The Intersection of Immigration Status and the New York Family Courts

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EXECUTIVE SUMMARY[1]

New York's most vulnerable children depend on the Family Court for some of the most important decisions about their lives such as where they will live, who will raise them, whether they are imminent danger of harm and how the necessary financial support will be provided. Victims of domestic violence depend on the Family Court to make the decisions that can save their lives and offer them a chance to leave a dangerous and abusive household.

An increasing number of immigrants who appear before New York state courts also have immigration matters pending before federal administrative tribunals. The interconnections between state law matters and immigration status mean that decisions made under state law impact immigration status and sometimes determine immigration outcomes.

Nowhere in the New York state court system is the question of immigration status more tightly bound up with state law than in the New York Family Courts. The Family Courts and the judges that preside over them are statutorily created to administer family law. Their jurisdiction is distinct from that of the federal immigration courts. Despite that jurisdictional divide, every day issues arise in Family Court where the immigration status of the litigant impacts the Family Court's judgment and the Family Court's decisions impact an immigrant's legal status. Whether a decision is made on a substantive question of guardianship, or an order of protection or whether a petition is timely accepted at the clerk's office or a roadblock is presented for fingerprinting, each of these issues has a direct bearing on the opportunity an immigrant has to seek special immigrant status under federal law. Without a thorough understanding of the laws and the knowledge of the interrelated impacts of these decisions, New York's Family Courts, and the advocates who appear before the courts, may cause harm to litigants with immigration issues, even when their intention is to help.

While many matters before the Family Court involve questions that might impact immigration status, the scope of this report is more limited. The report focuses on two types of requests for special findings in aid of immigration actions that are brought in the New York Family Courts: (1) requests for certification of helpfulness in connection with detection, investigation and prosecution of offenses needed for U Visa relief, available in cases of domestic violence and (2) special findings regarding a child's best interests required to seek Special Immigrant Juvenile Status (SIJS) for those children who are seeking protection as a result of abandonment, neglect or abuse. Examination of these

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proceedings now is especially important given the high demand for U Visa relief and the recent flood of unaccompanied children into the United States, many of whom may be eligible for SIJS.

The problem of obtaining the appropriate filings, rulings or certifications in these matters cannot be understated. Each are aggravated by all of the players in the Family Court system: judges, clerks, practitioners, and the parties. Often, many, but not all, suffer from a lack of awareness of the procedure, the law and the collateral consequences that one system's determination has on the other. And, compounding these issues are the lack of knowledge and fear many immigrants have about legal rights and remedies that U.S. immigration law affords to them, which in turn creates another roadblock to accessing Family Courts.

In order to address the myriad problems presented by the overlap of immigration and Family Courts, we have developed several recommendations.

> First, we propose that family law practitioners, Family Court judges, as well as other court personnel, receive regular, targeted training on immigration issues that affect family law proceedings.
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> Second, given the general lack of information on these issues among immigrant communities, we propose that measures be taken to increase access to information for undocumented clients and potential clients.
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> Third, we recommend the passage of legislation and an amendment to court rules to fund and reinforce these communication and training efforts.

Our paper seeks to highlight issues surrounding the proper and efficient adjudication in Family Court of orders seeking findings required for U Visa and SIJS petitions and offer practical recommendations and to spark a dialog on further efforts to bridge the gap between immigration issues and the Family Courts.

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INTRODUCTION

The recent flood of unaccompanied immigrant children into the United States, and significantly, New York State, has highlighted the issues surrounding immigration-related proceedings in family courts, including Special Immigrant Juvenile Status ("SIJS") petitions and U Nonimmigrant Status ("U Visa") certifications. The media, special interest groups and government officials continually speculate about what will happen to the thousands of unaccompanied children.[2] In the coming months, these children will seek to gain legal status and many, undoubtedly, will find themselves in the New York state family court system seeking critical certifications and findings. Consequently, reform and change are essential to better prepare judges, clerks, court officers and attorneys to properly and efficiently manage these cases and other matters that impact immigration while ensuring the proper administration of justice.

Modern Courts is a non-profit organization focused on recommending and proposing reforms and improvements to the New York state courts. As a result, we do not often advocate for issues relating to immigration.[3] We have always seen immigration as a federal issue, and immigration law as restricted to the U.S. Citizenship and Immigration Services and the federal courts which hear appeals. However, that assumption is wrong and recent events emphasize this. There are serious questions relating to immigration status facing the New York state courts and the advocates and litigants who turn to those courts for relief. For example, in the wake of the United States Supreme Court's *Padilla* decision, advocates and judges must place renewed focus on the plea bargaining process, ensuring that defendants are properly advised of the potential adverse immigration consequences of a guilty plea.[4] In New York's special domestic violence courts, prosecutors, police, and other law enforcement officers must consider carefully the contributions of domestic violence victims to the prosecutions of their aggressors in determining whether to certify "helpfulness" in support of a petition to gain

[2] Laura Meckler, Beth Reinhard and Peter Nicholas, *Flood of Child Migrants Spurs Local Backlash*, Wall Street Journal, July 13, 2014, *available at* http://online.wsj.com/articles/flood-of-child-migrants-spurs-local-backlash-1405294984; Fernanda Santos, *Border Centers Struggle to Handle Young Migrants*, N.Y. Times, June 18, 2014, *available at* http://www.nytimes.com/2014/06/19/us/border-centers-struggle-to-handle-onslaught-of-children-crossers.html?action=click&contentCollection=Americas&module=RelatedCoverage&region=Marginalia&pgtype=article&_r=0; Richard Cowan, *Waves Of Immigrant Minors Present Crisis For Obama, Congress*, Reuters, May 28, 2014, http://www.reuters.com/article/2014/05/28/us-usa-immigration-children-idUSKBN0E814T20140528.

[3] Modern Courts' family court monitoring programs focus on access for non-English speaking litigants who are in many cases undocumented.

[4] *Padilla v. Kentucky*, 130 S. Ct. 1473, 1483 (2010).

legal status. Status may also play a role in matrimonial cases, where some have observed that the issue of immigration status has been raised during divorce proceedings.[5]

Nowhere in the New York state court system is the question of immigration status more tightly bound up with state law than in the New York family courts. Judges must grapple with difficult questions of how a parent's immigration status should be weighed when determining what is in the best interest of the child in a custody proceeding, what type and amount of support can be required from an undocumented parent, what findings should be made in the context of an order of protection, and what evidentiary implications may arise for both the person seeking protection and the individual who will be barred by the order.

Family court judges also grapple with immigration issues when they are required to make findings relating to SIJS petitions and U Nonimmigrant Status (commonly referred to as "U Visa") certifications. Many of the recently arrived unaccompanied immigrant children will look to family courts to obtain the findings required to file petitions with the U.S. Citizenship and Immigration Services ("USCIS") seeking legal status. While New York family courts have made such findings on a regular basis, everyone agrees that the number of applications for SIJS findings of fact in the New York family court system will see a sharp increase. The number of pending cases on New York immigration judges' docket has already increased by almost 7 percent.[6] The New York Immigration Coalition ("Coalition") expects 7,000 unaccompanied immigrant children to make their way to New York state alone in the coming months.[7] In response, the Coalition has formed a task force with the Mayor's Office of Immigration Affairs, the New York Chapter of the American Immigration Lawyers Association and the International Network of Public Schools to help prepare New York for the increase in immigrant children.[8]

Like the increase in applications for the special findings required to seek SIJS relief from the USCIS, the number of U Visa certifications has skyrocketed as well. Each fiscal year, the USCIS can issue a total of 10,000 U Visas. Every year since the U Visa

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[5] Interview 2 (July 17, 2013) (noting that inquiries about status during matrimonial cases arise in Westchester Supreme Court).

[6] Mark Hamblett and Todd Ruger, *Growing Border Crush Adds to Existing Strain in New York,* The NY Law Journal (July 14, 2014), http://www.newyorklawjournal.com/id=1202663024342/Growing-Border-Crush-Adds-to-Existing-Strain-in-New-York?slreturn=20140628155441.

[7] The Associated Press, *Unaccompanied Immigrant Children Reaching New York*, WNYC News, July 25, 2014, http://www.wnyc.org/story/unaccompanied-immigrant-children-reaching-new-york/?utm_source=Newsletter%3A+WNYC+Daily+Newsletter&utm_campaign=04d5176bd4-Daily_Brief_July_4_20141_26_2014&utm_medium=email&utm_term=0_edd6b58c0d-04d5176bd4-68871393&mc_cid=04d5176bd4&mc_eid=0d20e2c849.

[8] The New York Immigration Coalition, *Partners Announce Effort to Coordinate Services and Support for Migrant Children in New York*, July 23, 2014, http://www.thenyic.org/PR/UACMPresser.

program's inception, the USCIS has issued the maximum number available. However, the 2014 fiscal year limit was reached in the shortest amount of time since the program began in 2008.[9] The race toward the 10,000 cap indicates that U Visa petitions are being filed at increasing rates, much like SIJS petitions. Reforms are needed now more than ever in the family courts to prepare for the expected increase in requests for the factual findings required in order for SIJS and U Visa applicants to seek relief with the USCIS.[10]

Unfortunately, despite the fact that questions relating to legal status arise on a regular basis in the New York family courts, there is (1) no systematic approach training judges and advocates to recognize and deal with these questions in a consistent and comprehensive manner; (2) no broad government outreach to the undocumented community to explain their rights in family court regardless of legal status; and (3) no funding from the State of New York to support the messaging and training needed to ensure that individuals, advocates, judges, court officers and clerks are aware of the importance of immigration-related issues in family court proceedings.

This memorandum is intended to review some of the immigration questions that commonly arise in the New York state family courts, with a special focus on requests for the factual findings required to bring U Visa and SIJS petitions before the USCIS. Part I describes the U Visa certification and SIJS petition processes and the intertwined roles that the immigration courts and the family courts must play. The memorandum then outlines the various problems that have arisen (from the perspective of advocates, practitioners, judges, and families) when the special factual findings needed for U Visa or SIJS relief are sought in family court. Part II provides practical recommendations to address these issues and make the recognition, administration, and resolution of these questions easier on both judges and practitioners and to establish more consistent expectations and outcomes for undocumented individuals. As a start, we recommend increased training for judges, clerks, court officers, and advocates in the family court on immigration issues; improved communication to the undocumented community regarding their access to family court; and legislation and court rules to reinforce and fund these recommendations.

I. IMMIGRATION ISSUES THAT ARISE IN NEW YORK FAMILY COURTS

Immigration status plays a significant role in family court proceedings throughout New York State. For example, status questions often arise during the course of custody proceedings. Many have observed that an individual with legal status may use his

[9] Amy Grenier, *Immigrant Victims Left Waiting After U.S. Reaches U Visa Cap*, Immigration Impact (Dec. 16, 2013), http://immigrationimpact.com/2013/12/16/immigrant-victims-left-waiting-after-u-s-reaches-u-visa-cap.

[10] Mark Hamblett and Todd Ruger, *Growing Border Crush Adds to Existing Strain in New York*, The NY Law Journal (July 14, 2014), http://www.newyorklawjournal.com/id=1202663024342/Growing-Border-Crush-Adds-to-Existing-Strain-in-New-York?slreturn=20140628155441.

spouse's lack of status against her in order to obtain custody over their children.[11] Doing so affects the rest of the proceedings, forcing judges to struggle with the decision of whether or not to assign custodial rights to an undocumented parent who may be subject to removal proceedings at any time.[12] In the eyes of the family court judge, a parent's undocumented status bears directly on whether her custodianship of her children is in their "best interest," the standard used in custody disputes.[13]

Many undocumented immigrants are also hesitant to use the family courts to obtain relief because of a systemic fear that their status will be disclosed during proceedings resulting in referral to U.S. Immigration and Customs Enforcement (ICE) for deportation.[14] This fear persists despite the fact that family court judges, at least in New York City, will not routinely inquire about the immigration status of the parties.[15] Many advocates have observed that this fear serves as the initial barrier to the family courts for many undocumented immigrants who may be otherwise eligible for relief.[16]

Furthermore, the petitioner does not only fear for herself. In many situations, she also fears the consequences that may befall her spouse as a result of the proceeding. For example, a civil finding of domestic violence[17] against an abuser can constitute grounds for removal from the country if the domestic violence is found to have been in violation of an existing order of protection.[18] If an individual (and perhaps her children) are dependent on her spouse for financial support, deportation of the spouse may be a disastrous outcome, even given the existence of abuse. Indeed, courts are supportive of consensual resolutions in part because they conserve judicial resources.

But there is a trade-off—orders of protection obtained by consent rather than through a fact-finding proceeding may make it more difficult for the undocumented spouse to seek legal status through U Visa certification.[19] Moreover, many conflicting,

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[11] *See, e.g.*, Interview 2, *supra* note 5 (claiming that they have observed these situations play out in family courts in White Plains and Yonkers).

[12] *See infra* note 97 and accompanying text (noting this struggle).

[13] *See infra* notes 95-97 and accompanying text (describing "best interest" standard and noting its centrality to family law).

[14] *See, e.g.*, Interview 19 (July 1, 2013); Interview 18 (July 9, 2013).

[15] Interview 13 (June 25, 2013).

[16] *See* Interview 19, *supra* note 14; Interview 18, *supra* note 14.

[17] Criminal convictions for crimes related to domestic violence likewise may have immigration consequences.

[18] 8 U.S.C. § 1227(a)(2)(E)(ii) (2006) (defining a "deportable alien" as "[a]ny alien who at any time after admission is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order").

[19] *See infra* Part I.C.2.

and sometimes extra-legal, interests of the petitioning noncitizen are at stake. Practitioners are therefore advised to approach these matters mindfully.[20] The full complexity of this dynamic is beyond the scope of this memorandum, but it is a serious issue that is currently being addressed by petitioners, advocates, and courts every day.[21]

The current atmosphere surrounding immigration issues has worsened the fear that undocumented individuals feel in accessing family courts. Discussions regarding immigration reform have even created a hostile environment in some areas of the country. For example, Boston residents protested a plan to house immigrant children in Massachusetts because they would essentially be "skipping the line" to receive state assistance.[22] It is thus even more important to engage with the community of undocumented immigrants and encourage them to access the family courts when needed.

While all of these concerns are important, we will focus our analysis on two types of requests for special findings in aid of immigration actions that are brought repeatedly in the New York family courts: requests for certification of helpfulness in connection with detection, investigation and prosecution of offenses needed for U Visa relief and special findings regarding a child's best interests required to seek Special Immigrant Juvenile Status (SIJS).[23] Sections A and B provide general descriptions of the U Visa and SIJS processes. In Section C we recount some of the many issues that have arisen in family court relating to these actions.

A. *U Nonimmigrant Status ("U Visas")*

U Visas were created by the Victims of Trafficking and Violence Protection Act of 2000 (TVPA).[24] The law was "intended to strengthen the ability of law enforcement agencies to investigate and prosecute cases of domestic violence, sexual assault,

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[20] Interview 24 (July 24, 2013).

[21] *See, e.g.*, EMPIRE JUSTICE CENTER, http://www.empirejustice.org/ (last visited July 25, 2013); INMOTION, http://www.inmotiononline.org/ (last visited July 25, 2013); NYS OFFICE OF INDIGENT LEGAL SERVICES, https://www.ils.ny.gov/ (last visited July 25, 2013); SEPA MUJER, http://sepamujer.org/ (last visited July 25, 2013).

[22] Nicholas Jacques, *Protesters Blast Plan To Bring Immigrant Children To Mass.*, The Boston Globe, July 27, 2014, https://www.bostonglobe.com/metro/2014/07/26/protesters-rally-against-plan-house-immigrant-children/SLZkUhYMdzZlHZuVaeLn4L/comments.html?p1=ArticleTab_Comments_Top.

[23] Self-petitions under the Violence Against Women Act ("VAWA") are similar in many respects to the U Visa. While this memorandum focuses primarily on issues that arise in the U Visa and SIJS context, the discussion that follows and the recommendations provided apply with equal force to VAWA petitions.

[24] Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in scattered sections of the U.S. Code). The term "U Visa" is a misnomer. The more accurate term is "U Nonimmigrant Status." A U Visa is not in fact a visa and does not convey the privileges typically associated with visas. However, the term "U Visa" is widely used and has been adopted in this white paper as a convenience.

trafficking of aliens and other crimes while, at the same time, offer protection to victims of such crimes."[25] Congress believed that "[c]reating a new nonimmigrant visa classification would facilitate the reporting of crimes to law enforcement officials by" victimized noncitizens and that "[p]roviding temporary legal status to aliens who have been severely victimized by criminal activity also comports with the humanitarian interests of the United States."[26]

The requirements for obtaining a U Visa are provided at 8 U.S.C. § 1101(a)(15)(U). Undocumented individuals who are victims of certain crimes[27] can "file a petition for status" if it is determined that (1) "the alien has suffered substantial physical or mental abuse as a result of having been a victim of" those crimes; (2) the noncitizen, or the noncitizen's "parent, guardian, or next friend" if the noncitizen is "under the age of 16," "possesses information concerning" that criminal activity; (3) *the noncitizen "has been helpful, is being helpful, or is likely to be helpful" to "Federal, State, or local authorities investigating or prosecuting" that criminal activity*; and (4) the crime "violated the laws of the United States or occurred in the United States . . . or the territories and possessions of the United States."[28]

For the purposes of this memorandum, the third factor is the most important. The TVPA provides that any U Visa petition filed by a qualifying noncitizen "shall contain a certification from a Federal, State, or local law enforcement official, prosecutor, judge, or other Federal, State, or local authority investigating" the crime at issue.[29] The statute also stipulates that the certification "shall state that the alien 'has been helpful, is being helpful, or is likely to be helpful," in the detection, investigation or prosecution of the

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[25] Questions & Answers: Victims of Criminal Activity, U Nonimmigrant Status, U.S. CITIZENSHIP & IMMIGRATION SERVS., http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=1b15306f31534210VgnVCM100000082ca60aRCRD&vgnextchannel=ee1e3e4d77d73210VgnVCM100000082ca60aRCRD (last updated Nov. 22, 2010).

[26] 8 U.S.C. § 1101 note (2000).

[27] The list of crimes by which a noncitizen victim can file for a U Visa is provided at 8 U.S.C. § 1101(a)(15)(U)(iii) (2006), as amended:

> [T]he criminal activity referred to in this clause is that involving one or more of the following or any similar activity in violation of Federal, State, or local criminal law: rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; stalking; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; fraud in foreign labor contracting (as defined in section 1351 of Title 18); or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes.

[28] 8 U.S.C. § 1101(a)(15)(U)(i)(I)-(IV) (2006) (emphasis added).

[29] *Id.* § 1184(p)(1). The certification form is called an I-918 Supplement B. The form is then submitted to USCIS by a petitioner seeking U nonimmigrant status.

crime.[30] It is worth emphasizing that state judges are authorized to consider U Visa certifications. Local authorities such as the Administration for Children's Services ("ACS") may also provide a certification of helpfulness.[31]

Applications seeking certifications of "helpfulness" from the family court are reasonably common in New York City. Beginning in January 2012 through July 2013, advocates filed 82 petitions in family court seeking certifications in aid of U Visa application to the USCIS.[32] Family courts in New York City have established a special procedure to aid undocumented immigrants seeking certifications, known as the "Z docket." Noncitizens file their petitions for U Visa certifications (referred to as "Z petitions"), with the family court, which are then placed on the Z docket. These petitions are dealt with administratively by the family court judges, which allows the requests to be kept confidential, which is especially important to victims of domestic violence.[33] Outside of New York City, however, family court judges do not appear to play the role of a "certifying" authority with any regularity. We spoke to advocates in Long Island, Westchester, Albany, and Rochester, many of whom represent litigants in other parts of the state, and all observed that in those jurisdictions litigants rarely seek the factual certifications required for a U Visa application from family court judges.[34]

B. *Special Immigrant Juvenile Status ("SIJS")*

Congress created SIJS in 1990.[35] The authorizing statute redefined the term "special immigrant"[36] to include an immigrant (1) "who has been declared dependent on a juvenile court located in the United States and has been deemed eligible by that court for long-term foster care," and (2) "for whom it has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the

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[30] *Id.*

[31] Federal regulations specifically contemplate that the courts may act as a "certifying body." *See* 72 Fed. Reg. 53014 (Sept. 10, 2007), 8 C.F.R. 214.14 (a)(2) and INA 214 (p)(1).

[32] This data was provided by Ms. Tionnei M. Clarke, Counsel to the Admin. Judge, N.Y.C. Family Courts, to Denise Kronstadt, Deputy Exec. Dir., Fund for Modern Courts July 26, 2013.

[33] Interview 13, *supra* note 15.

[34] An interviewee described a circumstance where she was able to obtain a U Visa certification from an Albany family court judge. However, her experience is the exception, not the rule, outside of New York City. Interview 24, *supra* note 20; Interview 23 (June 28, 2013) (characterizing the U Visa process in Albany compared to that in New York as "much more ad hoc").

[35] *See* Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C.).

[36] A "special immigrant" finding is significant, since it can be the basis for issuing a visa to qualifying noncitizens. *See* 8 U.S.C. § 1204 (2006) ("A consular officer may . . . issue an immigrant visa to a special immigrant or immediate relative as such upon satisfactory proof . . . that the applicant is entitled to special immigrant or immediate relative status.").

alien's or parent's previous country of nationality or country of last habitual residence."[37] Initially, the intention was to fashion a remedy "for children in Juvenile Court proceedings who could not be returned to their parents."[38]

The requirements to obtain SIJS have been altered by subsequent congressional amendments.[39] The most significant amendment is the current requirement that a SIJS petition "include Juvenile Court findings that the child is dependent on the court due to abuse, abandonment and/or neglect."[40] In New York, the request for the "Juvenile Court Findings" of abuse or neglect and the child's best interests needed to file a SIJS petition primarily go to the state's family court judges.[41] That finding, generally in the form of a "Special Findings Order," will then be included in the applicant's SIJS petition to USCIS.

Requests to the family court for the factual findings required to bring SIJS petitions are generally brought by one of three different groups: (1) private petitioners who are often relatives, although not parents, who seek guardianship of the petitioning juvenile;[42] (2) foster care agencies run by the county which have custody of undocumented minors; and (3) non-profit agencies, particularly when the child is neither in the custody of a private individual, nor in the county foster care system, but where instead the Department of Homeland Security still holds custody.[43] Private petitioners are common in New York City, where guardianship and SIJS relief are sought in the same proceeding. In such cases, judges appoint lawyers for the petitioning juvenile from the Attorney for the Children program to ensure that the child's interest is fully represented in the guardianship hearing, while a separate lawyer represents the potential guardian and simultaneously requests SIJS special findings on behalf of the minor child.[44] An example of a non-profit agency that petitions on behalf of SIJS applicants

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[37] Immigration Act of 1990 § 153.

[38] Lisa Mendel-Hirsa, *Understanding Special Immigrant Juvenile Status*, EMPIRE JUSTICE CTR. (Jan. 16, 2010), http://www.empirejustice.org/issue-areas/immigrant-rights/access-to-status/understanding-special.html#8.

[39] *See generally id.*

[40] *Id.*; *see also* 8 U.S.C. § 1101(a)(27)(J)(i) (defining "special immigrant" as "an immigrant who is present in the United States" "whose reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law").

[41] In some instances, a guardianship proceeding may be brought in New York Surrogate's Court. *See, e.g., In re Marcelina M.-G. v. Israel S., et al.*, 112 A.D.3d 100 (2d Dep't Oct. 23, 2013).

[42] Because the abandonment requirement has been prescribed valid when "reunification with one or both parents is not viable," some courts have interpreted the standard to allow for SIJS petitions when the child is in the care of one parent but has been abandoned by the other. In these cases, a parent may file a petition on behalf of her child. Interview 10 (June 12, 2013).

[43] Interview 2 (July 6, 2013).

[44] Interview 4 (July 23, 2014).

directly without the involvement of a guardian is Catholic Charities in Rochester, which acts for children who are in the custody of the Department of Homeland Security.[45]

C. *Problems Adjudicating Questions Relating to Immigration Status in New York Family Courts*

After reviewing the literature, the rules, and circulating a survey[46] inquiring among immigration law practitioners about their experiences with immigration issues in family court, we interviewed twenty-six people. The interviewees included attorneys in public interest and private practice, Attorneys for the Child, professors, family court judges and persons supervising pro bono attorneys. They all have experience dealing with immigration issues in family court and collectively practice in at least ten counties in New York state.[47] Our paper seeks to highlight issues surrounding the proper and efficient adjudication in family court of orders seeking findings required for U Visa and SIJS petitions. We found that the problems immigration status poses in New York family courts can be roughly broken down into three categories: (1) problems coordinating cases caused by parallel actions in family and immigration courts; (2) problems arising from incorrect legal rulings during family court proceedings; and (3) problems related to the undocumented status of litigants. Each of these categories is addressed below.

1. Parallel Actions in Family and Immigration Courts

One of the core structural problems created by the intersection of immigration law and the New York family courts is that cases often proceed in parallel in family and immigration courts. For example, because a violation of an order of protection can establish grounds for removal,[48] immigration authorities may have to wait until a family court judge makes a finding to this effect before initiating removal proceedings against the noncitizen. Resolutions reached in one court may have collateral consequences in the other, though little to no communication exists between the two systems.[49] "[T]he big

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[45] Interview 19, *supra* note 14.

[46] Fordham University's Feerick Center For Social Justice recently conducted a similar survey and focused on some of the same issues. Fordham University The School of Law, Feerick Center for Social Justice, *New York Unaccompanied Immigrant Children Project Family Court Working Group: Findings From a Survey of Lawyers Representing Immigrant Youth Eligible for Special Immigrant Juvenile Status in NYS Family Court*, March 2014.

[47] Albany County, Bronx County, Erie County, Kings County, Monroe County, Nassau County, New York County, Suffolk County, Ulster County and Westchester County.

[48] *See supra* note 18 and accompanying text.

[49] *See, e.g.*, Alizabeth Newman, Remarks at The Chief Judge's Hearings on Civil Legal Services (Oct. 4, 2012) [hereinafter CLS Hearings] (transcript at 64–65) (providing example of a family court judge and an immigration judge holding off on adjudicating the merits of their particular cases, such that "the two courts were waiting for each other" to resolve an issue in each of their proceedings); *see also* Sarah Rogerson, Unintended and Unavoidable: The Failure to Protect Rule and Its Consequences for Undocumented Parents and Their Children, 50 FAM. CT. REV. (SPECIAL ISSUE) 580, 585 (2012) ("There is a (….continued)

gap that exists between Immigration Law and New York State Family Law" is perceived as one of the significant problems currently afflicting family courts in the state.[50]

This administrative logjam has implications for undocumented immigrants seeking relief through U Visa applications and SIJS petitions. Because immigration authorities are the ultimate arbiters for granting relief, and because family court certifications (U Visa) or findings (SIJS) are a necessary part of both applications, noncitizens are completely dependent upon the family courts in order to obtain relief. This is especially true for undocumented minors, because SIJS petitions require special findings rendered by a family court while U Visa certifications of helpfulness can be obtained from many other sources, including prosecutors and police.[51]

As noted above, requests for a U Visa certification are typically dealt with via the family court Z docket. The docket itself has no statutory authorization, as evidenced by its omission from the New York Family Courts' docket numbering system.[52] In fact, there is no statutory cause of action for the filing of Z petitions whatsoever. Because there is no statutory cause of action grounding the right to file a Z petition, these applications are typically resolved on an *ad hoc* basis. This means that undocumented applicants may suffer prolonged delays in the family court before they even get their case filed with immigration authorities.

These problems are aggravated by each of the players in the family court system—judges, practitioners, and the parties.[53] Often, many, but not all, suffer from a lack of awareness of the collateral consequences that one system's determination has on the other. Many commentators, including judges themselves, observe that family court judges are often uninformed of the immigration issues that arise during the course of family court proceedings.[54] They are unaware of both immigration law generally and

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(continued….)

lack of information flow from the immigration officials to the child welfare system and vice versa." (footnote omitted)).

[50] Chief Judge Jonathan Lippman, Remarks at CLS Hearings, *supra* note 49 (transcript at 53).

[51] *See supra* Part I.B.

[52] *Overview*, NYCOURTS.GOV, http://www.nycourts.gov/courts/nyc/family/overview.shtml (last updated Jan. 3, 2013) (noting that "[t]he NYC Family Court docket number system begins with a letter which tells the type of case filed," and omitting "Z" entirely); *see also* Court Rule 205.7(b)("Z-Miscellaneous").

[53] It is important to note that some law enforcement agencies do not have a consistent and coherent approach in issuing U Visa certifications. Practitioners noted that the NYPD has numerous internal rules that hinder applicants from obtaining certifications and such rules have no statutory basis. This further highlights the need for reform in family courts. *See* Interview 14 (June 17, 2013).

[54] *See* Theo Liebmann & Lauris Wren, *Special Issue Introduction: Immigrants and the Family Court*, 50 FAM. CT. REV. (SPECIAL ISSUE) 570, 570 (2012) (observing from survey results that "[n]inety-three percent of [polled] judges had handled a case in which the immigration status of a party was raised as an issue," and that "seventy-two percent of family court judges surveyed believed that their level of (….continued)

their role in making findings that are incorporated into applications to the USCIS for legal status.[55] In fact, some family court judges mistakenly believe that they do not have jurisdiction to render findings necessary for noncitizen applications.[56] This belief is particularly problematic in the U Visa context, since other governmental authorities are often reluctant to get involved in immigration petitions. One practitioner noted that District attorneys' offices and police officers are sometimes unwilling to provide certification.[57] There have been cases where law enforcement offices have created arbitrary rules with no basis in the statute[58] and, in at least one case, a practitioner reported that a District attorney's office lost client files and then denied certification as a result of that mistake.[59]

As a result of this inconsistency in analyzing U Visa certifications, practitioners now proceed tactically with cases. We have been informed by some counsel that there is a database listing individual judges and their requirements or preferences in regards to issuing certifications.[60] One particular attorney told us that the attorney waited until a judge retired to proceed with requests for certification.[61] The administration of justice should be on the merits and not dependent on the judge to whom a certification request is assigned.

(continued….)

knowledge regarding immigration law was insufficient to resolve issues arising out of a party's immigration status" (footnote omitted)); Interview 13, *supra* note 15 (observing that knowledge of these issues varies tremendously across judges in New York). *But see* Interview 10, *supra* note 42 (observing that 95% of family court judges know what special findings motions are); Interview 19, *supra* note 14 (claiming that family court judges in Monroe County have a basic awareness of immigration issues, specifically SIJS status and what special findings are needed for SIJS petitions).

[55] *See, e.g.,* Randi Mandelbaum & Elissa Steglich, *Disparate Outcomes: The Quest for Uniform Treatment of Immigrant Children*, 50 FAM. CT. REV. (SPECIAL ISSUE) 606, 608 (2012) ("Overall, a lack of a clear and precise statement as to the role of state court judges in the SIJS process continues to pose significant obstacles to otherwise eligible SIJS youth who are unable to obtain the requisite findings from state courts.").

[56] *See, e.g., id*. at 610–11 (observing that "some [family court] judges do not even find it to be within the courts' authority" "to make . . . abuse and neglect determinations," taking "a narrow view of their role").

[57] *See* supra note 53.

[58] *Id*.

[59] Interview 17 (July 10, 2014) .

[60] Interview 16 (July 2, 2014); Interview 17, *supra* note 59.

[61] Interview 17, *supra* note 59.

Like judges, many family court practitioners are unaware of the available forms of immigration relief.[62] In some cases, judges raise the issues *sua sponte* and find themselves in the uncomfortable position of informing lawyers that their clients may be eligible for SIJS and U Visas as immigration remedies.[63] This happens in part because it is very difficult to develop an expertise in both immigration law and family law. While immigration law is code-based federal law, family law is state-based; and practitioners primarily practice in state court. Furthermore, while the procedural complexities of family law practice vary from county to county in New York State, it takes considerable time to master the complexities of immigration law.[64]

Undocumented individuals ultimately are impacted.[65] Many are uninformed about legal rights and remedies that U.S. immigration law affords to them,[66] which in turn creates another roadblock to accessing family courts.[67] "Abused, neglected, or abandoned" undocumented minors are especially vulnerable, given their situation and corresponding lack of knowledge and resources. Many do not know that they have a pathway to legal status, let alone that this path wends its way through the family court system.[68]

There is also a growing concern regarding detained noncitizens and the effect detention has on their ability to protect their parental interests and participate

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[62] *See* Liebmann & Wren, *supra* note 54, at 570-71 ("Only seven percent of the [surveyed] attorneys believed that family court practitioners were knowledgeable in areas in which immigration law affects family court decisions."); Interview 14, *supra* note 53 (claiming that poorly informed counsel is a problem in this area, illustrated by the fact that many attorneys do not know that divorce triggers a two year clock on VAWA petitions).

[63] Interview 12 (July 9, 2014).

[64] Interview 18, *supra* note 14.

[65] *See* Martha Maffei, Remarks at CLS Hearings, *supra* note 49 (transcript at 46) ("I will say that 99 percent of my clients, they have limited English proficiency, and 40 percent of them have a minimum education and have problems even in their own language.").

[66] *See* Kathleen M. Rice, Remarks at CLS Hearings, *supra* note 49 (transcript at 28) ("Many low-income individuals are not even aware that they have legal rights in our county or that an attorney can help them."); Interview 19, *supra* note 14 (observing that in Rochester, many people may be eligible for U Visas, but because they do not know about the existence of this form of relief, they do not pursue it); *see also* Martha Maffei, Remarks at CLS Hearings, *supra* note 49 (transcript at 49) ("[Undocumented] [w]omen do not have a basic understanding of the Court procedures and don't know what constitutes a family offense, much less how to meet the legal elements of [their] claim. There is little information given to women on what to expect in the process.").

[67] Other than ignorance of legal rights and remedies, the pervasive fear of noncitizens that their undocumented status will be revealed during the course of family court proceedings is a major threshold impediment to accessing the family courts. *See, e.g.*, Interview 18, *supra* note 14.

[68] *See, e.g.*, Mandelbaum & Steglich, *supra* note 55, at 607 (observing that at "crucial times, it is difficult for the child to even get his or her matter before [a family] court").

meaningfully in family court proceedings. While Immigration and Customs Enforcement (ICE) has issued guidance, stating that immigration proceedings should not impede parental rights, there is a question to what extent the ICE policy is enforced.

2. Administrative and Legal Issues

Judicial and administrative concerns also arise in the context of orders for special findings in aid of SIJS petitions and U Visa certifications. Family court judges struggle with the interpretation of key immigration terms. For instance, "abandonment" and "neglect" have unique definitions in the SIJS context. These interpretive issues are exacerbated by the lack of uniform standards and guidelines. For example, which law should family court judges use when determining whether an undocumented juvenile has been "abused, neglected, or abandoned"—New York law, or that of the juvenile's birthplace? Similarly, judges in New York are divided on the questions as to whether a juvenile must have been "abused, neglected, or abandoned" by one *or both* parents in order to satisfy the SIJS requirement.[69] Recently, in the Second Department, the Court answered this question definitively, finding that abandonment by only one parent is sufficient to satisfy the SIJS standard.[70] Nor is there a uniform standard on what findings will satisfy the requirement that a petitioner has in fact been "abused, neglected, or abandoned" by her parents,[71] or whether a child is dependent on a juvenile court within the meaning of the federal statute.[72] Judicial interpretation and lack of uniformity give rise to a number of administrative and legal issues in this context, a number of which are discussed at length below.

[69] Interview 2, *supra* note 43. This issue is rooted in the language of the statute. *See* 8 U.S.C. § 1101(a)(27)(J)(i) (2006) (defining "special immigrant" as "an immigrant who is present in the United States" "*whose reunification with 1 or both of the immigrant's parents is not viable* due to abuse, neglect, abandonment, or a similar basis found under State law" (emphasis added)).

[70] *In re Marcelina M.-G.*, 112 A.D.3d 100.

[71] Interview 13, supra note 15.

[72] In a Second Judicial Department decision issued on July 17, 2013, the court held that "a child support order does not satisfy the requirement for special juvenile status that a child be 'dependent on a juvenile court,'" where the order does not "award or affect the custody of a child." The court, however, acknowledged without challenge that "several decisions of this Court and Appellate Division, First Department, have addressed the questions of whether a guardianship petition and an adoption proceeding satisfy the dependency prong for special findings relative to special immigrant juvenile status, answering both questions in the affirmative." *In re Hei Ting C.*, No. 2012-00112, 2013 WL 3718750 (N.Y. App. Div. July 17, 2013). A new issue has arisen as to whether a request for special findings in support of a SIJS petition may be brought in the context of family offense proceeding. *In The Matter of Eliverta Fifo v. Ismail Fifo* (July 29, 2013), Judge Gruebel in the Kings County family court answered that question in the negative. The decision has been appealed to the Appellate Division, Second Department and is awaiting a hearing as of October 2014.

a. U Visa Certifications

The procedure for getting into the "Z" docket (or similar docket) to request a U Visa certification of "helpfulness" varies from family court to family court.[73] Furthermore, since such requests are not statutorily authorized, there is no right to appeal a denial.[74] As a result, while it establishes a procedure through which a U Visa certification may be sought, the Z docket suffers from a number of shortcomings that limit this form of relief to undocumented applicants.

Another legal issue arises when determining what a court may rely upon when granting certification for a U Visa. Some family court judges will refuse to equate evidence gathered in the context of an action resolved on consent with a formal "finding" which may satisfy the demands of a U Visa certification[75] even though the U Visa statute does not require a contested hearing.[76]

This approach creates a dilemma for an undocumented spouse who needs a remedy in family court for abuse, custody or support but still depends on the respondent. A petitioner wants to seek an order quickly,[77] without going through the delay and expense of obtaining formal findings, but obtaining such an order on consent can preclude her from generating the court findings that some judges believe are a necessary predicate for a U Visa certification. While some practitioners have been able to obtain certification by pointing to the context accompanying the consent order,[78] this perception has increased the difficulty of important decisions that noncitizens face.

A final issue arising in the family courts with respect to U Visas involves the existence of a confidential memorandum on U Visas circulating amongst New York City family court judges. Many practitioners believe that this memo includes incorrect legal guidance, including but not limited to, an assertion that a U Visa certification should not

[73] Interview 20 (June 17, 2013).

[74] Interview 13, *supra* note 15.

[75] *See* Interview 20, *supra* note 73; Interview 24, *supra* note 20.

[76] Nor does the USCIS require a judicial "finding" for a U Visa certification. The court simply needs to certify on state on Form I-918B that the person has been a victim of a crime, possesses information concerning the criminal activity and has been, or is likely to be, helpful in the investigation/prosecution of the criminal activity, has not been requested to provide further assistance in the investigation/prosecution, and has not unreasonably refused to provide assistance. *See* Form 1-918B and 8 C.F.R. 214(c)(2)(ii).

[77] This also creates a problem for the Courts which generally encourage consensual resolutions to preserve judicial resources. Incentivizing the parties to litigate when litigation is unnecessary is in no one's best interests.

[78] *See* Interview 24, *supra* note 20 (explaining that certain resolutions, including anger management referrals and supervised visits, can indicate to a judge that violence was a part of a consent order, thereby opening up a path to U Visa certification).

be granted based on findings in an underlying proceeding if that proceeding was resolved on consent.[79] Practitioners have repeatedly asked to review the memo but have been denied access in every instance.[80] The authors of this report sought a copy of the family court memorandum twice, and were likewise denied a copy.

The family court has confirmed that a memorandum discussing U Visa requests for certification was circulated to the judges. However, the court emphasized that the memorandum was not a directive and that family court judges in New York City are vested with the ultimate discretion to make decisions on U Visa certifications, including whether or not the Court will rely upon findings made during an action resolved on consent.[81]

Resolution of questions of law, including the question as to whether a family court judge may rely upon facts raised during a proceeding resolved on consent, is beyond the scope of this white paper. However, this is an important issue that directly impacts the ability of an undocumented person to obtain U immigrant status. It is critical that a thorough and definitive exploration of the requirements of the statute with respect to the consent issue be prepared by an eminent group with unquestioned expertise in the area. Then both the family court and the advocate community will have a clearly articulated expression of the law subject to review and debate. Decision-making based on undisclosed authority has the potential to infect the U Visa certification process with uncertainty and inconsistent administration of justice.

b. SIJS Petitions

Requests for special findings in connection with SIJS present unique cases for the family courts because they are overwhelmingly one-sided, as the abandoning parent or parents rarely appear to contest the proceeding. Unfortunately, it is difficult for judges to adequately assess the record without an adversarial process.[82] There is frequently no opposition to the petitioner's allegations, which forces courts to determine whether it is in the child's best interests to stay in this country or return to the country of origin based on only one side of the story. Despite any concern that a family court judge might have regarding the petitioner's allegations, a family court judge often has no other choice but to credit the testimony of the child.[83] This leaves family court judges unsatisfied with the

[79] Interview 17, *supra* note 59; Interview 8 (July 8, 2014).

[80] *Id.*; *see also* Interview 16, *supra* note 60; Interview 17, *supra* note 59.

[81] Interview 13, *supra* note 15.

[82] Interview 12, *supra* note 63.

[83] Interview 6 (July 17, 2014). Indeed, family court judges have expressed a fear that SIJS may expose undocumented youth to greater harm than good. *In re Amandeep S.*, G-1310/14, 2014 N.Y. Misc. LEXIS 2679, at *42-44 (Family Ct. of N.Y. Queens Cty. June 19, 2014) ("Although SIJS was enacted to protect children who have been abused, neglected, or abandoned, it may perversely expose those children (….continued)

system, in which a majority of requests for special findings for a SIJS petition are granted, despite the range of cases and quality of evidence presented to the courts.[84]

Although a request for special findings is not an entirely adversarial process, the family courts nevertheless require service on the child's missing parents. This process requirement can be challenging in circumstances when (1) the location of the parent is unknown; or (2) the parent is located in a rural area of a foreign country. In the first scenario, petitioners often face difficulties identifying parents and providing proper notice.[85] In the second scenario, flexible family court judges will often waive foreign service in favor of service by publication. However, service by foreign publication can be a prohibitively expensive process for petitioners, even if they are represented by counsel.[86] In either event, service of process can impose heavy costs on petitioners.

SIJS petitions have an added complication of applicants "aging out." A child may file a SIJS petition with USCIS only until he or she is twenty-one.[87] Anyone who applies after reaching the age of twenty-one is considered to have "aged out" and no longer eligible. The Trafficking Victims Protection Reauthorization Act of 2008 provides that the USCIS will determine the child's age on the date of the SIJS petition, not the date of adjudication.[88] While this provides children with some protection, they are not shielded from the delay in obtaining a special finding, a prerequisite to filing a SIJS petition with the USCIS. Given the backlogs in the judicial system, courts and practitioners need to be aware that there are very strict time constraints on obtaining certain orders from the court. Specifically, the courts should maintain flexibility with respect to procedures that are only recommended under the statute, rather than required by statute. To hold up cases

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(continued….)

to maltreatment."). Indeed, young children are encouraged to take terrible risks for the promise of sanctuary in the United States. *Id.*

[84] Interview 6, *supra* note 83.

[85] Interview 16, *supra* note 59.

[86] Interview 21 (June 26, 2014).

[87] Unlike New York, it is still the case in many states that a child can only file a SIJS petition until he or she is 18 years of age. This limit reflects restrictions on some state juvenile and family courts that only have jurisdiction over children younger than 18. Therefore, although federal law allows children under the age of 21 to qualify, petitioners between the ages of 18 and 21 in certain states cannot obtain the necessary court order to apply for SIJS. To ameliorate this problem, states like Maryland have created state legislation to expand the jurisdiction of their juvenile courts. Kelly Kidwell Hughes, *Maryland Law Expands Eligibility for Special Immigrant Juvenile Status*, Catholic Legal Immigration Network, Inc. (July 17, 2014), https://cliniclegal.org/resources/articles-clinic/maryland-law-expands-eligibility-special-immigrant-juvenile-status.

[88] TVPRA, §235(d)(6).

when there are strict deadlines by requiring unnecessary procedures fails to take into account the best interest of the child in these proceedings.[89]

Requests for special findings also pose problems with respect to judicial interpretation of statutorily-mandated procedural requirements. For example, special findings are often sought in the context of guardianship proceedings. The only statutorily-mandated procedural requirement with respect to guardianship proceedings is registration with the New York State Central Register for any individuals eighteen years of age or over who reside in the home of the proposed guardian.[90] However, many practitioners stated that there are a number of other procedures that family court judges might also require which impede the guardianship decision and in turn delay the request for special finding. Specifically, family court judges might also ask for (1) fingerprinting for all participants in the guardianship proceedings who are eighteen years of age or over; (2) a court-ordered investigation of the home; and (3) criminal background checks of guardians.[91]

Fingerprinting has especially posed a recent barrier to the ability of petitioners to advance their application.[92] Even though fingerprinting is not a statutorily required procedure, court clerks have refused to accept petitions that fail to include this information.[93] Most courts utilize a private contractor to perform the required fingerprinting.[94] These services are often located in geographic areas that are difficult for participants to get to, and courts have refused to accept fingerprinting performed by alternative providers, including the Federal Bureau of Investigation and local police departments.[95] In addition, participants are frequently required to provide two forms of photo identification or one form of non-foreign photo identification for fingerprinting.[96] Not surprisingly, many find it impossible to comply with this requirement. While

[89] The practitioners that contributed to this white paper expressed the view that the family courts are accommodating in circumstances where expedition is necessary. However, a few dissenting voices shared experiences where the family courts were less cooperative. *See, e.g.*, Interview 22 (July 1, 2014).

[90] N.Y. Surrogate's Ct. P. Act § 1706(2) (2008).

[91] Interview 21, *supra* note 86; Interview 22, *supra* note 89.

[92] Interview 21, *supra* note 86; Interview 25 (January 6, 2015).

[93] Interview 25, *supra* note 92 (recalling a petition that was denied by a clerk for failure to include fingerprinting documentation).

[94] Interview 21, *supra* note 86; Interview 25, *supra* note 92 (stating the challenges petitioners face in accessing fingerprinting services).

[95] Interview 25, *supra* note 93.

[96] Interview 21, *supra* note 86; Interview 25, *supra* note 92.

fingerprinting, among other additional procedures, might be best practice,[97] it can also unnecessarily delay otherwise valid SIJS related requests.[98]

3. The Undocumented Status of Litigants

The policy clash between immigration and family law is another problem.[99] Many aspects of U.S. immigration law promote the importance of family unity,[100] while the "best interests of the child" is one of the core values of family law and policy.[101] Commentators have observed that these values often compete during family court proceedings. For example, during custody battles between a U.S. citizen and an undocumented immigrant, if the latter's undocumented status surfaces during the course of the proceedings, family court judges often struggle to apply the "best interests" standard knowing that the noncitizen could be subject to removal proceedings if detained by the ICE.[102]

The use of status itself is another glaring problem that afflicts many undocumented spouses seeking relief in New York family courts. Abusers who happen to be U.S. citizens can use the undocumented status of a spouse to inflict and perpetuate

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[97] Interview 6, *supra* note 83 (describing scenario in which the interviewee was skeptical of a guardian's credibility with no recourse given a clean background check with New York State Central Register).

[98] Interview 21, *supra* note 86.

[99] *See* Rogerson, *supra* note 49, at 582 ("At the intersection of archaic child welfare policies and inflexible immigration rules is a clash of unresolved and conflicting values resulting in the evisceration of American ideals promoting the importance of family unity in our immigration policy and determining the best interests of the child in family law and policy." (footnotes omitted)).

[100] The easiest example of this is seen in the "immediate relative category" of immigration relief, which permits a current U.S. citizen to petition for a green card for a spouse, unmarried children under the age of 21, and parents. *See Green Card for an Immediate Relative of a U.S. Citizen*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=9c8aa6c515083210VgnVCM100000082ca60aRCRD&vgnextchannel=9c8aa6c515083210VgnVCM100000082ca60aRCRD (last updated Mar. 30, 2011) ("*To promote family unity*, immigration law allows U.S. citizens to petition for certain qualified relatives to come and live permanently in the United States." (emphasis added)).

[101] *See, e.g.*, Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. FAM. STUD. 337, 337 (2008) (observing that in numerous family court proceedings, "a judge must decide what is 'best' for any child at any time under any particular circumstance").

[102] *See, e.g.*, Interview 2, *supra* note 5 (confirming that, it is often argued that undocumented status affects an parent's ability to provide for the children in custody disputes because of potential removal). *But see* Interview 14, *supra* note 53 (recounting story where, after the father in a custody dispute raised the immigration status of the mother, the family court judge granted custody to the mother, since it was the father, as the mother's sponsor, who had stopped the citizenship process).

domestic violence, threatening to subject the spouse to removal proceedings if he or she seeks relief through family court.[103] This threat, coupled with a lack of resources and language barriers,[104] often means "that those who most need assistance are not getting served."[105] Consequently, rather than serving as a forum for relief, family courts "unknowingly" become "an instrument of abuse."[106]

Lastly, it is important to point out that the distribution of these problems falls unevenly across the state. A change in geography brings with it a change in the set of problems particular to that location. Generally, far fewer calls for help are made upstate. This is potentially rooted in the fact that there is less public transportation upstate than downstate, thereby limiting the opportunities for upstate immigrants to seek relief.[107] This becomes particularly problematic when venue rules for New York family courts require individuals who seek relief to go to the family court within the county in which they reside. If immigration proceedings are lodged against an individual downstate but she is domiciled upstate, then two cases will proceed in two different courts at opposite ends of the state, creating a logistical quandary for immigrants.

II. PRACTICAL RECOMMENDATIONS

In order to address the myriad problems presented by the overlap of immigration and family courts, we have developed several recommendations. First, we propose that

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[103] *See, e.g.*, Martha Maffei, Remarks at CLS Hearings, *supra* note 49 (transcript at 46) ("[U]nderstanding the court system is hard for anyone, but it's worse for someone who is suffering domestic violence, because many times they are still intimidated by the abusers and threatened with deportation."); Alizabeth Newman, Remarks at CLS Hearings, *supra* note 49 (transcript at 65) (observing that "the spouse with status . . . has almost total control of the petitioning process," and that "if you superimpose a situation of domestic abuse, you have a recipe for disaster").

[104] *See* Martha Maffei, Remarks at CLS Hearings, *supra* note 49 (transcript at 48) (claiming that "[j]udges can be frustrated by the lack of communication and may think a woman is uncooperative," and recounting experience where "[t]he mother was trying to participate but was unable to come out with the right word because of the language barrier"); Interview 14, *supra* note 53 (observing that the inability of non-English speakers to complete pro se forms has been a problem in Long Island, and that a loose policy of acquiring an interpreter during family court proceedings has been haphazardly implemented); *see also* Interview 2, *supra* note 5 (noting that the scarcity of interpreters in family court, can cause lengthy case delays).

[105] Martha Maffei, Remarks at CLS Hearings, *supra* note 49 (transcript at 46); *see also* Kathleen M. Rice, Remarks at CLS Hearings, *supra* note 49 (transcript at 17) ("I think that especially when it comes to domestic violence issues . . . I can't think of an area where there is more of a desperate need for civil access to representation than in that area.").

[106] Alizabeth Newman, Remarks at CLS Hearings, *supra* note 49 (transcript at 65–66). The family courts can also be an instrument of discovery abuse when an abuser attempts to gain access to a victim's confidential U Visa petition as part of a proceeding based on other issues, including orders of protection or custody. Federal law prohibits disclosure of information regarding VAWA/U Visa petitions.

[107] Interview 18, *supra* note 14.

both family law practitioners and family court judges receive regular, targeted training on immigration issues that affect family law proceedings. Second, given the general lack of information on these issues among immigrant communities, we propose that measures be taken to increase access to information for undocumented clients and potential clients. Two ways we have identified by which information may be most effectively dispersed are online FAQs and regional resource centers. Third, we recommend the passage of legislation and an amendment to court rules to fund and reinforce these communication and training efforts.

A. *Trainings related to immigration issues that arise in family court should be provided for judges, clerks and advocates*

Training for judges, other court personnel, and practitioners is essential to addressing issues presented by the overlap in immigration and family law. Currently, the extent and frequency of trainings received by judges varies greatly across the state. These trainings are often spearheaded by advocacy organizations. As a result, areas with the fewest resources for immigrant parties are also more likely to have the judges who receive the least training. Trainings for advocates are largely generated internally by organizations and vary in quality. These trainings are sometimes shared among organizations, but there is no systematic process for doing so, no public database, and no quality guarantee. Because proceedings in a family court can affect issues related to immigration and vice versa, it is important that those who are involved are adequately trained.

1. Training for judges and court personnel

Family court judges have a unique role in dealing with immigration issues. The family courts and the judges that preside over them are statutorily created to administer family law. Their jurisdiction is distinct from that of the immigration courts. Unfortunately, the misconception persists that family court judges should not play a significant role in making the factual findings which are necessary to U Visa or SIJS petitions because of the connection with immigration. In reality, the family courts have a significant role to play in these proceedings that the immigration authorities simply cannot assume.

It is evident that proceedings that take place in family court can have serious crossover effects on immigration status, which may not always be clear to the judges, practitioners, and especially the parties involved. While family court judges are not charged with a duty to enforce immigration law, they are better able to facilitate justice in the family court setting when fully informed of the various facets of a case, including those related to immigration. Better trained judges will increase confidence in the court and encourage more undocumented parties to pursue remedies through the legal system. With the increase in unaccompanied minors over the past year and continuing strong demand for U Visa relief, many more proceedings will make their way through the family courts. Thus, the need for better training for all parties involved has never been greater.

More specifically, training for judges should take place regularly, in-person, and cover a number of issues. It is important that judges are uniformly taught so that individuals may better prepare themselves through alignment of expectations and reliance on consistent administration of the law. Because immigration law is constantly evolving and new issues related to immigration rapidly arise in family courts, it is essential that these trainings occur on a regular and ongoing basis. Because of budget cuts, the majority of training for judges now takes place online.[108] Whenever possible, these trainings should take place in-person to allow for a more interactive approach and sharing of experiences among judges. Such sessions would not only allow judges to raise questions and engage in discussion, but would also facilitate widespread consistency in knowledge.[109]

These trainings should first focus on ensuring that judges understand their obligations related to, and court policies addressing, immigration. For example, judges come out differently on how citizenship status should be treated in the context of a family law dispute. It is unclear whether a judge should inquire about citizenship, and if introduced by a party, how its relevance should be considered; it is also unclear whether there are any affirmative or negative obligations to report it. Proceedings in family court, immigration court, or both, can be delayed because of each body's misunderstanding of the other's role, requirements, and factors for decision-making. Without imposing on duly exercised judicial discretion, trainings should inform judges about the formal relationship between family courts and immigration courts to improve the court's function and subsequent results for individual parties.

Furthermore, these trainings should stress the need for flexibility. As discussed above, there are misconceptions about processes that are required in these proceedings versus those that are only recommended. For example, in the absence of the availability of personal service on a parent, petitioners should be allowed to use alternative methods of service. These trainings should stress that certain processes, like personal service, are not statutorily required, and judges should maintain flexibility, especially when statutory deadlines constrain timing and litigant resources are scarce.[110] Absent this approach, proceedings can become unnecessarily complicated and fail to serve the best interest of the child.[111]

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[108] Interview 13, *supra* note 15.

[109] Training on immigration issues for the family court is receiving more attention. While still in the planning stages, the family court intends to hold a full day seminar for state court judges who deal with immigration-related issues, including U Visas and SIJS. The seminar target date is the first or second quarter of 2015. Interview 13 *supra* note 15 (October 9, 2014).

[110] Interview 21, *supra* note 86.

[111] Interview 5 (July 1, 2014).

Other topics that trainings for judges should cover include U Visas,[112] SIJS, and any other immigration proceedings for which family court decisions may be determinative. It would be helpful for judges to flag frequent or recurring issues and invite feedback, to aid in developing content for these trainings. Although the development of uniform court policies or procedures on these matters would be helpful to petitioners, educating judges about their very existence is beneficial in its own right. For example, there was a child custody case in which the father brought up the mother's undocumented status to support his argument for parental custody. When the judge probed further, the court discovered that the reason the mother did not have legal status was because the father, her former husband, deliberately failed to complete the process required of a sponsor. When this information came to light, the judge found that it weighed against the father's integrity and ruled in favor of custody for the mother.[113]

Sadly, the facts of this case are not unique. Many advocates report instances where the documented party uses the legal status of the undocumented party as leverage to achieve a legal objective, though wholly irrelevant and grossly inequitable.[114] Moreover, while training need not dictate how a judge rules on the immigration aspects of a case, training may allow for judges to better exercise their judicial discretion by acting upon more complete information.

Court clerks and officers also need to be trained in dealing with the immigrant community. Many practitioners noted that there have been cases where clerks have rejected U Visa certification requests because clerks are unaware of the family court's role in the immigration issue. In some very unfortunate cases, practitioners have noted that clerks have exhibited prejudice towards the immigrant community.[115]

2. Training for advocates

Because the family court's role is confined to adjudicating family law disputes rather than resolving immigration issues, it is imperative that advocates are informed. For example, the Bronx Defenders have a coordinated family law and immigration law practice, but this arrangement is not common. In most instances, the best way to accomplish broader familiarity with both sides is through regular training for advocates. Since immigration law and family law are such expansive legal areas, it is unrealistic to expect that most practitioners have expertise in both.[116] It is much more likely that a

[112] Family Court judges, like police officers and prosecutors, are authorized under federal law as signatories to U Visa certifications. That should be clarified and emphasized in training.

[113] *See supra* note 102.

[114] *See supra* notes 102 -106 and accompanying text (demonstrating the improper use of legal status).

[115] Interview 16, *supra* note 60.

[116] *See supra* notes 62-63 and accompanying text.

practitioner will have extensive knowledge of one field but not the other, or focus on a narrow cross-section. For example, a practitioner with broad family law experience but little immigration background might advise a client to accept a resolution that solves a family law problem but carries immigration consequences. Or a practitioner may advise a client to accept an order of protection on consent, which, without a legal fact-finding, may foreclose her from later obtaining the court's certification in connection with U Visa.[117] Alternatively, practitioners who are particularly knowledgeable about U Visas may not have as extensive knowledge about related issues like SIJS, but which may be relevant if a woman they are advising also has a child. In addition, experts in these areas are geographically dispersed, which makes information-sharing even more difficult.

Accordingly, trainings should be administered through regional centers, or a similarly structured network, with emphasis on shared resources and attention to local issues. As with trainings discussed in the prior section for judges, trainings for advocates should include basic information on U Visas, SIJS, and other immigration proceedings for which family court decisions may be determinative. These trainings should focus on issue spotting in addition to expertise building—because it is impossible for family court advocates to become experts in all fields, it is imperative that they are able to at least flag immigration issues that may arise and direct individuals to sources that can provide further assistance.

The regional framework of the administration of these trainings will also allow for greater attention to local issues. As the courts and practitioners identify issues specific to, or pervasive within, a given area, trainings should be created or adapted to address them. Training materials should also be accessible via online database to improve the efficient distribution of resources.

B. *There should be a special part in the family courts dedicated solely to requests for special findings in connection with SIJS.*

As discussed in depth above, one persistent problem in the family courts in this arena is the inconsistent application of law. To achieve greater consistency, the family courts should consider creating a special SIJS part in courts where demand is high. This would allow a family court judge or judicial hearing officer to hear exclusively requests for the special findings orders required to file SIJS petitions in the USCIS.[118] Not only

[117] Interview 20, *supra* note 73.

[118] Interview 13, *supra* note 15. Nicolette M. Pach, a retired judge now serving as a Judicial Hearing Officer, presides over guardianship cases in Queens County. Because, at least in New York City, orders seeking special findings to support SIJS petitions are brought most often in connection with guardianship cases, Justice Pach now hears more SIJS-related proceedings than the other judges in Queens family court. While not created as an "SIJS part", Justice Pach's courtroom has become a *de facto* SIJS part within the Queens family court.

would this help achieve a more consistent application of justice, but it would also allow for family court judges or judicial hearing officers to become experts in this arena. Additionally, with the extraordinary increase in unaccompanied minors in the United States, a special SIJS part in the family courts would help address the influx of SIJS petitions in the USCIS.

The New York Family Court based in New York County is already moving forward to create a specialized Part to address Family Court proceedings involving recently arrived unaccompanied minor children.[119] The protocol for this new Part is being created now and should be operational by April 2015. Supervising Judge Douglas Hoffman invited recommendations and input from the community regarding the effective utilization of the new Part.

C. *Access to information for clients and potential clients should be increased*

Access to information for clients and potential clients is a major area of concern. For a variety of reasons that are geographical, cultural, and psychological in nature, individuals who may have problems relevant to, and remedies available through, family law and immigration law often have difficulty gaining access to the legal system and even further difficulty navigating it. To address this issue, we recommend two possible solutions: (1) increase online resources, such as FAQs, provided by the New York State Unified Court System, at www.nycourts.gov or through another online venue, that would make information available in a simple form and in one location; and (2) establish regional resource centers that would consolidate basic information and facilitate access to specialized assistance for clients.

1. Online FAQs and Form Requests for Special Findings

Improved online resources are important for a number of reasons. First, immigrant populations are spread out across New York State. Not surprisingly, more resources are available in New York City than are available upstate or in more rural areas. Because immigrant populations are also frequently low-income groups, and transportation can be costly, access is critical.[120] Resources not only vary in volume, but also in type. For example, Her Justice assists immigrant women in New York City in acquiring orders of protection and filing for U Visa relief. Due to the advocacy of Her Justice and other similar organizations in New York City, the family courts there have become generally familiar with the process of seeking a certification of "helpfulness" in connection with a U Visa petition.[121] In contrast, fewer resources for filing U Visas exist

[119] See email from Hon. Douglas E. Hoffman addressed to a variety of legal organizations, dated January 23, 2015, "New York County Family Court Specialized Part for Unaccompanied Minors".

[120] Interview 18, *supra* note 14.

[121] Interview 20, *supra* note 73.

outside of the New York City metropolitan area in areas such as Albany County[122] and Monroe County.[123] Likewise, family courts in these counties are less familiar with the issue. Online FAQs would address this disconnect by universally distributing basic information on topics in immigration law and family law that might otherwise go unidentified among regionally isolated immigrant communities.

There are also cultural and language barriers for immigrant populations that inhibit access to information.[124] FAQs made available in different languages commonly spoken among immigrant populations would inform individuals about issues that may be relevant to their situations and indicate the need for further inquiry or special assistance.[125] Cultural norms may also play a role in forming barriers to information. Certain legal issues, such as domestic violence, divorce, and custody disputes, may carry a social stigma among particular immigrant populations.[126] These stigmas may discourage individuals from openly pursuing legal recourse, even when a remedy may be available, for fear of social repercussions. For example, in some Latino communities, individuals do not talk about domestic violence, which carries strong associations of guilt and shame. As a result, Latina women are sometimes reluctant to bring attention to their situation by seeking help from an in-person agency.[127] Online and printed FAQs would allow individuals to gain basic, preliminary information about their rights and remedies without drawing attention from family or community members who might pose a threat to their safety or well-being.

Finally, there is a pervasive mistrust of the government among immigrant communities, which makes many individuals reluctant to openly engage the legal system. Undocumented immigrants especially fear exposing their lack of status and risking deportation.[128] Accordingly, online and printed FAQs would provide information to immigrants without triggering any outcome-determinative process. This anonymous resource would reduce any intimidation that might exist and increase immigrants' willingness to explore legal options at the initial level of inquiry.

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[122] Interview 23, *supra* note 34.

[123] Interview 19, *supra* note 14.

[124] Interview 20, *supra* note 73; *see also supra* note **Error! Bookmark not defined.** and accompanying text.

[125] Many practitioners have also expressed the need for increased access to interpreters in the Family Courts to help aid in the processing of applications. While interpreters are available during many Family Court proceedings, often then are unavailable in the petition rooms. As a result, many applications are negatively impacted because they are improperly translated. *See, e.g.*, Interview 8, *supra* note 79.

[126] Interview 14, *supra* note 53.

[127] *Id.*

[128] *See supra* note 67.

Several organizations have made FAQs that provide information related to immigration issues in family court available on their websites.[129] For example, Legal Information for Families Today ("LIFT"), an organization that provides legal assistance in New York City's family courts, provides a useful legal resource guide entitled "Rights of Immigrants in Family Court" on its website that gives information on, among other things, orders of protection for undocumented immigrants, U Visas, SIJS, and the impact that legal proceedings in the family court might have on an individual's status.[130] The National Network to End Violence Against Immigrant Women provides a more detailed handout specifically on U Visas, including eligibility, the process for filing, and benefits.[131] There are many other examples that demonstrate similar types of information and guidance.[132]

We recommend that the FAQs created for the New York State Unified Court System at www.nycourts.gov incorporate information from these and similar resources. At a minimum, the online FAQs developed should include information related to the following topics:

1. Family courts do not administer immigration law, and it is not the policy of family courts to report citizenship status to the ICE.

2. Immigrants who do not have legal status may nonetheless seek legal remedies, such as orders of protection, through the family court system.

3. Immigrants who are victims of crimes, including domestic violence, may be eligible for U Nonimmigrant status.

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[129] *See, e.g., infra* notes 120-122 (indicating resources available on organization websites).

[130] *See* Exhibit 2: Legal Information for Families Today, *The Rights of Immigrants in Family Courts* (2009), *available at* http://www.liftonline.org/guides/show.php?id=121.

[131] *See* Exhibit 3: National Network to End Violence Against Immigrant Women, *U Visa Interim Regulations Fact Sheet and Guidance*, *available at* http://www.vawnet.org/summary.php?doc_id=1601&find_type=web_sum_GC.

[132] *See, e.g., Immigration Intervention Project,* SANCTUARY FOR FAMILIES, http://www.sanctuaryforfamilies.org/index.php?option=com_content&task=view&id=141&Itemid=164 (last visited July 29, 2013) (providing information on legal services that Sanctuary for Families provides in New York City, including assistance with U Visas and SIJS); *see also, e.g.*, *Domestic Violence Victim Services*, INTERNATIONAL INSTITUTE OF BUFFALO, http://www.iibuff.org/index.php?src=gendocs&ref=DomesticViolenceVictimServices&category=Main (last visited July 29, 2013) (providing information on services to battered immigrants and refugees in Buffalo, New York); *Get Help: Immigration Law*, inMotion, http://www.inmotiononline.org/content/view/20/20/lang,en/ (last updated Oct. 13, 2008) (providing information on legal residency under VAWA but disclaiming that inMotion cannot assist with U Visas and SIJS).

4. The legal proceedings in family court may affect an immigrant's eligibility for a U Visa. Anyone who thinks she may be eligible for a U Visa should consult with legal counsel to understand how her eligibility may be affected.

5. If a child does not have legal status, he or she may be eligible for SIJS if the child is dependent on the court due to abuse, abandonment and/or neglect and the child's best interests would not be served by return to the country of origin.

6. Interpreters in family court will be made available for individuals with limited or no English language skills.

In addition to online FAQs, we recommend creating a form request[133] for the special findings required in order for a child to file a SIJS petition with the USCIS. The form would be readily available for applicants attempting to file a request for special findings as pro se litigants. We further recommend that this form have several language options (at least Spanish, French, Mandarin and Cantonese). There are a number of reasons why a form request for special findings would be useful. First, petitioners attempting to represent themselves pro se would have an opportunity to gain access to basic information on how to file their request. Second, a form might help litigants gain access to the family courts without facing some of the initial bias from court clerks and officers, who often do not have the information necessary to help petitioners. Third, a form might help to provide standardization to a process that is seemingly lacking uniformity.

2. Regional resource centers

In addition to making online FAQs available, we recommend creating regional resource centers for clients and advocates to gain information relevant to immigration and family law issues.[134] The NYS Office of Indigent Legal Services ("ILS") has already drafted a grant to fund the development of regional centers for immigration issues more generally, and we think that these centers would be an ideal conduit for disseminating information related to immigration issues in family court.[135] These regional resource centers will address many of the same barriers previously discussed that immigrant populations face—geographical, cultural, and psychological—and will further provide comprehensive information and assistance to attorneys assigned to represent noncitizen

[133] Similarly, a Form U Visa request for certification might be helpful for *pro se* litigants.

[134] It should be noted that there are already other resource centers available around the state which perform similar functions, including through the Immigration Coalition.

[135] Interview 3 (July 2, 2013).

clients who are unable to pay for an attorney.[136] In particular, regional resource centers will be attuned to the issues most prevalent in each area of operation and will have specialized knowledge of the legal landscape. Forming regional hubs will improve information coordination and ensure that resources spanning a range of issues are locally accessible. A network of centers will facilitate communication about these issues across the state. This will allow individuals to have one point of contact, the regional resource center, which in turn can access information seamlessly from a variety of sources, if not readily available on location.

Another approach would be to create similar regional centers under the auspices of the Office of Court Administration which would provide the same types of advice, but would have an alternate source of funding (i.e., the Office of Court Administration versus the county government). The Legal Aid Society of Rochester is already operating a regional center which provides family law and immigration advice to clients in the Rochester-Albany-Syracuse corridor.

Regional resource centers will also reduce cultural barriers. Each center will have knowledge of the immigrant backgrounds of the communities they serve, and personnel will be sensitive to cultural norms and practiced at addressing them. Centers can greatly increase access for non-native English speakers by providing interpreters who speak the languages most common in a specific locality. This is important as language barriers have created huge delays and disruptions in the court system.[137] There has been at least one instance in which a legal proceeding was so greatly delayed due to the combination of an inability to initially find an interpreter and the ineptitude by the interpreter who was eventually provided, that the client became discouraged and abandoned her case seeking an order of protection after more than a year.[138] There have been other instances reported in which an immigrant woman was unable to present her case, and thereby adequately represent herself, due to her lack of proficiency in English.[139]

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[136] The primary purpose of the statewide network of ILS regional resource centers is to provide legal support and training to assigned attorneys providing mandated representation to indigent immigrant clients pursuant to NYS County Law Article 18-B in family and criminal court proceedings. The goal is to enhance compliance by assigned counsel with the mandate established by the United States Supreme Court in Padilla v. Kentucky to advise noncitizen clients about the immigration consequence(s) of a conviction, as well as about the potential immigration consequences arising within a family court proceeding. The centers may also support assigned counsel in their efforts to ensure local compliance with the Parental Interests Directive released by the Department of Homeland Security, Immigration and Customs Enforcement authorities in 2012 (accessible at http://www.ice.gov/doclib/detention-reform/pdf/parentalinterestdirectivesigned.pdf).

[137] *See supra* note 104 and accompanying text.

[138] Interview 14, *supra* note 53.

[139] *Id*.

Interpreters who are able to explain court proceedings and documents are critical to addressing these and similar issues. Additionally, fostering cultural understanding may ameliorate fear of official actors that might otherwise surround a center offering immigration-related services. Since frequently information about immigration and legal assistance is spread by word of mouth and largely based on trust among immigrant populations, regional resource centers that are tied to the community are likely to be more successful in reaching potential clients.[140]

Ideally, immigration lawyers and family law advocates would collaborate to combine expertise in both immigration and family law in one place. Since the focus of these centers will be immigration, clients will know to seek advice about the effects of family law proceedings on immigration concerns. Additionally, the centers can provide advice to family law practitioners to ensure that client concerns are competently addressed and expertise is efficiently disseminated.

D. *There should be state legislation and court rules to address the intersection between family and immigration courts*

Throughout the course of our research and interviews we have noted that in order to effectuate many of our recommendations, new legislation and court rules will be necessary. In this section, we discuss some of the legislation that has been proposed in other jurisdictions, as well as recommend our own proposed legislation and amendments to the New York State Court Rules.

1. State and Federal Legislation

As this memorandum demonstrates, much remains to be accomplished to address the issues facing undocumented immigrants in New York family court. Nonetheless, there have been some state and federal legislative proposals that attempt to address concerns similar to those raised herein. With the help of leading activists in family and immigration law, legislatures have come to appreciate the need to address the gaps that are present in the overlap between family and immigration courts. California, New York and Florida, are at the forefront of this movement. However, most existing statutes address immigration issues rather than target the specific intersection between family courts and immigration law. We propose legislation that comprehensively addresses the issues and facilitates the solutions set forth in this memorandum.

a. California

In 2012, California passed a law that permits a court to place a child in any family court proceeding with a parent, legal guardian, or relative regardless of the immigration status of that parent, legal guardian, or relative.[141] The importance of not inquiring into a

[140] *Id*.

[141] S.B. 1064: The Reuniting Families Act, signed by Governor Brown on October 1, 2012.

person's legal status for child placement is critical. Foremost, it encourages potential family members to come forth and claim the child without fear that they will be questioned about their status and face deportation.[142] In essence, California has adopted the position that immigration status should not be relevant to the best interest of the child when determining child custody.[143]

b. Florida

Florida is another state that has legislation relating to the intersection between family courts and immigration, specifically pertaining to children.[144] In Florida, the caregiver for any court-dependent child is required to ascertain the child's immigration status and, when the child is undocumented, to take steps toward regularizing the child's status as part of the child's case plan.[145] The department or community-based care provider shall report to the court in its first judicial review as to whether the child is a citizen of the United States and, if not, the steps that have been taken to address the citizenship or residency status of the child.[146]

Services to children alleged to have been abused, neglected, or abandoned must be provided without regard to the citizenship of the child except where alienage or immigration status is explicitly set forth as a statutory condition of coverage or eligibility.[147] If the child is not a citizen, the department or community-based care

[142] California is also considering legislation that would afford immigrant detainees the right to make three phone calls, and require that notice of this right be posted conspicuously and in multiple languages within the detention facility; but the legislation is still pending. Seth Freed Wessler, California Pols Move to Keep Immigrant Families Unified During Deportation, COLORLINES (Apr. 24, 2012, 9:36 AM), http://colorlines.com/archives/2012/04/a_california_state_legislative_committee.html.

[143] Additionally, there are some bills and reforms that have been proposed at the federal level. For example, in July 2011, California Representative Lynn Woolsey and Minnesota Senator Al Franken reintroduced the Human Enforcement and Legal Protections for Separated Children Act (HELP Separated Children Act). The HELP Separated Children Act aimed to amend the Social Security Act to "require that state plans for foster care and adoption assistance include provisions regarding foster care children with a parent, legal guardian, or primary caregiver relative who is in immigration detainment or has been removed from the United States." Help Separated Children Act, H.R. 2607, 112th Cong. (2011). Additionally, it would have directed "the Secretary of Homeland Security to: (1) mandate vulnerable population and child welfare training for immigration enforcement personnel, and (2) ensure that immigration detention facilities take steps to preserve family unity." *Id*. However, the bill died while pending in the House Subcommittees on Human Resources and Immigration Policy and Enforcement and the Senate Judiciary Committee. *Id.*; Rogerson, *supra* note 49, at 586 n.84.

[144] Fla. Stat. Ann. § 39.5075 (West 2012).

[145] *Id*. § 39.5075(2).

[146] *Id*.

[147] *Id*.

provider shall include in the case plan developed for the child a recommendation as to whether the permanency plan for the child will include remaining in the United States.[148]

Under Florida law, if the case plan calls for the child to remain in the United States, and the child is in need of documentation to effectuate this plan, the department or community-based care provider must evaluate the child's case to determine whether the child may be eligible for Special Immigrant Juvenile Status under federal law.[149] If the child is eligible for SIJS, the department or community-based care provider shall petition the court for an order finding that the child meets the criteria for Special Immigrant Juvenile Status.[150] The ruling of the court on this petition must include findings as to the express wishes of the child, if the child is able to express such wishes, and any other circumstances that would affect whether the best interests of the child would be served by applying for SIJS.[151] No later than 60 days after an order finding that the child is eligible for SIJS and that applying for this status is in the best interest of the child, the department or community-based care provider shall, directly or through volunteer or contracted legal services, file a petition for SIJS and the application for adjustment of status to the appropriate federal authorities on behalf of the child.[152] If a petition and application have been filed and the petition and application have not been granted by the time the child reaches 18 years of age, the court may retain jurisdiction over the dependency case solely for the purpose of allowing the continued consideration of the petition and application by federal authorities.[153]

c. New York

Similarly, in New York, there are a series of bills that have been introduced to protect immigrants in criminal and family court proceedings. For example, one comprehensive bill was proposed by Representative Kim, a member of the New York State Assembly, to amend the Family Court Act, the social services law and the executive law, in relation to the New York State Reuniting Family Act in 2012.[154] New York bill A.6377 proposed to add a new subsection to the Family Court Act that would prevent the immigration status of a parent or other person responsible for care of a child from disqualifying such person from being granted custody.[155] Moreover, the bill provides

[148] *Id*. § 39.5075(3).

[149] *Id*.

[150] *Id*. § 39.5075(4).

[151] *Id*.

[152] *Id*. § 39.5075(5).

[153] *Id*. § 39.5075(6).

[154] *See* Exhibit 3.

[155] Assemb. B. 6377 § 1054(c), 236th Legis. Sess. (N.Y. 2013).

that the Family Court may postpone for a maximum of twenty-four months its determination of a petition for custody pending the consideration of a parent's circumstances if a parent has been arrested and issued an immigration hold, has been detained by the U.S. immigration and customs enforcement, or has been deported.[156] This is important because there have been instances of concurrent proceedings in the family and immigration courts where each judge waited for the other judge to make his or her finding first, which resulted in procedural gridlock.[157]

New York bill A.6377 also mandates that information and training be provided on SIJS and their certification to all employees of a child protective service and all other employees assigned with the duty of placing children in the foster care system.[158] A similar provision in the same bill mandates that a court shall require any attorneys that have been appointed to represent a child who has been allegedly abused, neglected, or abandoned to receive information and training on SIJS and their certification.[159] Finally, the executive law was amended by adding a section that would mandate virtual statewide information systems to establish and maintain a website to provide assistance to local city or county departments of social services and the court system with assistance on immigration law related issues affecting children and relatives of children in the family court system. The website would need to include (1) existing links to social services, legal services, and advocacy organizations and other government organizations with experience in working with courts or child protection agencies; and (2) live help case consultations.[160]

The bill did not advance past the Assembly Committee stage, but there are many supporters and hopes that the bill will be reintroduced in another legislative session. Additionally, in 2008, New York State's Office of Children and Family Services issued an Administrative Directive on Special Immigrant Juvenile Status (SIJS).[161] The policy required all child welfare agencies to seek SIJS for eligible children in foster care. Importantly, the policy mandated that the process be completed before the child leaves foster care and that the child and case manager work with an experienced immigration attorney in the process. This policy, consistent with permanency planning goals, encourages caseworkers to discuss immigration issues with the youth and their family in

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[156] *Id.* § 651(g).

[157] *See supra* note 49 and accompanying text.

[158] N.Y. Soc. Serv. Law § 17(i) (McKinney 2013).

[159] Assemb. B. 6377 § 1016.

[160] *Id.* § 501-I.

[161] Special Immigrant Juvenile Status, N.Y. State Office of Children & Family Servs., Administrative Directive 08-OCFS-ADM-05 (Aug. 19, 2008), *available at* http://www.f2f.ca.gov/res/pdf/Special_Immigrant_Juvenile_Status.pdf.

a sensitive manner. Discussions should make clear that inquiry into immigration status is conducted for the benefit of the child.

In 2011, the Cuomo Administration issued another Administrative Directive regarding SIJS. This 2011 Directive is intended to be a reminder of the duty that local departments of social services and authorized volunteer agencies have to assess eligibility for SIJS for youth in foster care who are neither U.S. citizens nor have permanent residency. The remainder of the 2011 Directive discussed the process for applying for SIJS.[162]

2. Proposed Court Rules and Legislation

As discussed above, there have been some efforts to effect change in the way immigration issues are handled in family courts. As part of our plan, we recommend that legislation be passed in New York to improve the administration of justice for undocumented individuals in the family courts by encouraging and funding communications strategy and training. To that end, below is an amendment to the New York Court Rules to ensure training for judges on the relevant issues and a draft bill including many of the provisions already proposed in prior NY bills.

a. Proposed Court Rule

Part 17 of the Administrative Rules of the Unified Court System & Uniform Rules of the Trial Courts is amended by adding Section 17.5 to read as follows:

Section 17.5. Training on Immigration Issues in Family Courts

(a) Each judge in a Family Court shall attend, every two years, a program approved by the Chief Administrator of the Courts addressing issues relating to Immigration, including but not limited to training on "U nonimmigrant status," more commonly known as "U Visa," and Special Immigrant Juvenile Status ("SIJS") petitions.

(b) Attendance at such program shall be counted toward fulfillment of the training and education requirements for justices and judges subject to section 17.3 of this Part.

b. Proposed Legislation

An ACT to amend the family court act, the social services law, and the executive law, in relation to enacting the New York State Reuniting Family Act.

[162] Special Immigrant Juvenile Status (SIJS), N.Y. State Office of Children & Family Servs., Administrative Directive 11-OCFS-ADM-01 (Feb. 7, 2011), *available at* http://ocfs.ny.gov/main/policies/external/OCFS_2011/ADMs/11-OCFS-ADM-01%20Special%20Immigrant%20Juvenile%20Status%20%28SIJS%29.pdf.

Section 1. Section 1054 of the family court act is amended by adding a new subdivision (c) to read as follows:

(c) the immigration status of a parent or other person responsible for care shall not disqualify such person from being granted custody under this section.

Section 2. Section 651 of the family court act is amended by adding a new subdivision (g) to read as follows:

(g) Detainment for immigration violations; effect on child custody orders. Unless where the child has been determined an abandoned infant or the parent has been convicted of committing a violent felony against his or her child, the family court may postpone for a maximum of twenty-four months its determination of a petition for custody pending consideration of a parent's circumstances if a parent has been arrested and issued an immigration hold; has been detained by the United States Immigration and Customs Enforcement; or has been deported to his or her country of origin.

Section 3. Subdivision (i) of section 17 of the social services law, is relettered subdivision (k) and new subdivisions (i) and (j) are added to read as follows:

(i) provide information and training to all employees of a child protective service and all other employees assigned with the duty of placing children in the foster care system, on U Visas and the employee's ability to act as a signatory for a U Visa, which may provide immigration relief for certain undocumented individuals.

(j) provide information and training to all employees of a child protective service, and all other employees assigned with the duty of placing children in the foster care system, on Special Immigrant Juvenile Status (SIJS) and the employee's ability to commence an action in family court to obtain the findings necessary for a SIJS petition, which may provide immigration relief for certain undocumented individuals.

Section 4. Section 1016 of the family court act, as amended by chapter 41 of the laws of 2010, is amended to read as follows:

§ 1016. Appointment of attorney for the child. 1. The court shall appoint an attorney to represent a child who has been allegedly abused or neglected upon the earliest occurrence of any of the following: (i) the court receiving notice, pursuant to paragraph (iv) of subdivision (b) of section one thousand twenty-four of this article, of the emergency removal of the child; (ii) an application for an order for removal of the child prior to the filing of a petition, pursuant to section one thousand twenty-two of this article; or (iii) the filing of a petition alleging abuse or neglect pursuant to this article. The court shall require that appointed attorneys have received information and training on U Visas and Special Immigrant Juvenile Status (SIJS) and an attorney's ability to bring a U Visa application or SIJS petition to provide immigration relief for certain undocumented individuals.

Section 5. The executive law is amended by adding a new section 501-i to read as follows:

§ 501-i. Virtual statewide information system. The office shall establish and maintain a website to provide a virtual statewide information system designed to assist the local city or county department of social services and the court system with assistance on immigration law related issues affecting children and relatives of children in the foster care system. The website shall include (in Chinese, Arabic, and Spanish):

1. existing links to social services, legal services and advocacy organizations and other government organizations with expertise in working with courts or child protection agencies;

2. live help case consultation; and

3. basic information and FAQs.

Section 6. Subdivision 2 of section 812 of the family court act is amended by adding a new paragraph (h) to read as follows:

(h) That any information regarding the petitioner's immigration status shall be kept confidential and will not be referred or reported to any local, state or federal law enforcement agency.

III. CONCLUSION

As this memorandum recounts, considerable problems exist at the intersection of immigration issues and the family courts that have yet to be adequately addressed in New York. While by no means exhaustive, some of the most important issues relating to immigration that face the family courts are: (1) coordinating cases caused by parallel actions in family and immigration courts; (2) ruling on legal issues that arise during family court proceedings; and (3) disputes arising from the undocumented status of litigants. These problems cannot go unaddressed. While there have been many ad hoc efforts to ameliorate these issues, led mostly by public service and policy organizations, more comprehensive changes need to take place statewide.

This memorandum attempts to offer some practical recommendations for next steps to clarify and improve the problems presented by the overlap of immigration issues and family courts. First, we suggest that training for judges, other court personnel, and practitioners is crucial to addressing these issues. For best results, these trainings should occur regularly, in-person, and respond to emerging issues and local conditions. Second, we suggest that access to information for clients and potential clients should be increased. We propose that this may be done through provision of FAQs and creation of regional resource centers.

Finally, we propose an amendment to the court rules and state legislation in order to adequately address the problems identified in this memorandum and to codify the

solutions we suggest. While this memorandum focused on U Visa and SIJS petitions, there are still numerous issues related to immigration, families, and the legal system in New York. This memorandum is meant to spark a dialog on further efforts to bridge the gap between immigration issues and the family courts, rather than propose definitive solutions.

Exhibit 1

Exhibit 2

Exhibit 3

2013 New York Assembly Bill No. 6377, New York Two Hundred Thirty-Sixth Legislative Session

NEW YORK BILL TEXT

TITLE: Enacts the New York State Reuniting Families Act.

VERSION: Introduced
March 26, 2013
Kim, Ron
SUMMARY: Enacts the New York State Reuniting Families Act.

TEXT:

STATE OF NEW YORK

6377

2013-2014 Regular Sessions

IN ASSEMBLY

March 26, 2013 _____

Introduced by M. of A. KIM -- read once and referred to the Committee on Children and Families

AN ACT to amend the family court act, the social services law and the executive law, in relation to enacting the New York State Reuniting Families Act

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. This act shall be known and may be cited as the “New York State Reuniting Families Act.”

§ 2. Section 1054 of the family court act is amended by adding a new subdivision (c) to read as follows:

(c) The immigration status of a parent or other person responsible for care shall not disqualify such person from being granted custody under this section.

§ 3. Section 651 of the family court act is amended by adding a new subdivision (g) to read as follows:

(g) Detainment for immigration violations; effect on child custody orders. Unless where the child has been determined an abandoned infant or the parent

has been convicted of committing a violent felony against his or her child, the family court may postpone for a maximum of twenty-four months its determination of a petition for custody pending consideration of a parent's circumstances if a parent has been arrested and issued an immigration hold; has been detained by the United States Immigration and Customs Enforcement; or has been deported to his or her country of origin.

§ 4. Subdivision (i) of section 17 of the social services law, as relettered by section 1 of part K-3 of chapter 57 of the laws of 2007, is relettered subdivision (j) and a new subdivision (i) is added to read as follows:

(i) provide information and training to all employees of a child protective service and all other employees assigned with the duty of placing children in the foster care system, on U Visas and the employee's ability to create a U Visa to provide immigration relief for certain undocumented individuals.

§ 5. Section 1016 of the family court act, as amended by chapter 41 of the laws of 2010, is amended to read as follows:

§ 1016. Appointment of attorney for the child. 1. The court shall appoint an attorney to represent a child who has been allegedly abused or neglected upon the earliest occurrence of any of the following: (i) the court receiving notice, pursuant to paragraph (iv) of subdivision (b) of section one thousand twenty-four of this article, of the emergency removal of the child; (ii) an application for an order for removal of the child prior to the filing of a petition, pursuant to section one thousand twenty-two of this article; or (iii) the filing of a petition alleging abuse or neglect pursuant to this article. The court shall require that appointed attorneys have received information and training on U Visas and an attorney's ability to certify a U Visa to provide immigration relief for certain undocumented individuals.

2. Whenever an attorney has been appointed by the family court pursuant to section two hundred forty-nine of this act to represent a child in a proceeding under this article, such appointment shall continue without further court order or appointment during (i) an order of disposition issued by the court pursuant to section one thousand fifty-two of this article directing supervision, protection or suspending judgment, or any extension thereof; (ii) an adjournment in contemplation of dismissal as provided for in section one thousand thirty-nine of this article or any extension thereof; or (iii) the pendency of the foster care placement ordered pursuant to section one thousand fifty-two of this article. All notices and reports required by law shall be provided to such attorney for the child. Such appointment shall terminate upon the expiration of such order, unless another appointment of an attorney for the child has been made by the court or unless such attorney makes application to the court to be relieved of his or her appointment. Upon approval of such application to be relieved, the court shall immediately

appoint another attorney for the child to whom all notices and reports required by law shall be provided.

3. The attorney for the child shall be entitled to compensation pursuant to applicable provisions of law for services rendered up to and including disposition of the petition. The attorney for the child shall, by separate application, be entitled to compensation for services rendered subsequent to the disposition of the petition.

4. Nothing in this section shall be construed to limit the authority of the court to remove the attorney for the child from his or her assignment.

§ 6. The social services law is amended by adding a new section 383-a to read as follows:

§ 383-a. Foster youth identification. The commissioner shall provide a foster youth identification card to the foster parent or foster parents of any child upon the request of such parent or parents. Such identification card shall include a recent photograph, the phone number of the local city or county department of social services and the docket or file number of the case placing such child in foster care.

§ 7. The executive law is amended by adding a new section 501-i to read as follows:

§ 501-i. Virtual statewide information system. The office shall establish and maintain a website to provide a virtual statewide information system designed to assist the local city or county department of social services and the court system with assistance on immigration law related issues affecting children and relatives of children in the foster care system. The website shall include:

1. existing links to social services, legal services and advocacy organizations and other government organizations with expertise in working with courts or child protection agencies; and

2. live help case consultation.

§ 8. The department of family assistance is hereby directed to provide guidance, no later than July 1, 2014, to counties and municipalities in contacting the home governments of detained parents and assisting with family reunification.

§ 9. This act shall take effect on the ninetieth day after it shall have become a law.