INTRODUCTION

Since October 2018, the United States Border Patrol has apprehended nearly 45,000 unaccompanied alien children (“UCs”)¹ at the United States southern border.² U.S. law requires that, once apprehended, the U.S. Customs and Border Protection (“CBP”) place the child in the care of the Office of Refugee Resettlement (“ORR”) within 72 hours.³ ORR then is responsible for managing the custody and care of the child until he or she can be released to family members (or other individuals or organizations) while their court proceedings go forward.⁴ As set forth in the ORR policies (including the Legal Resource Guide to be provided to each UC by ORR upon their detention), while in the custody of ORR, a UC has the right to be represented by an attorney and be afforded a hearing so that an immigration judge can review their custody status.⁵ The Ninth Circuit recently reaffirmed this right to a hearing under Flores v. Sessions, stating:

A hearing does provide minors with meaningful rights and practical benefits. The hearing is a forum in which a child has the right to be represented by counsel, and to have the merits of his or her detention assessed by an independent immigration judge. The hearing is also an opportunity for counsel to bring forth the reasons for the minor’s detention, examine and rebut the government’s evidence, and build a record regarding the child’s custody. Without such hearings, these children have no meaningful forum in which to challenge ORR’s decisions regarding their detention or even to discover why those decisions have been made. There are no procedures available to them that afford them the right to a hearing with counsel, an opportunity to examine adverse evidence, or a forum in which to refute the government’s claims regarding the need for their custody.⁶

Currently, however, due to an overwhelmed immigration system, many UCs are being held by the government without a hearing and past the time period permitted under U.S. law. The Office of Inspector General (“OIG”) is charged with overseeing the ORR’s programs and operations regarding UCs, particularly to combat fraud and abuse, and promote efficiency and effectiveness.⁷ In its recent management alert, the OIG observed that during an unannounced inspection of the CBP holding facilities in the Rio Grande Valley, nearly 2,669 children were being detained past

¹ This advisory uses the abbreviation “UC” rather than “UAC”—the legislative term—given the dehumanizing connotations of the word “alien.”
⁶ Flores, 862 F.3d at 867-868.
the 72 hour deadline, and that children in some of those facilities had no access to showers, limited access to a change of clothes, and had not been provided hot meals.\(^8\) Periods of detention, especially in conditions such as these, can lead to physical and mental health problems for the child, and in some cases even death.\(^9\) Many children are subjected to lengthy detention even after being transferred from CPB to ORR custody. As a result, there is an urgent need to find relief in the courts for these children, so that they have the chance of being released from detention sooner. One method to seek such relief is by pursuing a writ of habeas corpus action pursuant to 28 U.S.C. § 2241, whereby the petitioner requests that a court intervene in a child’s detention and directly release a child that is “in custody in violation of the Constitution or laws or treaties of the United States.”\(^10\)

This practice advisory is offered as an introduction to how a writ of habeas corpus can be used on behalf of a UC. It is intended to assist advocates as they develop their own legal strategies. It is not intended to be used as legal advice and does not purport to be comprehensive. Further, this area of law and the policies addressing the rights of UCs at the U.S. southern border change frequently and such developments may not have been addressed in this practice advisory. As such, it is recommended that further research be performed.

This practice advisory has four parts. The first part is an analysis of the laws governing the detention of UCs and recent decisions on the question of whether a writ of habeas corpus should be granted by a court. The second part includes a template form “Petition for Writ of Habeas Corpus” (“Petition”). The Petition is provided as a starting point only. Given the fact driven nature of habeas petitions, this Petition cannot address all points of law and fact that should be used in a particular case. Rather, it should be revised by advocates to address the unique circumstances of each UC’s claims. Part three includes a list of practical inquiries and procedural guidelines advocates may want to review in preparing their case. Part four is an appendix that includes a list of additional resources that may further aid advocates in preparing their case.

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\(^9\) Hauslohner, supra note 1. See also Flores, 862 F.3d at 872-874; Statement of Record by Ranking Member Dianne Feinstein, Judiciary Subcommittee Hearing on the Humanitarian and Security Crisis at our Southern Border, COMM. ON THE JUDICIARY (May 8, 2019), https://www.judiciary.senate.gov/imo/media/doc/05.08.2019%20Feinstein%20Statement.pdf.