protocols that instruct and direct them to promptly institute legal actions related to the immigration status of children in agency custody. This includes juvenile court proceedings that provide the predicate for Special Immigrant Juvenile Status (“SIJS”), or otherwise helping assure that if a child is a victim of crime such as sexual abuse, has suffered family violence, or has been a trafficking victim, then he is aided in appropriate immigration applications that can help him remain in-country on a path towards citizenship. Ideally, this work should be coordinated through an agency Immigration Issues Liaison, a position every state and county child welfare agency should establish. I have met several individuals who have this responsibility, and they have been able to help caseworkers, agency lawyers, and judges with immigration-related issues, and foster relationships with foreign consulates.

4. Using culturally sensitive approaches

Child welfare agencies should, pursuant to clearly stated policy, always provide culturally sensitive support and language-appropriate services to immigrant children and families. They should do this through establishment and maintenance of collaborative partnerships using the resources of grass roots immigrant community agencies. One example of a child welfare agency policy that reflects the diversity of families that they serve, including immigrant families, is in New York City. The Administration for Children’s Services has Immigration and Language Guidelines for Child Welfare Staff, which are intended to maximize child welfare services to meet the diverse needs of New York City’s immigrant communities.

5. Applying the Vienna Convention on Consular Relations


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Child welfare agencies should have clear written policy mandating that they promptly follow the consular notice requirements of the Vienna Convention on Consular Relations. This is a treaty the U.S. has long been a party to, which mandates that as soon as a government agency takes a foreign national child into child protective custody, and when it institutes a state court action that could affect the parental rights of a non-citizen mother or father, that it follow the Convention’s requirements. The Convention also provides a framework through which foreign consulates can provide a range of assistance to states in child custody-related cases affecting foreign national children or parents.

6. Addressing repatriation considerations
Since some children leave foster care for placement with, or return to, a parent or relative in another country, child welfare agencies should have policies guiding prompt inquiries and decisions on the safety of repatriation, including—after diligent family-finding efforts—expeditious checks on the suitability of a child’s parents and relatives as placements. In certain cases involving both citizen and non-citizen children who have parents, or relatives, residing in other countries, it may be in a child’s best interests to be sent to live with that parent or relative. If a state or county child welfare agency decision is made to repatriate a child, it should only be done through written protocols that mandate close coordination with child welfare authorities in the country of return, with special attention given to the child’s safety.

7. Providing protections in termination of parental rights proceedings
Child welfare agencies should not institute termination of parental rights proceedings against deported or immigration-detained parents without giving them full opportunity to be present and participate actively in such proceedings, through competent counsel. Deportation or detention, or the possibility of such, should never in itself be used as a basis for terminating parental rights.

50 Pamela Kemp Parker, When a Foreign Child Comes into Care, Ask: Has the Consul Been Notified?, 19 CHILD L. PRAC. 177, 177 (2001).
B. ABA Commission on Youth At Risk Policy Reforms

In 2011, through my work with the American Bar Association’s Commission on Youth at Risk, we developed several resolutions, approved by the ABA House of Delegates, calling for several additional law and policy reforms.\(^\text{51}\) These proposed policy reforms are summarized below. In part they elaborate on the seven general principles listed above.

1. **Screen for immigration status**
   Whenever an undocumented child is apprehended by immigration authorities, placed in foster care, or otherwise made the subject of a case opened by a child welfare agency, that child should be promptly screened for the wide range of possible immigration relief options by the public agency that encounters the child.

2. **Assure access to birth certificates**
   U.S. citizen children who may have undocumented parents should be entitled to full access to their U.S. birth certificates, paternity documents, and other vital records, such as state-issued identification cards and school and health records, without regard to the immigration status of their parent or guardian. In examining this issue, we learned that some undocumented parents have difficulty obtaining such records for their children or are fearful of seeking them. Before any child in the custody of a child welfare agency leaves the United States, he should be assisted in obtaining appropriate U.S. or foreign passports, other legal forms of identification, and his complete education and medical records.

3. **Provide detained parents access to counsel**
   When parents are in immigration detention, they should have access to an attorney who can help them understand legal issues related to the care and custody of children who were in their care prior to apprehension. They also should be referred to an attorney who can represent them in state court custody, dependency, or other state court actions related to their children. This, of course, will

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require the family law and juvenile dependency bar to step up to the plate to be better informed about how they can help. Related to this, in 2010, the ABA approved a policy calling for the establishment of programs to provide *criminal defendants and prisoners* with no cost or low cost legal assistance on family law issues, including the avoidance of their child being placed in foster care, through private kinship care and guardianship arrangements.\(^{52}\) This aid should also be provided to parents detained for immigration violations, since they risk being permanently separated from their children because of federal immigration law enforcement.

4. Permit detained parents to participate in child welfare-related court proceedings

In state court proceedings related to the care and custody of their children, detained parents should have an opportunity for meaningful participation as well as access to services related to their parenting, when mandated by a state court as part of a case plan. Because of the potential impact of these state court cases, parents who are in federal detention due to alleged immigration law violations should either be granted release in order to attend relevant child welfare court hearings, or to participate in such hearings through telephone or video conferencing. Also, when children enter foster care, the child welfare agency’s case plan will often specify what a parent must do to regain custody of his child. If detained, or deported to another country, parents should still be provided with the services needed to fulfill their case plan requirements.

5. Obtain information regarding location and placement of family members

State child welfare agencies and juvenile courts should have ready access to Immigration and Customs Enforcement information on the location of, and any transfer of, detained immigrant parents. These detained parents should also receive information on the location of, or any changes of placement for, their minor children.

6. Clarify detention and removal laws and polices

Laws and policies should be clarified to *explicitly prohibit* a parent’s immigration detention, or removal from the U.S., from being

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\(^{52}\) *Id.* at 103C.
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the sole basis for failing to provide legally mandated reasonable efforts to reunify the family. It is critical that such parents, if they have child welfare agency case plans, have plans that set realistic goals that recognize the need for linguistic and culturally competent social services. A parent’s immigration status alone should never disqualify him from accessing the support services that he so desperately needs.

C. Significant Immigration Bills and Reports

There are several bills that were introduced in the last session of Congress to address some of these issues. They included Representative Roybal-Allard’s Help Separated Families Act \(^53\) and the Humane Enforcement and Legal Protections for Separated Children Act \(^54\) sponsored by Senator Al Franken and Representative Lynn Woolsey. California Governor Jerry Brown recently signed into law two landmark state laws addressing these issues, which may become models for other states. \(^55\) In August 2012, the Center for American Progress issued a report, *How Today’s Immigration Enforcement Policies Impact Children, Families, and Communities*, that recommended Presidential Executive Action to allow


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undocumented parents who are supporting U.S. citizen children to stay in this country if they have not committed any crimes and are only guilty of being in the country without legal status.56

Probably the most-cited report about the impact on children of immigration enforcement against their parents has been the November 2011 Shattered Families report referred to earlier,57 which was produced from a study conducted by the Applied Research Center.58 As the report’s subtitle suggests, there is a “perilous intersection between immigration enforcement and the child welfare system.”59 I think the most important thing in the report is that it includes over thirty individual stories of how parents and children have suffered greatly because of the mishandling of their cases, and why these problems should be addressed to better protect the rights and interests of parents and children.60 These stories paint a horrific picture far better than mere statistics would.

III. Roadblocks and Progress: Addressing the Nexus Between Undocumented Relatives, Parental Unavailability, Permanency Decisions, and SIJS

In cases where minor children have been left behind by immigration enforcement actions and placed in state foster care or even when unaccompanied minors are in federal custody, another barrier to family integrity occurs when child welfare caseworkers are reluctant to place those children with relatives living in the U.S. who happen to be undocumented. I have heard that some states will not conduct a home study, or license or approve a relative as a foster

57 SHATTERED FAMILIES, supra note 41.
58 See APPLIED RES. CTR., http://www.arc.org (last visited Feb. 15, 2013). The Applied Research Center (ARC) is a 30-year-old racial justice think tank that uses media, research, and activism to promote solutions.
59 SHATTERED FAMILIES, supra note 41.
60 Id.
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placement, or not even place the child there at all, if the relative does not have a Social Security number. There is a remedy for that: private home studies can be arranged; criminal background checks and fingerprint clearance letters provided, with consulate assistance, from the relative’s home country; and even alternative taxpayer identification numbers can be secured.

The Washington State Court of Appeals has issued a decision, In re Dependency of M.R., reversing a trial court’s order to remove a child from her paternal grandparents’ home because they were undocumented immigrants. The court found she had a strong emotional and psychological bond with her grandparents, they had fostered her relationship with other family members, and that removal from their care would be detrimental to the child. In contrast, Illinois child welfare agency policy explicitly states that the immigration status of a relative caregiver should not hinder the placement of a relative child in his home.

I want to share some other state appellate case law establishing a variety of legal concepts worthy of following broadly throughout the country. Almost ten years ago, a Georgia appellate court in In re M.M., overturned termination of a father’s parental rights by clearly stating what should be a universally inviolate principle: that if termination is essentially based on the mere possibility of a father being deported someday, and the child possibly either having to be returned to state custody or sent to another country, that such a termination cannot be based simply on “speculation on the vagaries or vicissitudes that beset every family on its journey through the thicket of life.”

In 2009, the Nebraska Supreme Court, in In re Angelica L.,

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61 Paulos, 270 P.3d at 616.
62 Id.
63 Id. at 614-15.
66 Id. at 832.
67 In re Angelica L., 767 N.W.2d 74 (Neb. 2009).
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issued an opinion that should be discussed in any attorney training on children in foster care who have detained or deported immigrant parents. In this case, children entered foster care, and their mother was deported.\textsuperscript{68} The appellate court criticized the agency for frustrated her efforts to be reunited with her children, and overturned the termination of her parental rights, holding that it was never established that she was unfit or that termination of parental rights (“TPR”) was in the children’s best interests.\textsuperscript{69} The trial court seemed to be oblivious that the mother, upon her return to Guatemala, had secured a stable living environment and could provide for her children’s basic needs.\textsuperscript{70}

In 2011, in \textit{In re C.M.B.R.},\textsuperscript{71} the Supreme Court of Missouri also reversed a TPR of a Guatemalan mother, whose children had been placed in a pre-adoptive home.\textsuperscript{72} The mother had been incarcerated as a result of a workplace raid, but had arranged for alternative care of her son.\textsuperscript{73} However, that placement fell through and he was placed in a home with a couple who wanted to adopt him.\textsuperscript{74} The high court judges called the case a “manifest injustice” and a travesty in its egregious procedural errors, its long duration, and its impact, and the court stated that at retrial the mother would finally have an opportunity to present evidence on her behalf.\textsuperscript{75}

Also in 2011, the Supreme Court of Vermont, in \textit{In re R.W.},\textsuperscript{76} reversed a TPR, finding that a father, residing in Sri Lanka, had not been given an opportunity to participate in hearings through telephone participation, interpreter services, or assignment of counsel, and that there were no facts constituting grounds to terminate his parental rights.\textsuperscript{77} The court noted a failure to notify the

\begin{itemize}
\item \textsuperscript{68} \textit{Id.} at 80.
\item \textsuperscript{69} \textit{Id.} at 93.
\item \textsuperscript{70} \textit{Id.}
\item \textsuperscript{71} \textit{In re Adoption of C.M.B.R.}, 332 S.W.3d 793 (Mo. 2011).
\item \textsuperscript{72} \textit{Id.} at 823.
\item \textsuperscript{73} \textit{Id.} at 801-02.
\item \textsuperscript{74} \textit{Id.} at 802.
\item \textsuperscript{75} \textit{Id.} at 824 n.25.
\item \textsuperscript{76} \textit{In re R.W.}, 39 A.3d 682 (Vt. 2011).
\item \textsuperscript{77} \textit{Id.} at 699-700.
\end{itemize}
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Sri Lankan consulate of the proceedings.\textsuperscript{78}

In 2012, the Supreme Court of Idaho, in \textit{In re Doe},\textsuperscript{79} also overturned a TPR against a Mexican father who had made it clear to the agency he wanted his daughter to live with him in Mexico. But the girl had been in foster care for several years with foster parents, one of whom was a child welfare agency employee who wanted to adopt her.\textsuperscript{80} The father had a favorable home study done in Mexico, but it was never presented at trial.\textsuperscript{81} Additionally, he never received proper notice of the TPR hearing.\textsuperscript{82} In significant language, the court stated, “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 the parental rights of a foreign national.”\textsuperscript{83} The court instructed the trial court to “order the Department to take all reasonable steps to promptly place the daughter with her father in Mexico.”\textsuperscript{84}

Finally, in a 2012 unaccompanied minor case, a California Court of Appeals, in \textit{In re Y.M.},\textsuperscript{85} ordered a juvenile court dependency proceeding reinstated, after it had been dismissed because the girl had been placed in federal Health and Human Services Office of Refugee Resettlement custody.\textsuperscript{86} She had been designated a sex trafficking victim, and the court found her entitled to protections provided by both state and federal systems, “guided by concurrent jurisdiction principles” including prompt court consideration of the girl’s request for SIJS findings made by the state court.\textsuperscript{87} Holding the facts of her case did not pre-empt state dependency law, the court observed that the state process provides counsel for the child, while the federal process does not.\textsuperscript{88}

\textsuperscript{78} Id. at 699.
\textsuperscript{79} \textit{In re Doe}, 281 P.3d 95 (Idaho 2012).
\textsuperscript{80} Id. at 100.
\textsuperscript{81} Id.
\textsuperscript{82} Id.
\textsuperscript{83} Id. at 102.
\textsuperscript{84} Id. at 103.
\textsuperscript{85} \textit{In re Y.M.}, 144 Cal. Rptr. 3d 54 (Ct. App. 2012).
\textsuperscript{86} Id. at 64.
\textsuperscript{87} Id. at 77-78.
\textsuperscript{88} Id. at 66-67.
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According to ORR, and the Department of Homeland Security, the number of unaccompanied immigrant minors taken into federal custody has more than doubled in 2012. Fortunately, in the 2008 federal Trafficking Victims Protection Reauthorization Act, Congress mandated that unaccompanied children in ORR custody be promptly placed in the least restrictive setting that is in their best interests. My understanding is that ORR seeks to place these children with parents, relatives, or family friends.

A project the VERA Institute of Justice has subcontracted with legal organizations to provide pro bono legal assistance to these released children, who are no longer considered by ORR to be under their direct responsibility. One of those legal programs, the Immigrant Child Advocacy Project, based at the University of Chicago, appointed child advocates in 169 new cases in 2010, mostly for children in the Chicago area. Notably, also in 2010, forty percent of the children served through VERA’s national child advocacy program were identified as potentially eligible for some form of immigration relief that would protect them from removal.

89 See Office of Refugee Resettlement, supra note 16.
92 Wilberforce Trafficking Victims Protection Reauthorization Act § 235(c)(2).
95 OLGA BYRNE & ELISE MILLER, VERA INST. OF JUST., CTR. ON IMMIGR. & JUST., THE FLOW OF UNACCOMPANIED CHILDREN THROUGH THE IMMIGRATION SYSTEM: A RESOURCE FOR PRACTITIONERS, POLICYMAKERS, AND RESEARCHERS 4 (2012),
Because the 2008 federal trafficking law amendment also changed SIJS law, it has been estimated that many more children are now eligible for SIJS than previously. Those amendments had a provision, unfortunately never funded by Congress, to permit state or county child welfare agency recovery from HHS for the costs of foster care provided to unaccompanied minors later granted SIJS status. That provision would have provided an important financial incentive for states to provide foster care for these children.

SIJS is still sought and granted in relatively small numbers. For example, in 2010 there were a total of only 1,492 youth granted SIJS. This is compared with 265,808 immigrants under twenty-one who obtained some form of lawful permanent residency that year.

I do have a specific concern about the use of SIJS. Because it inevitably leads to separation of parent and child, frequently without affordable, prompt, unbiased, and quality home studies in other countries, we may never know for sure whether what is alleged as abuse, neglect, or abandonment truly is such, or that it really is in a child’s best interests not to be reunified with a parent. The Shattered Families report noted that SIJS poses concerns about parental rights because, in certain instances that were reported to them, child welfare agencies were confronted with a difficult choice: help an undocumented child gain authorized immigration status and essentially end parental rights and responsibilities, or reunify children with their parents in another country. The report states that a Child Protective Services ("CPS") bias against placing children in other countries can sway its SIJS decision-making, even when those
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Parents are fit and willing caretakers.102 One reason for the relatively small number of SIJS petitions is that far too many child welfare and juvenile justice attorneys, caseworkers, and probation officers involved in their cases, do not know that SIJS exists. There are tragic cases of undocumented immigrant youth who grew up in U.S. foster care, but never obtained this protected status prior to leaving the system.

The U.S. Supreme Court, in the 2010 case of Padilla v. Kentucky,103 held that the failure of defense counsel to advise their client about the immigration consequences of a guilty plea constitutes ineffective assistance of counsel. I would suggest that, under that same reasoning, lawyers for children in any juvenile court proceeding must become aware of the immigration status of their clients, and also about the process of securing legal status for their clients to remain in the U.S. if their client wishes.

To do that, we need new partnerships between immigration law experts and lawyers who practice in juvenile court. For this to happen, I believe we need funding from both private foundations and federal agencies, to support demonstration projects pairing children’s law centers, juvenile defender agencies, law school child advocacy clinics, and CASA programs, with immigration lawyers.104

Judges in juvenile and family courts should have bench cards that list and describe the various forms of immigration relief a child before them may be eligible for, as well as what findings of fact a judge must make to establish the predicate for that relief. The ABA Center on Children and the Law has developed bench cards for judges on other topics, such as education issues for children in foster care and father involvement in child welfare cases. Judges should be holding appointed counsel and the guardian ad litem (“GAL”) accountable for assisting their clients in obtaining appropriate immigration relief, in partnership with immigration law experts.

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102 Id.
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Angie Junck from the Immigrant Legal Resource Center in San Francisco\textsuperscript{105} has recently written an excellent article on SIJS in an issue of the \textit{Juvenile and Family Court Journal}. She recommends some practices that I was unaware of. For example, she encourages judges to sign orders establishing in writing the birth details for undocumented children before the court who lack formal birth certificates, because proof of age is one essential SIJS requirement.\textsuperscript{106} She also suggests that judges help assure that children under their jurisdiction are transported from their placement for immigration hearing processes.\textsuperscript{107} In some cases, a judge can do even more. For example, in a case of a sexually abused immigrant child, the juvenile court judge can formally certify a child as eligible for U Visa relief as a victim of crime, which in some cases may be a preferable alternative to SIJS since it can potentially aid in also providing what is called “derivative” immigration relief to the child’s parents, which SIJS cannot.

Judges can also assist immigrant parent and child victims of domestic violence. One of the first things I ever wrote about children and domestic violence was a 1994 ABA publication entitled \textit{The Impact of Domestic Violence on Children}.\textsuperscript{108} I stated there that:

\begin{quote}
[O]ffering 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
\end{quote}

\begin{itemize}
\item \textsuperscript{105} IMMIGR. LEGAL RESOURCE CTR., http://www.ilrc.org/ (last visited Feb. 15, 2013).
\item \textsuperscript{106} \textit{id}.
\item \textsuperscript{107} \textit{id}.
\end{itemize}
experiences.\textsuperscript{109} Today, when an undocumented child and mother have been victims of domestic violence committed by a U.S. citizen or lawful permanent resident offender, they both may benefit from a juvenile court judge establishing in a court order the facts that would become the predicate for what is called a VAWA visa, which may provide authority for immigration relief to both the child and her mother.\textsuperscript{110}

If an undocumented immigrant youth is before the court because he or she were arrested for prostitution, once again the juvenile court judge and the youth’s attorney should be aware of the youth’s potential eligibility for another form of immigration relief, a T Visa for a sexually trafficked child. In 2010, the HHS Office of Refugee Resettlement determined that only 92 children in its care were eligible victims of human trafficking.\textsuperscript{111} Clearly, there are far more that 92 non-citizen children a year identified by law enforcement authorities and the courts as victims of sex trafficking. Worse, in the ten-year period between 2001 and 2011, only 212 children were formally determined as eligible for T visa benefits.\textsuperscript{112}

There is an acute need to better identify children qualified for T visas,\textsuperscript{113} as well as for help in obtaining them. Given how many child sexual abuse victims come to the attention of both juvenile and criminal courts, and given how many sixteen and seventeen-year-old youth are arrested for prostitution or soliciting, when that youth is an undocumented immigrant I believe that there should be far more common inquiries as to whether the U or T visas should be pursued.

There is also an important role to be played by State Court

\textsuperscript{109} Id.
\textsuperscript{112} Jacqueline Bhabha & Susan Schmidt, From Kafka to Wilberforce: Is the U.S. Government’s Approach to Child Migrants Improving?, IMMIGR. BRIEFINGS, No. 11-02, Feb. 2011, at 5.
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Improvement Programs that are well funded by HHS to improve local judicial handling of child abuse and neglect cases. We need to identify and report on which Programs have helped improve the judicial handling of cases involving undocumented children or family members. Models for official juvenile court forms used in making SIJS findings, and for making requisite findings for other forms of immigration relief, need to be developed and shared. Ways that detained or deported parents can be effectively involved in their state child welfare court cases should, in my opinion, be shared.

Child welfare lawyers, family law practitioners, and juvenile defense counsel should educate themselves, and their judges, on common misconceptions about who is eligible for SIJS status. Predicate findings for SIJS eligibility can be made not just in dependency proceedings, but also in family and probate court cases. These findings can be made when a child is placed into a guardianship, as well as in juvenile delinquency cases, even though those cases do not directly adjudicate parental abuse or neglect.

We must greatly increase and expand legal resources and attorney expertise to encompass and integrate both immigration and family law. There also needs to be greater practical and comprehensive immigration-related resources for state and county child welfare stakeholders. I hope the ABA Center on Children and the Law, in collaboration with the ABA Commission on Immigration and other partners, can be involved with both efforts.

National child welfare-immigration link expert Yali Lincroft114 and I recently put together, at the request of the South Carolina Department of Social Services, a full day of Continuing Legal Education training for the state’s child welfare agency lawyers. We created a model for attorney training, including sessions on Immigration 101, various forms of immigration relief for children, what a child welfare agency should do when a parent is detained and his child comes into foster care, and immigration-related adoption

114 Yali Lincroft, MBA, is a policy consultant for First Focus/First Focus Campaign for Children located in Washington D.C. Yali helped develop several federal and state legislation assisting immigrant families in the foster care system, including California’s Senate Bill 1064 “Reuniting Immigrant Families” signed into law in California in 2012 and is currently being replicated by many states.
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issues, including children leaving the U.S. foster care system for placement in another country. We also covered consular notification requirements and how foreign consulates can aid child welfare agencies, parents, and children, such as the excellent work done by the Consulate of Mexico in the Chicago area, and we addressed notice and service of process issues when parents and relatives reside outside the United States. We are hoping to produce similar full-day CLE trainings in other states.

IV. Change on the Horizon?

Someday, a more family-centered Congress may decide to give U.S. citizen minor children and undocumented children who are granted lawful resident status the legal right to petition, through a guardian ad litem, or next friend, for extension of family-centered immigration benefits to their undocumented parents and legal guardians. That same family-centered Congress may hopefully also compel U.S. immigration authorities to make decisions that are guided by best interests of children principles and that prioritize family unity.

Until then, one way for all of us to be kept apprised of developments in this field is to participate in the Migration and Child Welfare National Network.115 I continually encourage both lawyers and law students to join the Network.

The Network adopted, at its formation in 2006, seven guiding principles that, in conclusion, are important to share:

1. Migration of children and families to the U.S. is a very important, but largely unaddressed, issue affecting the child welfare system, and child welfare system

115 MIGRATION & CHILD WELFARE NAT’L NETWORK, http://research.jacsw.uic.edu/icwnn/ (last visited Mar. 16, 2013). The Migration and Child Welfare National Network is a coalition of individuals and organizations focused on the intersection of immigration and child welfare issues. Housed at the Jane Addams College of Social Work at the University of Illinois, the Network has four main areas of focus - policy/advocacy, promising practices, research/evaluation, and international issues. Howard Davidson and Yali Lincroft are founding members of the Network.
professionals should be educated on this issue.

2. Immigrant children who are involved in programs that provide child protection and child welfare services should be afforded services that will address their needs for safety, permanency, and well-being.

3. Child welfare services should be available to all children, regardless of their immigration status.

4. Federal, state, and local policies should encourage full integration of immigrant families into U.S. society through an expanded delivery of child welfare services where necessary.

5. All child welfare agencies and courts, and the professionals who work within those settings, should individually, and through their membership organizations, become better informed about immigration laws and best practices affecting the immigrant children and families they are serving.

6. Delivering services to migrating children and families should be a focus at major national child welfare conferences, in the work of the federal child welfare resource centers, and in new research and demonstration projects.

7. The roots and causes of migration issues impacting child welfare cannot begin to be resolved unless collaboration with other countries exists, since the issues that impact U.S. systems do not start and stop at our borders, but rather are the result of larger, more complex problems that should involve transnational activities and a global approach.

To make this nation of immigrants do the right thing for these kids and families, we have a lot of work to do. I truly hope all of us will bring our own knowledge and passion to addressing these critically important issues. I hope state and local bar associations and Continuing Legal Education programs will educate lawyers about the family-related aspects of federal immigration law and its intersection with state child welfare court proceedings.
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Judicial training should also address the issue. Law school courses and clinics that address immigration should include a focus on the child welfare related aspects of immigration enforcement. Child welfare agencies should be training their attorneys, caseworkers, and others on immigration issues that affect their cases. Programs, such as the ABA Center on Children and the Law, should be training children’s attorneys, guardian ad litems, and parents’ attorneys on immigration issues.

As we look into the future, the issues I’ve discussed hopefully will be addressed as part of comprehensive immigration reform. Even if they are, the legal profession will still have a continuing responsibility to help assure that implementation of such reform achieves the intended result of helping keep families together.