

CHILDREN'S RIGHTS LITIGATION

AMERICAN BAR ASSOCIATION SECTION OF LITIGATION



Summer 2014, Vol. 16 No. 4

TABLE OF CONTENTS

Articles »

An Urgent Need: Unaccompanied Children and Access to Counsel in Immigration Proceedings

By Annie Chen

Unaccompanied minors without lawful immigration status in the United States face the threat of deportation and desperately need access to competent attorneys that can help them navigate the U.S. legal system.

Unequal Access to Special Immigrant Juvenile Status: State Court Adjudication of One-Parent Cases

By Meghan Johnson and Kele Stewart

Whether facts of abuse, abandonment, or neglect by one parent alone are sufficient to make one of the required SIJS findings has been subject to divergent interpretations by state courts and has yielded disparate results.

Undocumented Parenting: Immigration Status as a Proxy for Parental Fitness

By Marcia Zug

Family and juvenile courts and child welfare agencies routinely express the belief that a parent's undocumented status means the parent is, by definition, unfit, without any additional evidence, despite immigration law's presumption that deported parents retain custody of their children.

Ready, Set, Go to Federal Court: The Hague Child Abduction Treaty, Demystified

By Jennifer Baum

As the number of internationally relocating parents grows, so too grows the number of child repatriation cases under the Hague Convention.

News & Developments »

Lack of Counsel Violates Washington Youth's Legal Rights

For the first time in Washington state's history, an appellate court has ruled that failure to appoint counsel to a foster youth violated the youth's legal rights.

Comprehensive School Discipline Consensus Report

The Council of State Governments Justice Center has released a report on how to impose discipline in academic settings without discrimination on race, color, or national origin.

ARTICLES

An Urgent Need: Unaccompanied Children and Access to Counsel in Immigration Proceedings

By Annie Chen – July 14, 2014

An “unaccompanied alien child” (UAC) is a minor who has no lawful immigration status in the United States, and has no parent or legal guardian in the country present or available to provide care. Homeland Security Act of 2002, § 279(g)(2). The U.S. Department of Health and Human Services projected that in Fiscal Year 2014, approximately 60,000 unaccompanied children (also UAC) would be apprehended at the U.S. border and turned over to the custody of the Office of Refugee Resettlement (ORR). [HHS Budget in Brief, Fiscal Year 2015](#). Current trends indicate that the numbers will continue to increase. This is an unprecedented “surge” that caps a growing trend: 13,625 UAC entered U.S. custody in Fiscal Year 2012 and 24,668 in Fiscal Year 2013. [Fact Sheet, U.S. Department of Human Services, Administration for Children and Families, Office of Refugee Resettlement, Unaccompanied Alien Children Program, December 2013](#). UAC are placed in removal proceedings in which they face deportation. Most are released by ORR if they have family or an adult in the United States able to care for them, after which they continue to fight their deportation in immigration court, often without an attorney. For a detailed description of the path UAC follow through the immigration system, see [Flow of Unaccompanied Children through the Immigration System, Vera Institute of Justice, 2012](#).

This article discusses the challenges that UAC face in the immigration system and their urgent need for access to counsel in light of the complex web of U.S. immigration laws. First, a general overview of the most common forms of relief available to UAC explains the difficulties of obtaining legal status, which becomes nearly insurmountable without the assistance of competent legal counsel. This article then surveys the growing consensus for reform—such as appointing government-funded counsel for UAC and other eligible children—as well as broader proposals to create a more “child-friendly” immigration system that ensures the rights of the most vulnerable.

Running the Gauntlet

Many UAC have legitimate claims that would grant them legal status under U.S. immigration law *if* they could navigate the country’s complex web of immigration laws. For example, approximately 40 percent of UAC in ORR custody in 2010 were potentially eligible for some kind of relief from deportation. [Vera Report](#). Depending on where a UAC is released, local legal services organizations and private law firms may be available to provide representation to some children. But these meager resources are already stretched beyond capacity—the current surge in numbers will stretch them even further, meaning that more and more UAC will go without legal representation.

Moreover, unlike other court systems, immigration courts do not accord special treatment to children. UAC are not entitled to representation at government expense, so they must defend

themselves against trained government attorneys who bring evidence against the child in court. Arrayed against children are a myriad of challenges: they must testify under oath, plead to government charges, tell the judge what forms of relief they wish to pursue, file applications for relief and supporting documents in English, testify, and call witnesses with no knowledge of the legal norms and customs. In addition, they almost always do not speak English and must communicate through an interpreter. Faced with this daunting task, the existing protections and remedies offered by the laws of the United States are rendered meaningless if these children do not have access to an attorney.

Available Forms of Relief

The most common forms of relief that unaccompanied children are eligible for are (1) *special immigrant juvenile status (SIJS)* for children who have been abused, abandoned, or neglected by their parents; and (2) *asylum* for children fleeing persecution in their home countries. Approximately 23 percent of unaccompanied children are potentially eligible for SIJS and 17 percent for asylum and related protections. [Vera Report](#). Other potential forms of relief include the U visa for individuals who have been a victim of certain serious crimes in the United States, and the T visa for victims of severe forms of human trafficking including for any child under the age of 18 engaged in commercial sex acts. For a detailed treatment of these forms of relief and the associated challenges, see the February 2014 report by Kids in Need of Defense (KIND) and the Center for Gender and Refugee Studies (CGRS), [A Treacherous Journey: Child Migrants Navigating the U.S. Immigration System](#). This article focuses on SIJS and asylum and describes the challenges that children who are eligible face in obtaining these forms of relief. Without adequate assistance of counsel, the complexity of these forms of relief can doom an otherwise viable claim.

Challenges to Obtaining Special Immigration Juvenile Status

SIJS is a unique hybrid of family and immigration law that requires findings from both state court and federal immigration court, as well as the United States Citizenship and Immigration Services (USCIS). Thus, the challenges are compounded. Although it is a form of relief under immigration law, a state court must first make certain factual findings, including that a child is unable to reunify with one or both parents because of abuse, neglect, abandonment, or some similar basis under state law, and that it is not in the child's best interest to return to the home country. 8 U.S.C. § 1101(a)(27)(J). An increasing number of state courts are familiar with this form of relief, but even with growing awareness, some state court judges are confused by the federal immigration laws related to SIJS and others are unaware that they have the authority to grant the special findings. As detailed below, many other barriers make obtaining SIJS a challenge:

- First, a state juvenile court must issue the special findings order. State courts' unfamiliarity with SIJS can make it difficult to initiate and file a claim, let alone to obtain the predicate order with the appropriate language acceptable for USCIS adjudication. Most state courts do not provide interpreters. In addition, the appropriate jurisdictional grounds for filing in state court are varied and depend

on the individual state. Examples include a petition for legal guardianship, child custody, juvenile delinquency proceedings, or child dependency proceedings. Trained attorneys are familiar with the state laws and appropriate mechanisms but the complexity of navigating these *pro se* is very intimidating for an immigrant child. Even if a child knows that he is eligible for SIJS, questions abound—which court should he file in, and what kind of proceeding is most appropriate to bring? Should the child start the claim, or the adult caring for the child?

- Second, after the state juvenile court has issued its special findings order, the child must submit an application for SIJS to the immigration adjudication office at USCIS. An adjudications officer at USCIS may conduct an interview of the child to determine whether to grant or deny the child SIJS. This process can be very stressful and intimidating for a UAC proceeding *pro se*. An attorney would ensure that the child files the correct application and documents and that he is prepared to answer questions about his application.
- Third and finally, if a child is in removal proceedings, the child must submit an application for lawful permanent residency (LPR) that is separate and distinct from the SIJS application. The LPR application is decided by an adjudications officer at USCIS after an interview or by an immigration judge after a hearing. An attorney would ensure that the child is prepared to answer any questions about his application before USCIS and to testify and be cross-examined by the government attorney in immigration court.

During all the steps of the SIJS process, the UAC must continue to appear in immigration court, explain the progress of the SIJS application, and request continuances from the judge. As described above, the complexity of multiple areas of law coupled with multiple legal venues make SIJS particularly difficult to obtain on a *pro se* basis.

In addition, there is often time pressure: although SIJS is technically available until the age of 21, UAC often “age-out” of SIJS eligibility before that age because many state juvenile courts lose jurisdiction when a child turns 18.

Challenges to Obtaining Asylum

Many of the UAC arriving in the United States are fleeing some type of violence, such as drug wars, gang violence, or domestic violence. A recent report by the United Nations High Commissioner for Refugees estimated that approximately 58 percent of UAC from El Salvador, Guatemala, Honduras, and Mexico (from which 95 percent of UAC enter the United States) have suffered or face harm that indicates a potential need for international protection. [*Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection*](#), UNHCR, 2014; [*ORR Fact Sheet*](#). They may qualify for asylum or related protections under U.S. law. Unfortunately for children, asylum claims based on gang violence and domestic violence are among the most challenging to establish.

Asylum is a very complicated form of relief that requires a showing of a well-founded fear of persecution if returned to the home country. An asylum petition requires substantial legal research and briefing, as well as gathering of testimony, often including expert testimony, and evidence. These are often challenging cases even when a child is represented and are particularly difficult to pursue *pro se*. While this article does not attempt a full treatment of the issues that can arise in an asylum claim, many asylum seekers are found ineligible because they cannot show that the persecution is on account of one of the five protected categories: race, religion, nationality, political opinion, or membership in a particular social group.

Most children's claims fall within the "membership in a particular social group" category for protection, which is the most difficult to define and the subject of many legal arguments. A social group is an identifiable group of people sharing a common characteristic that is so fundamental to their individual identities that the members cannot or should not be expected to change it. Defining a social group requires careful lawyering so that the definition is broad enough to encompass a group of people but also narrow enough to be specific to the person. Further, the lack of clear legal standards gives USCIS adjudicators and immigration judges great latitude in determining whether a social group is protected.

Asylum also requires providing a nexus or required causal link between persecution and one or more of the protected grounds by establishing evidence of a persecutor's motive. This causal nexus is especially difficult for children because they may have limited knowledge or understanding of the context in which their persecution occurs, or have difficulty articulating what understanding they do have.

Critically, asylum adjudicators must decide if an applicant is credible. This determination is made based on the child's testimony before a USCIS adjudicator or an immigration judge. Some adjudicators or immigration judges do not consider age and developmental factors that may make a child's story seem inconsistent or lacking in detail. As a result, they may interpret a child's testimony or inability to corroborate claims as lack of credibility. These challenges are but some that face unaccompanied children seeking asylum and related protections in the United States. The stakes are high—if a child is deported, he will return to the violence and danger he initially fled.

Consensus on Need for Reform and Recommendations for the Way Forward

There has been an increasing call for improving access to counsel for immigrant children, which would give UAC a much better chance of accessing the legal rights and relief to which they are already entitled under the law. *The New York Times* recently ran an op-ed by Pulitzer Prize-winning journalist Sonia Nazario, ["Child Migrants, Alone in Court,"](#) calling for unaccompanied children to be entitled to public defenders who are experts in immigration law and for Congress to include money to hire lawyers for all unaccompanied minors as part of any comprehensive immigration reform. Elected officials are also joining in the call for appointed counsel. Both the Senate comprehensive immigration reform bill, S. 744, approved in 2013, and

the House of Representatives' companion bill, H.R. 15, include a provision that would mandate counsel for UAC. Organizations that advocate for immigrant children's rights have long supported similar recommendations as well as further reforms. See [*KIND and CGRS Report*](#).

While these efforts are critical steps in the right direction, improving access to counsel will go only so far if it is not accompanied by a more fundamental re-think of how the immigration system should address the needs of children. In March 2014, the *Los Angeles Times* ran an editorial, ["Young, alone and in court,"](#) urging that the federal government ensure access to counsel *or* access to experienced child advocates. In fact, both attorneys and child advocates are needed. In addition to access to counsel, appointing independent child advocates (analogous to *guardians ad litem*) for each child in removal proceedings would ensure that the child's best interests are heard and considered in the legal process, while the child's attorney represents his expressed wishes and ensures the child's legal rights are protected. Currently, the government appoints child advocates only in a very limited number of cases for particularly vulnerable UAC. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 § 235(c)(6). Few UAC have the benefit of child advocates even though they face deportation to unsafe countries.

Even in the few cases where a child advocate is appointed, the law does not require that adjudicators and judges even consider the child's best interests. Therefore, a "best interests of the child" standard should be incorporated into all procedures and decisions concerning children in immigration proceedings. This way, immigration adjudicators are required to take into account whether it is in the best interests of the child to be deported to potentially unsafe conditions. Incorporating a "best interests" standard would bring immigration law in line with standards in family law in which courts consider the best interests of the child in matters of adoption, child custody, guardianship, and visitation, among other issues.

Fundamentally, the immigration system needs to recognize that because of age and developmental factors, children should be treated differently from adults. Creating a more child-friendly system along with government-funded access to counsel will ensure that the entire immigration system will better protect children's special needs.

Note: On July 9, 2014, the American Civil Liberties Union, American Immigration Council, Northwest Immigrant Rights Project, Public Counsel, and K&L Gates LLP [filed a nationwide class-action lawsuit](#) on behalf of children challenging the federal government's failure to provide them with legal representation in deportation proceedings. The complaint charges the U.S. Department of Justice, Department of Homeland Security, U.S. Immigration and Customs Enforcement, Department of Health and Human Services, Executive Office for Immigration Review, and Office of Refugee Resettlement with violating the U.S. Constitution's Fifth Amendment Due Process Clause and the Immigration and Nationality Act's provisions requiring a "full and fair hearing" before an immigration judge and seeks to require the government to provide children with legal representation in their deportation hearings.

Keywords: litigation, children's rights, unaccompanied alien child, immigration, juvenile system, best interests, deportation

[Annie Chen](#) is with the Vera Institute of Justice's Center for Immigration and Justice in New York, New York.

Unequal Access to Special Immigrant Juvenile Status: State Court Adjudication of One-Parent Cases

By Meghan Johnson and Kele Stewart – July 14, 2014

The past few years have marked a tidal wave of unaccompanied children entering the United States. The Office of Refugee Resettlement (ORR) reports that in 2013, 24,668 unaccompanied youth—that is, youth unaccompanied by a parent or legal guardian—were apprehended by U.S. immigration authorities and passed over to ORR care for the duration of their immigration detention. This number has jumped from an average of about 8,000 in 2011 and years prior, and current official projections show the number continues to rapidly climb. For some of these children, the United States provides not only economic opportunity but safety from abuse, abandonment, and neglect. The Immigration Act of 1990 established a path to lawful permanent residency, known as Special Immigrant Juvenile Status (SIJS), for this vulnerable subset of immigrant children.

The process for obtaining SIJS relief involves a unique two-tiered system in which a state juvenile or family court must first make factual findings related to the child's familial situation and best interests. Federal immigration officials then use the state court's predicate findings to determine eligibility for immigration relief. Congress delegated the first phase of the process to state courts in order to benefit from state expertise in fact finding on family and juvenile issues, and to provide for the safety and welfare of abused, abandoned, and neglected children. In serving this role, state courts act within their usual function of ensuring the safety, well-being, and appropriate custody of children. This structure, however, has allowed variation within and among states in interpreting certain provisions of the SIJS law. Although immigration officials retain exclusive authority to make immigration decisions, significant discrepancies among state courts has created a situation in which state courts are sometimes serving as gatekeepers for immigration relief.

One issue that recently has been subject to divergent interpretations by state courts is whether facts of abuse, abandonment, or neglect by one parent alone are sufficient to make one of the required SIJS findings. This issue often arises where one parent has been the source of abuse, neglect, or abandonment but there is another parent with whom the child lives or reunification is viable. While some aspects of the SIJS statutory scheme accommodate diversity between states—for example in what defines “abuse” or “neglect”—that comfort with disparity is limited and not intended to create wide divides between the states or vastly different immigration outcomes for similarly situated children. In light of the overarching principle guiding SIJS relief to provide humanitarian relief to children who experienced abuse or neglect and are unable to safely return to their home countries, this disparate result amounts to impermissible immigration adjudication by state courts. This article examines this issue, termed “one-parent SIJS,” and offers arguments and strategies to address the issue at the state and federal level.

The SIJS Process

State courts must first make predicate findings showing that the child meets the federal definition

of a special immigrant juvenile. The state court must make the following findings: (1) the child is dependent on the court or the court has placed the child in the custody of an individual or entity; (2) reunification with one or both parents is not viable due to abandonment, abuse, neglect, or similar basis; and (3) it is not in the best interests of the juvenile to be returned to his or her country of origin. The findings may be made in a wide variety of state proceedings including custody, child welfare, guardianship, adoption, and delinquency cases. Congress chose to rely on state courts to make those findings because of their special expertise in making determinations as to abuse and neglect issues, evaluating best interest factors, and ensuring safe and appropriate custodial arrangements.

During the second phase of the process, the applicant must submit a certified copy of the order containing the state court predicate findings, along with a Petition for Amerasian, Widow(er) or Special Immigrant (Form I-360) to the United States Citizenship and Immigration Services (USCIS). It is at this stage that a decision is made that the child qualifies for SIJS immigration relief. If Form I-360 is approved, the child has attained SIJ status and is immediately eligible to apply for adjustment of status to lawful permanent resident by filing an Application to Adjust Status (Form I-485). Due to this immediate eligibility, immigration officials recommend filing both the SIJS petition and the adjustment of status application at the same time. Adjudication of Form I-485 involves a background check, questionnaire, and possible interview to screen for grounds of inadmissibility that would foreclose one's ability to become a lawful permanent resident, such as criminal history or medical conditions.

Split in State Courts on One-Parent SIJS Issue

In 2008, the Trafficking Victims Protection Reauthorization Act (TVPRA) revised an SIJS predicate finding, now requiring a state court to find that "reunification with 1 or both parents is not viable due to abuse, abandonment, neglect or a similar basis." Pub. L. 110-457, 122 Stat. 5044 (2008), INA 101(a)(27)(J). State courts routinely read this requirement to mean that a child is eligible for SIJS as long as there are abuse allegations against one parent. See, e.g., *In the Matter of Karen C*, 111 A.D.3d 622, (N.Y. App. 2013); *In re Welfare of D.A.M.*, 2012 WL 6097225 (Minn. App. 2012). Acknowledging their limited role in making the requisite predicate findings, these courts read the plain language of the statute to mean that facts of abuse that prevent reunification with one parent are sufficient to support the finding, even if there is the possibility of reunification with another parent. Courts also explain that their reading is consistent with the legislative history of the federal SIJS law, which expanded SIJS eligibility with enactment of the TVPRA and specifically removed earlier language that required a finding that reunification with both parents was not an option.

Some courts, however, have interpreted this language to require a finding that both parents have abused, abandoned, or neglected the child. The two most notable published decisions come out of Nebraska and New Jersey and represent the law in those states.

In *In re Erick M*, 820 N.W.2d 639 (Neb. 2012), the trial court denied the motion for SIJS findings based on the fact that Erick had been removed from his mother as a result of

delinquency, not abuse, abandonment, or neglect, and the mother remained actively involved while Erick was in state custody. The court made no findings as to abandonment by the father. Erick argued on appeal that while reunification with his mother was anticipated and perhaps viable, he was unable to reunify with his father, who had abandoned him and, based on that alone, the court could make the required SIJS finding as to nonviability of reunification with one or both parents. The Nebraska Supreme Court held that the statutory language “one or both parents” is susceptible to more than one reasonable interpretation. Although it conceded that Erick’s interpretation is reasonable, the court found it could also mean that the court must find that “either reunification with one parent is not feasible or reunification with both parents is not viable.” In other words, the court believed that the child could have one parent for whom reunification is at issue or two parents for whom reunification is at issue, depending on who was involved in the child’s life prior to removal. The court determined that both parents were at issue, and that Erick had to demonstrate that reunification was not viable with *either* parent. The court’s opinion indicates that it was preoccupied with the widespread consequences of providing SIJS findings to children who present facts of a viable placement with a parent, appearing to read that situation to mean that the child is not really in need of U.S. immigration protection.

The New Jersey appellate decision in [*H.S.P. v. J.K.*](#), 2014 WL 1238739 (N.J. Super. 2014), followed the Nebraska Supreme Court’s decision and has statewide applicability and is being considered for appeal to New Jersey’s highest court. The court in *H.S.P.* determined that it could not make the required SIJS finding without facts demonstrating that *both* parents were unavailable for reunification due to abuse, abandonment, or neglect. It found that the child in question had demonstrated abandonment by his father but that the mother had not abused, abandoned, or neglected him. The court also looked at the purpose of granting SIJS relief and what immigration officials and federal immigration policy said about SIJS, and then determined that the child was not the kind of child that federal immigration legislators had in mind when it provided SIJS relief.

The Nebraska and New Jersey decisions are alarming for child advocates because they introduce a narrow interpretation of the SIJS statute that appears inconsistent with the generally understood, broad meaning of the statute and the purpose underlying the law. If adopted by other courts, it would foreclose SIJS relief for many children that are arguably eligible and create a situation where access to SIJS relief is significantly different across states and even within the same state.

Legislative History Supports One-Parent SIJS

When Congress added the language in 2008 that reunification is not viable with one parent, it intended to expand SIJS eligibility and specifically eliminated language that had previously been interpreted to foreclose one-parent SIJS applications. The original statute provided relief to children declared dependent on a U.S. juvenile court, who had been “deemed eligible for long-term foster care” and for whom the court determined that it was not in the child’s best interests to return to his or her home country. Immigration Act of 1990, 1990 Pub. L. No. 101-649, 104 Stat. 4978 § 358 (Nov. 29, 1990). Under applicable federal regulations, “eligible for long-term foster

care” meant that family reunification—with both parents—was not a viable option and the child was expected to stay in foster care until the age of majority. The law was amended in 1997 to make clear that it applied only to those juveniles eligible for long-term foster care as a result of abuse, abandonment, or neglect. Department of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1998 Pub. L. No. 105-119, § 113,111 Stat. 2440 (1997).

In 2008, the TVPRA expanded SIJS eligibility in several ways. It replaced “eligible for long-term foster care due to abandonment, abuse or neglect” with a finding that “reunification with one or both parents is not viable due to abandonment, abuse, neglect or a similar basis.” By eliminating the long-term foster care requirement, the TVPRA broadened the eligibility for SIJS from those where reunification with “both parents is not viable” to only one parent. It also expanded the protected grounds from abandoned, abused, and neglected to include “a similar basis” under state law; and by removing the language about eligibility for long-term foster care, explicitly included children who are placed in guardianship, adoption, or other custody arrangements.

SIJS Protection Where Reunification Is Not Viable with One Parent

In enacting the SIJS law, Congress sought to provide special protection to immigrant children who suffered abuse, abandonment, or neglect. It understood that these children need special protections and, without an independent path to immigration, are vulnerable to further exploitation and instability. The need for unique immigration relief applies even when there is a possibility of reunification with one parent. The child may be fleeing an abusive parent in the home country and migrated in an effort to reunify with the other parent. Unless the child has an independent right to relief, he or she could be deported to the abusive parent. In other situations, the abuse may have occurred in the United States and, although there is a parent with whom the child could theoretically return, that parent may not be able to provide consistent care for the child or adequately protect the child from further abuse. If the “non-abusing” parent is in fact a safe option for the child, then both child welfare and immigration policies governing children in detention favor reunification with that parent. Indeed, the ORR, tasked with custody of unaccompanied minors, must incorporate child welfare principles when making placement and release decisions. Release to a parent or legal guardian is the first priority. Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544-RJK (Px.) (C.D. Cal. Jan. 17, 1997). Reunification with a parent where there is a history of abuse, abandonment, or neglect does not obviate the need for the child to petition for immigration relief.

The facts in the following two cases granting one-parent SIJS exemplify why Congress may have intended to afford relief in one-parent cases. In *Matter of D.A.M.*, the child came to the United States at age six and initially lived with both parents. As a result of domestic violence by the father and alcohol abuse by the mother, the child was placed in foster care on two different occasions and experienced instability and homelessness throughout his life. The motion for SIJS findings was filed in a delinquency case when the child was 17. The trial court made no factual findings with respect to the father, and denied the motion because the child would be released to

the mother after completion of his delinquency program. The appellate court reversed the lower court's decision.

In *Matter of Marcelina M.G. v. Israel S.*, 112 A.D.3d 100 (2013), Susy's mother traveled to the United State and left Susy in Honduras where she was physically abused by her aunt. Susy eventually arranged to travel to the United States because life with her aunt was "unbearable." She was detained at the border and ultimately released to an uncle. Susy never had a relationship with her father, and the mother reported that he was an alcoholic and violent towards the mother. The uncle sought guardianship of Susy and petitioned for SIJS findings. Although the mother initially supported the uncle's guardianship application, saying that she could not afford to support Susy, she subsequently contested the application and was awarded custody of Susy. The family court denied the SIJS motion because the mother was awarded custody. The appellate court reversed.

Based on the facts, there is no question that both D.A.M. and Susy experienced abuse, abandonment, or neglect at the hands of one or both parents. At the time the SIJS motion was filed, one parent was able to provide a safe environment for the child. But the underlying reasons for SIJS relief remained present—as it would if the safe haven was provided by a guardian or adoptive parent instead. These children cannot safely return to their home countries and, while in the United States, cannot make independent decisions about their care or where to live. In enacting the SIJS law, Congress gave minors in these situations the independent ability to petition for legal immigration status regardless of their current custodial arrangement.

State Court Overreaching and Unequal Immigration Gatekeeping

The appellate decisions holding that there must be allegations against both parents to grant a SIJS motion go against a literal reading of the statute and overstep the courts' delegated authority. *In re Erick M.*, 820 N.W.2d 639 (Neb. 2012); *H.S.P. v. J.K.*, 2014 WL 1238739 (N.J. Super. 2014). In interpreting "one or both" to mean that applicants had to demonstrate that reunification with both parents was not feasible, the courts' reading seems to have not only departed from the plain language of the statute but also nullified the 2008 amendment and reintroduced a finding that family reunification is not an option.

The courts also seem to have been improperly concerned about opening the floodgates of immigration relief to children abandoned by one parent. For example, while the Nebraska court agreed that the effect of the 2008 amendment was to expand the pool of children eligible for SIJS, its decision focused on the 1997 amendment to conclude that despite these expansions, juveniles must still be seeking relief from parental abuse, abandonment, or neglect. The court also looked to USCIS policy guidance noting that the primary concern of USCIS is to protect the child from abuse, abandonment, or neglect, not for the purpose of obtaining lawful permanent residence. While some attention to the purpose of the statute is important, the court's concerns reveal misunderstanding as to the limited role that state courts play in SIJS determinations. For a discussion on the specific flaws in the *Erick* decision's reasoning, see [*Uneven Access to Special Immigration Juvenile Status: How the Nebraska Supreme Court Became an Immigration*](#)

[*Gatekeeper*](#). The New Jersey decision relies heavily on the reasoning of *Erick* and conducts the same analysis into child's purpose in pursuing relief.

The purpose of state court is to enter discrete factual findings as to abuse, abandonment, and neglect based on the court's expertise in child welfare considerations. These findings will be reviewed by federal immigration officials, along with a broader inquiry about the child's eligibility for immigration relief, and it is only these federal officials who can confer an immigration benefit. Thus, the juvenile court need not determine issues such as the juvenile's motivation in applying or whether the application constitutes abuse of the immigration process. *In re Mario S.*, 954 N.Y.S.2d 843, 853 (2012). By concluding that "one or both" effectively means "both," the Nebraska and New Jersey courts, whose function in the SIJS statutory scheme is to deploy its expertise in child protection, ends up applying a more conservative approach to the SIJS law than even immigration authorities themselves apply. In fact, in an unpublished decision from June 2013, the Administrative Appeals Office (AAO), which hears appeals from USCIS, reviewed facts from a one-parent case out of New Jersey and determined that the child was eligible for relief. In that case, custody was awarded to the mother in New Jersey, and the child and mother presented facts that the father in the home country was violent and threatening to kill the mother and take away her children. Despite reunification with the mother and a custody order in her favor, the AAO determined that the child qualified for SIJS, having demonstrated that she pursued the state court order to obtain relief from her father's abuse and abandonment.

The Nebraska and New Jersey courts' approach to these decisions is problematic in the context of the SIJS adjudication as a whole. Federal immigration authorities review the state court orders submitted as part of SIJS applications. That review accords due deference to state court expertise on particular matters regarding child welfare and custody, but it nevertheless examines each SIJS petitioner's motive and means of pursuing SIJS relief, including at the state court level. That is, USCIS adjudication of SIJS petitions involves exactly the type of analysis the Nebraska and New Jersey courts conducted: what the petitioner's primary purpose was for pursuing relief and whether Congress intended to provide relief for that particular individual. For state courts to engage in that type of review usurps the decision-making function of USCIS and leads to a haphazard application of SIJS relief across state lines. In short, state courts involve themselves in these cases in analysis best left to immigration authorities, who do in fact conduct that analysis on a regular basis. See, e.g., *In re Redacted*, 2013 WL 5176056 (AAO Apr. 15, 2013); *In re Redacted*, 2012 WL 8524275 (AAO Aug. 2, 2012); *In re Redacted*, 2012 WL 8501275 (AAO Feb. 22, 2012); *In re Redacted*, 2011 WL 10877979 (AAO Oct. 25, 2011). Immigration authorities consider this review of the state court process and the child's purpose for pursuing relief as its main function in deciding whether to grant SIJS relief. See Memorandum from Donald Neufeld for USCIS Field Leadership, *Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Petitions* (Mar. 29, 2009).

The other cause for concern stems from the variation among state court interpretations. The effect of state court overreaching is to cut off immigration relief to one class of immigrants that

might get relief in a different state court. Immigration policymaking is the exclusive province of the federal government, in part because it involves treatment of foreign nationals who should receive uniform treatment nationwide.

Federal Solutions

To be sure, and in defense of state courts involved in this hybrid adjudication process, federal authorities have yet to clarify this statutory language that has caused significant confusion and misapplication of SIJS language. The issue is not discussed in USCIS policy memoranda promulgated since the TVPRA was passed. The issue is not even squarely addressed by the proposed regulations published in September 2011. To address these inconsistencies, USCIS should promulgate rules implementing the 2008 amendments or issue an official legal memorandum articulating its policy on the validity of one-parent SIJS petitions. In its commentary to the proposed regulations, USCIS seemed to recognize the “one or both parents” language to mean “expanded eligibility” for SIJS. But without an explicit recognition of the validity of one-parent SIJS cases, there is the risk that even more state court judges will close the door to eligible youth before their petitions can be considered by USCIS.

Congress should also amend the statute to clarify that it intended to include one-parent SIJ status. SIJS is an important form of relief for children who have been abused, abandoned, or neglected, even when there is one parent in the picture. Children who have suffered abuse, abandonment, or neglect are vulnerable and often at risk for further exploitation or continued instability. These children cannot safely return to their home countries, and while they are in need of safe caregivers in the United States, they also cannot make decisions about where they live or independently access legal relief. Congress extended SIJS relief so that these children would have an independent path to legal status and be able to move out of the shadows of society, regardless of their current custodial arrangement.

Keywords: litigation, children's rights, one-parent SIJS, state court adjudication, immigration, abuse, abandonment, neglect

[Meghan Johnson](#) is with ProBAR Children's Project, a project of the American Bar Association serving unaccompanied youth detained in South Texas. [Kele Stewart](#) is a clinical professor at University of Miami School of Law in Coral Gables, Florida.

Undocumented Parenting: Immigration Status as a Proxy for Parental Fitness

By Marcia Zug – July 14, 2014

Parents have a constitutional right to the care and control of their children and this right is not confined to citizens. Undocumented immigrant parents also have this right, yet many of these parents are losing their children and having their parental rights terminated. On the surface, these separations and terminations are the result of immigration law because families are separated when undocumented parents are placed in detention facilities or deported. However, family separation is not the goal of immigration law and an examination of such cases demonstrates that the permanent removal of children from their undocumented parents is more often the result of state child welfare agencies and family courts than federal immigration law.

United States immigration law assumes immigrant parents will retain custody of their children regardless of the parents' immigration status and therefore considers family separation an unlikely consequence of deportation. According to the Bureau of Immigration Affairs (BIA), when "an alien parent's child is a United States citizen and the child is below the age of discretion, and if the alien parent is deported, it is the parent's decision whether to take the minor child along or to leave the child in this country." *In re B & J Minors*, 279 Mich. App. 12, 20 n.5 (2008). Immigration authorities take it for granted that immigrant parents will bring their children with them if deported, and parents claiming that deportation will result in a separation from their children are required to present significant evidence of intention to separate. Even then, the BIA has held that "absent proof of extreme hardship to a child if he returns to his parents' native country with them, we will generally consider the decision to leave the child in the United States to be a matter of personal choice." *In re Ing*, 20 I. & N. Dec 880, 886 (B.I.A. 1996).

Nevertheless, many immigrant parents are losing their children despite immigration law's presumption that deported parents retain custody of their children. In fact, family and juvenile courts and child welfare agencies routinely express the belief that a parent's undocumented status means the parent is, by definition, unfit, without any additional evidence.

In some cases, an undocumented parent can be labeled unfit for simply not speaking English. For example, in [an illustrative case from Mississippi](#), the State Department of Social Services was contacted after an undocumented immigrant mother, Cirila Baltazar Cruz, gave birth to a daughter. The department immediately removed the child, finding the mother's lack of English "placed her unborn child in danger and will place the baby in danger in the future." In [a similar case from Tennessee](#), an immigrant mother had her daughter removed after the child's teacher accused the mother of neglect. The court agreed, finding the mother unfit because she did not speak English and then prohibited contact with the daughter until the mother demonstrated her "commitment to her daughter" by learning to speak English.

There are also many court decisions finding undocumented parents unfit based on little more than their immigration status. For example, in [*Angelica L.*](#), 767 N.W.2d 74 (Neb. 2009), the court found an undocumented mother unfit because she “either A) embarked on an unauthorized trip to the United States with a newborn premature infant or B) gave birth to a premature infant in the United States” after entering the country illegally. Without deciding between the two, the court held that either scenario demonstrated “that [Maria] did not provide the basic level of prenatal and postnatal care.” According to the court, good mothers do not illegally cross the border if they are pregnant or if they have a baby and consequently, the court terminated the mother’s parental rights.

Courts and agencies also display a stunning lack of sympathy when confronted with the difficulties faced by undocumented parents trying to reunite with their children. For example, In *Anita C.*, 2009 WL 2859068 (Cal. App. Sept. 8, 2009), the court held the fact that certain parenting classes did not exist in Guatemala did not excuse the deported mother’s failure to attend such classes. Instead, the court blamed the mother for this situation, stating that by choosing to enter the U.S. illegally and getting deported, “the mother placed herself out of reach of many of the services . . . [the state] could have provided.” The court then concluded that the fact the mother’s deportation left her unable to comply with the terms of the reunification plan was simply “a sad consequence of illegal immigration.” Similarly, in [*In re Adoption of C.M.B.R.*](#), 332 S.W.3d 793 (2011), the court was willing to find that Bail Romero’s ICE detention, which forced her to separate from her child, qualified as “abandonment” and thus justified the termination of her parental rights.

As the above examples demonstrate, in cases concerning undocumented parents, courts are frequently abandoning the fitness requirement and replacing it with a standard that permits them to terminate undocumented parents’ rights whenever they determine termination to be in the child’s best interest. Moreover, as these cases also show, courts and agencies are often inclined to find against the parents simply because they believe life in the United States is preferable. For example, in *Angelica L.*, the state presented evidence to demonstrate that “living in Guatemala would put [the children] at a disadvantage compared to living in the United States.” The state contrasted the standard of living in Guatemala with that of the United States, and used this difference as evidence to argue that the children should remain in the United States rather than be reunited with their mother in Guatemala.

These conclusions are a significant departure from the well-established characterization of “fit parent,” which is typically defined as providing a minimally adequate amount of care. In undocumented parent cases, courts are skipping this step and instead asking whether these parents meet the difficult and highly subjective standard of being a “good parent” and/or whether it is in the child’s best interest to have their parental rights terminated.

“Good parent” is typically defined in relation to dominant cultural norms. According to family law Professor Annette Appell, this currently means “married, white, Christian (preferably Protestant); Anglo, and relatedly, English-speaking; and middle class.” [*“Bad” Mothers and*](#)

[*Spanish Speaking Caregivers*](#), 7 Nev. L.J. 759, 771 (2007). Defining “good parent” in relation to such norms can be particularly problematic for immigrant parents because these norms may differ widely from those present in their country of origin. For example, American norms hold that families should be independent and not too reliant on extended family or community members. Professor Naomi Cahn has noted this means that parents, and particularly mothers, are expected “to be primarily responsible for their children.” [*Policing Women: Moral Arguments and the Dilemmas of Criminalization*](#), 49 DePaul L. Rev. 817, 822 (2000). Consequently, shared child rearing, a practice common throughout much of the world can, when practiced in America, put parents at risk of being considered bad.

Also problematic is the fact that some state agencies seem to be deliberately working toward separation of undocumented families. The state’s testimony in *Angelica L.* led to the termination of the mother’s parental rights. However, even before trial, the state was making efforts to ensure this outcome, and in undocumented parent cases such obstruction is not uncommon. In *Angelica L.* the state’s obstruction efforts including assigning the Spanish-speaking mother a non-Spanish speaking caseworker, withholding the children’s contact information from her, neglecting to provide her with a physical copy of her case plan, and responding to her request for help complying with her case plan, with the statement she would “have to take initiative for that herself.”

In other cases, state agencies are not only unhelpful; they are actively aiding termination efforts. For example, the Commissioner of the Alabama DHR purposefully lied about the danger that continued custody by Marta Alonzo, an undocumented immigrant teenage mother, posed to her son, Javier, in order to facilitate the child’s removal. According to the Commissioner, the child was neglected and removal “saved his life.” Vivi Abrams, *Fuller Says DHR Workers Removed Baby*, Birmingham News, Oct. 25, 2003. He publicly stated that “[t]here is no question but that he was in imminent danger.” However, the child’s doctor publicly disputed them, stating that Alonzo was a fit parent who sought medical treatment and never placed her child in danger. Similarly, [*in the case of Karen Arriga*](#), an undocumented teenage mother whose children were removed based on questionable charges of neglect, the state agency lied not only to terminate her parental rights but also to ensure her deportation. After Arriga’s children were taken into protective custody, Arriga was told by members of Family Preservation, a welfare group under contract with the Florida Department of Children and Families, that she should come to their offices for a supervised visit with her children. When she arrived at the facility, ICE officers were waiting to take her into custody. In *B and J Minors*, the undocumented parents’ deportation was also arranged in a similar manner. In that case, the State Department of Human Services (DHS) was ordered to provide reunification services to the undocumented immigrant family. DHS objected to reunification and requested termination. After the court denied this request, DHS reported the parents to ICE officials and the parents were deported. DHS then renewed its petition to terminate their parental rights and, because the court found deportation made reunification unlikely, it granted the termination.

These cases demonstrate that child welfare agencies and family courts frequently believe that immigrant children's best interests are served by terminating their undocumented parent's rights. However, history has shown that beliefs about "good parents," particularly when applied to minority parents, are highly susceptible to bias and often lead to decisions that harm the very children they were intended to protect. For example, beliefs about the inferiority of American Indian culture and families led to the removal of generations of American Indian children in order protect them from the "damaging" influences of their parents and provide them with the benefits of "civilization." The effects of these removals were devastating and many Indian families and tribes and are still recovering from the consequences of these removals decades later.

Similarly, during the late nineteenth and early twentieth centuries, thousands of immigrant children were removed from their immigrant parents, placed on "orphan trains," and sent to the homes of families in the West and Midwest. However, despite the label "orphan," many of these children were not orphans. Mostly, these were children of recent Catholic immigrants who were sent west so they could be adopted by "better" Protestant families. According to the Protestant groups organizing these adoptions, the children's Catholic parents were bad parents and thus, removing their children and sending them across the country to the homes of strangers was in the children's best interest.

The above removal policies were widely supported at the time, but they have now come to be regarded as harmful and racist. Consequently, the fact that similar justifications are being used to support the removal of immigrant children from their undocumented parents is highly concerning. One recent improvement however is the promulgation of new ICE guidelines known as the [Parental Interest Directive](#). The directive was issued in response to the significant public outrage that occurred after a number of highly publicized workplace raids resulted in the separation of nursing immigrant mothers from their infants. The new guidelines seek to help undocumented families and prevent such separations in the future by permitting the monitored release of parent caregivers when possible, placing detained parents in facilities close to their children and by helping detained parents reunite with their children prior to deportation. Such changes are encouraging, but their effects are limited. Courts and state welfare agencies are still facilitating the removal of hundreds, perhaps thousands, of children from their undocumented parents and such practices must end.

Keywords: litigation, children's rights, immigration, deportation, child removal, parental rights, undocumented parents

[Marcia Zug](#) is an associate professor of law at the University of South Carolina School of Law in Columbia, South Carolina.

Ready, Set, Go to Federal Court: The Hague Child Abduction Treaty, Demystified

By Jennifer Baum – July 14, 2014

The Hague Convention on the Civil Aspects of International Child Abduction may sound intimidating, but is easily demystified. Since 1980, signatory nations have agreed that parents should not be permitted to forum shop among countries when it comes to custody of their children. The Hague Convention requires the prompt repatriation of children under 16 years of age who were wrongfully removed by a parent from the country in which they had been living, except in certain very limited circumstances (some of which are discussed in more detail, below). The Convention does not address or permit the alteration of custody rights, even temporarily, though as a practical matter, denying a repatriation petition usually results in physical custody going to the relocated parent (sometimes called the “abducting” or “removing” parent). The treaty contains some limited exceptions to repatriation, and these few exceptions form the basis for much of the Hague Convention litigation in the United States.

The need for the treaty is even greater now than when it first went into effect. The ease and affordability of present day international travel combined with the increasing globalization of business, industry, and education, have created more opportunities than ever for the formation of cross-border families, and along with that, the inevitable increase in cross-border family dissolution. As the number of internationally relocating parents grows, so too grows the number of child repatriation cases under the Hague Convention.

However, the number of lawyers available to handle such cases, especially on behalf of indigent families, has not kept pace. Some parents endure months without representation for cases which the Convention contemplates taking just weeks to complete, resulting in unnecessarily prolonged separations or status uncertainty, and impacting, sometimes permanently, a child's relationship with the left behind parent. Not surprisingly, the situation is more serious for indigent parents, as there is no right to counsel in Hague Convention cases, and the parent who is unable to afford an attorney must seek *pro bono* counsel (and if they are the left behind parent they must do so from abroad), often while laboring under a language barrier, making access to U.S. counsel and courts even more onerous.

The purpose of this article is to provide a brief overview of the Convention, and urge more child welfare, matrimonial, and *pro bono* lawyers to consider representing parents (including indigent parents) and children on Hague cases. The subject matter of these cases—the legal rights of children and families—is not so dissimilar from the core work of the state court family law or child welfare professional, even if the cases are generally heard in federal court. Hague child abduction cases are challenging, fast-paced, and profoundly meaningful, and they can also lead to the development of an exciting and rewarding new practice area.

Trying a Hague Case

The Hague Convention on the Civil Aspects of Child Abduction is implemented in the United

States through the International Child Abduction Remedies Act (ICARA), [42 U.S.C. § 11601](#), *et seq.* ICARA is brief, containing just eleven sections. Section 11603(d) directs simply that courts “decide the case in accordance with the Convention.” Other sections provide for concurrent state and federal court jurisdiction ([§ 11603\(a\)](#)); burdens of proof ([§ 11603\(e\)](#)); and the role of the Central Authority, which is the agency in each country responsible for coordinating requests for assistance from left behind parents ([§ 11606](#)). The goal of ICARA is to provide a uniform domestic process for effecting prompt repatriations under the Hague Convention. Courts may not use ICARA to alter physical custody, even by removing a child from the “abducting parent,” unless there is an independent basis to do so under state law. ICARA § 7(b). Unless at least one of the exceptions to repatriation is raised, ICARA requires a child’s prompt return, plain and simple.

There is no statute of limitations for Hague cases, but as a practical matter, delay, and in particular delay of more than a year, could give rise to two defenses: (a) the Article 12 defense of more than a year having elapsed, during which a child has “settled” into its new environment; and (b) the defense set forth in Article 13 that “the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.” The Convention directs that contracting states “shall act expeditiously in proceedings to return children,” and notes that if a court cannot reach a decision on repatriation within six weeks from the filing of the petition for return, it may be required to explain the reasons for the delay. [Hague Convention Article 11](#).

Some courts treat the six-week mark as a deadline by which the case must be concluded (and many have done this), but other courts proceed more slowly, sometimes with months or years elapsing before a final decision. Appeals and remands can further delay a final decision. (Expedited stays and appeal procedures are available for counsel who choose to use them, though the Supreme Court recently ruled in *Chafin v. Chafin* that repatriation pending appeal does not moot an appeal.

There is much room for individual interpretation of the treaty and of ICARA, resulting in a decided lack of uniformity among the federal courts on a number of procedural issues. Some courts expedite the cases and others do not; some courts dispense with formal discovery procedures entirely, others employ, modify, or expedite them; some courts may appoint a guardian ad litem for a child, some provide legal representation for a child, and some provide neither. In this way, every Hague case is procedurally different from the one that came before it. There is even lack of uniformity on some substantive issues, including a circuit split on whether ICARA provides a federal right of action for the enforcement of visitation rights, with the Second Circuit holding that it does ([Ozaltin v. Ozaltin](#), 708 F.3d 355 (2d Cir. 2013)) and the Fourth Circuit holding that it does not (*Cantor v. Cohen*, 442 F.3d 196 (4th Cir. 2006)).

While ICARA provides for jurisdiction in both state and federal courts, most practitioners choose to file in federal court. Because the bulk of all domestic cases involving children and families most commonly arise in state courts, however, the judges and practitioners most familiar with the

law and social science of at-risk children are found working in state, not federal courts. Additionally, although federal courts generally have lighter dockets, and therefore shorter delays, than do state courts, they also lack ready access to typical family law resources that state courts have come to rely on, such as specialized training, institutional relationships with local child protective agencies and other professionals, a trained and dedicated specialty bar, and on-site or on-call social services to address common risk factors such as domestic violence, drug and alcohol abuse, corporal punishment, housing, and other needs of high-risk families.

In straightforward Hague Convention cases in which no defenses are raised, specialized child protective expertise may never be needed, because the court should order the child's immediate repatriation and any custody proceedings can be handled by the home country upon the child's return. But in practice, when a parent raises a child welfare-like defense to repatriation (think Article 13(b)'s "grave risk of harm"), an otherwise straightforward jurisdiction selection question becomes a quasi-child protective case in federal court. This means that the federal courts must work that much harder to access the same resources that come much more easily to state courts, which handle child protective matters day in and day out. This federal court disadvantage is exacerbated by the Convention's emphasis on expediency, leaving the district court and lawyers little actual time to figure out the best path forward.

Despite this challenge, the federal bench has prioritized Hague cases (as it must), and strives to get them exactly right. One district court held evening sessions. *Yaman v. Yaman*, 730 F.3d 1, 7 (1st Cir. 2013). Another, in lower Manhattan, opened the courthouse on emergency power the day after Hurricane Sandy, solely for a Hague case. *Souratgar v. Fair*, 2012 WL 6700214, *1, fn1 (S.D.N.Y. 2012). I have handled three Hague cases, all of which were expedited. To many seasoned child welfare practitioners whose day-to-day caseloads comprise high-need families desperately vying for attention from overcrowded state courts, such singular concern for the welfare of a child is refreshing and affirming.

The Defenses: A Closer Look

As noted, much of the domestic litigation around the Hague Convention centers on three defenses which should, at heart, feel fairly familiar to any child protective lawyer. One defense is that of the mature child who objects to repatriation, and who has "attained an age and degree of maturity at which it is appropriate to take account of its views." [Hague Convention, Article 13](#). Expert testimony or an in camera interview may help the court decide whether this defense has been established.

Another defense is Article 12's "one year plus now settled" provision, which may apply if more than one year has elapsed since the child's wrongful removal or retention, and as a result, the child was permitted to put down roots and build a new and stable life in the United States. The defense seeks to balance the rights of a left behind parent with a child's right not to be uprooted and forced to start over. The Supreme Court recently held that there is no tolling of the one-year period even when a parent concealed the child, underscoring the importance of the question of child settledness. *Lozano v. Alvarez*, 134 S. Ct. 1224 (2014).

Finally, [Article 13\(b\)](#) provides that repatriation is not required when there is a “grave risk that [the child’s] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.” Unlike the defenses discussed above, which need only be proven by a preponderance of the evidence, “grave risk of harm” must be proven by clear and convincing evidence.

Serious physical abuse, sexual abuse, and extensive or serious domestic violence will constitute grave risk of harm, but neglect, poverty, and mere substandard parenting should not. In the words of the Second Circuit in *Blondin v. Dubois* (“*Blondin IV*”):

[A]t one end of the spectrum are those situations where repatriation might cause inconvenience or hardship, eliminate certain educational or economic opportunities, or not comport with the child's preferences; at the other end of the spectrum are those situations in which the child faces a real risk of being hurt, physically or psychologically, as a result of repatriation. The former do not constitute a grave risk of harm under Article 13(b); the latter do.

The courts are careful to differentiate the risk of harm presented by a particular parent from a risk of harm presented by repatriation to the jurisdiction generally. Whenever possible, a child should be returned to the home jurisdiction, even if the child is to reside in the care of extended relatives, foster care, or even the removing parent, once he gets there. In *Blondin IV*, however, the Second Circuit concluded that the extensive history of violence witnessed and experienced by the children before they fled to the United States with their mother prevented the children’s return to France under any circumstances, so great was their trauma.

The “grave risk of harm” inquiry is one in which the skills and experience of child welfare lawyers are transferrable to, and welcomed by, the district court. A family’s social history, expert psychological testimony, and other evidence of family functioning and child safety may be needed to prove this defense. This is all highly familiar territory for the experienced child welfare professional.

There are also other, less commonly litigated defenses, such as consent or acquiescence to the child’s removal ([Article 13](#)), the failure of the petitioning parent to establish that she was exercising her custody rights at the time of the wrongful removal ([Articles 3, 13](#)), and the defense that that repatriation would violate public policy and shock the conscience ([Article 20](#)). Counsel should obviously explore the applicability of all available defenses.

Hague Cases and You (Yes, You)

So, why should you care about the Hague Convention? Because you are needed in federal court. Not only do federal courts lack the day-to-day experience of serving at-risk families and children, there are also no specific federal rules (other than the skeletal instructions set forth in ICARA) governing Hague cases, there is no right to counsel for the parents or child(ren), and

many federal court practitioners are unfamiliar with the specialized needs of court-involved families. (In one case, the respondent incorrectly assumed she had an immigration problem and retained immigration counsel, who was familiar with neither federal trial practice, nor matrimonial law /child protection.) But an experienced child welfare lawyer, with direct experience in cases involving abuse, neglect, abandonment, visitation, substance abuse, domestic violence, mental illness, corporal punishment, education, etc., can make a big difference in a case in which a respondent invokes one or more defenses to repatriation.

Much of the domestic litigation of Hague cases centers on the defenses discussed briefly above. But it is the [Article 13\(b\)](#) “grave risk of harm” defense in which the skills and expertise of the child welfare professional are most needed, and are also most transferrable. The child protective nature of the grave risk of harm defense should be familiar territory for any child welfare attorney.

These cases are also ideal for law firms seeking pro bono matters for associates, perhaps in conjunction with local child protective lawyers. Hague cases are highly litigious, virtually guaranteeing a hearing and all of the valuable trial preparation that comes with it. There is ample opportunity for direct client contact. The cases are not document-heavy. They are usually concluded relatively quickly (many cases are measured in weeks or months, not years), and will not result in protracted entanglement or years of supplemental petitions: either the repatriation request is granted or it is not, and in some cases an appeal and remand follows. But once the case is done, it is done, and there are no further proceedings to be had. They are not overly expensive: there may be costs associated with interpretation and translation, or with overseas witnesses, but some costs may be recoverable from the district court’s pro bono fund, if available, and counsel can make the appropriate inquiries before accepting assignment.

Representing Parents

As noted earlier, left behind parents face enormous obstacles in seeking judicial intervention in the United States to compel return of their children. There is no right to counsel under ICARA, so parties who wish to be represented must hire and pay for lawyers themselves. Hiring a lawyer in the United States from another country poses obvious logistical challenges, and those challenges are compounded when the parent does not speak English. When a parent is indigent, he must seek pro bono counsel, and the situation complicates further. Representing parents in Hague cases is a perfect opportunity for the skilled child welfare lawyer.

Representing Children

Raising a defense to repatriation often prompts a federal court to appoint a guardian ad litem (GAL) to represent the interests of the child. This is precisely because the court values information about the functioning, safety, and opinions of the child—something a child welfare lawyer can provide. There are no published standards or guidelines for GALs on Hague cases, and the role of the GAL on a particular case is circumscribed entirely by the appointing court. A GAL should ensure that facts and arguments relevant to the disposition of the case, and which are therefore critically relevant to the child’s interests, are brought to the court’s attention. GALs

have been tasked with different roles, including assisting the court in making a grave risk analysis, reporting on a child's maturity in connection with the defense of objection to repatriation, presenting evidence on how "settled" a child may be under an Article 12 defense (including testifying to the results of interviews and investigations), facilitating visitation or phone calls, attending in camera interviews, etc. In one of my own cases, as GAL I appeared as amicus curiae on the appeal. *Souratgar v. Lee*, 720 F.3d 96 (2d Cir. 2013).

By contrast, some courts have addressed the need for information by assigning an attorney to litigate a child's interests. In another of my cases, the Southern District of New York granted intervention to the child, who then became a party to the case. *Jakubik v. Schmirer*, 2013 WL 3465857 (S.D.N.Y. 2013). The Fifth Circuit also recently remanded a case for assignment of a GAL in contemplation of the children's possible intervention. *Sanchez v. R.G.L.*, 743 F.3d 945 (5th Cir. 2014). A GAL, attorney, next friend, or other representative for the child must ensure that the child's rights and interests are protected, however that is to be accomplished within the bounds of a particular appointment. In the absence of court-assigned counsel it should also be possible, at least in theory, for a child to independently retain counsel and seek to intervene in the proceedings on her own initiative. However it comes about, though, Federal Rule of Civil Procedure 17(c) governs the participation of minors in federal litigation, and compliance with this rule must be satisfied.

How to Get Started

A good way to get started on Hague cases is to contact the Civil Division of the Department of Justice, Office of International Judicial Assistance, which acts as the Central Authority for Hague cases in the United States, and helps secure counsel for left behind parents. The International Child Abduction Attorney Network (ICAAN) is another clearinghouse for lawyers who wish to accept Hague case referrals. Attorneys can also contact the pro se law clerk at their local federal courthouse and volunteer to accept referrals for Hague cases; this office is often the first stop for respondents, and is therefore the place where attorneys who wish to defend Hague cases might start. Attorneys can also offer to accept referrals on behalf of the children this way, and can also contact the National Center for Missing and Exploited Children, which has worked closely with the State Department on Hague cases, and asked to be placed on a referral list.

Conclusion

Hague cases are exciting, demanding, and—not unlike traditional matrimonial and child protective cases—emotionally charged. (In *Blondin III*, the French authorities questioned whether the district court viewed them as "uncivilized monkeys or responsible partners to an international convention." *Blondin v. Dubois*, 78 F.Supp.2d 283, 299 (S.D.N.Y. 2000).) Hague cases move quickly, sometimes going from petition to repatriation in just six weeks. They provide excellent pro bono opportunities, and opportunities for gaining federal court litigation experience. Many of the skills needed are those which the child welfare lawyer has already perfected in state court. And Hague cases are rewarding, providing the opportunity for lawyers to make a meaningful difference in the life of someone's son or daughter, mother or father. There is

no greater reason for being a lawyer than having the ability to make a real world difference in the lives of your clients, and Hague cases provide that immediate opportunity.

Keywords: litigation, children's rights, Hague Convention, child protective cases, repatriation, ICARA

[Jennifer Baum](#) is the associate professor of Clinical Legal Education and director of the Child Advocacy Clinic at St. John's University School of Law in Queens, New York.

NEWS & DEVELOPMENTS

June 30, 2014

Lack of Counsel Violates Washington Youth's Legal Rights

For the first time in Washington state's history, an appellate court has ruled that failure to appoint counsel to a foster youth violated the youth's legal rights. In the case, [*In re the Dependency of J.A.*](#), the appellate court found that the juvenile court misapplied due-process law by understating the youth's interests in his case as well as incorrectly analyzing the risk of error in the case. The appellate court also held that the government's financial interests did not outweigh the interests of J.A. in having legal counsel.

State law makes appointment of counsel completely discretionary for the vast majority of children and youth in Washington. Some counties appoint to all children, some only to adolescents, and some rarely, if ever. In 2012, the Washington Supreme Court held that, while there was no universal right to counsel for foster children in termination proceedings, some children did, in fact, have a constitutional right to counsel. *In re Dependency of M.S.R.*, 174 Wn.2d 1, 22 n. 13, 271 P.3d 234 (2012). To determine which children, the court suggested a case-by-case analysis using the *Mathews v. Eldridge* due-process factors. 424 U.S. 319 (1976). While the Court made significant pronouncements about children in dependency actions, it limited its holding to children in termination trials. It also reserved the issue of whether those children had a state constitutional right to counsel in dependency or termination proceedings. No Washington appellate court had ever found a right to counsel for any dependent child.

J.A. is a 15-year-old foster youth living with developmental delays. While in care, J.A. was prescribed psychotropic medications, put in inpatient treatment, arrested, and separated from his sibling. He wanted to return to his mother's care, but his requests were denied. J.A. filed a motion to appoint counsel at public expense, arguing it was required under the federal and state constitutions, as well as under state law. The Pierce County Juvenile Court denied the motion and, even after the foster mother indicated she was no longer interested in adopting J.A., denied a subsequent motion for reconsideration. The motions were largely unopposed, though the GAL wrote and submitted a letter arguing that J.A. did not need an attorney.

J.A. appealed and the department responded to the appeal, arguing that the juvenile court properly exercised discretion. Neither the GAL nor J.A.'s parents weighed in on the appeal. The department's position was that the motion was not appealable and that the trial court had acted properly, and rejected J.A.'s argument that all children in dependencies had a state or federal constitutional right to counsel.

In the appellate court's opinion, issued June 11, 2014, it held that the trial court had misapplied all three *Mathews* factors. First, the court held that a "child's fundamental liberty interests are at stake, not only in the initial hearing, but also in the series of hearings and reviews that occur as part of a dependency proceeding once a child comes into state custody." In other words,

children's important due-process rights do not come into play during the dependency and termination trials but in all judicial hearings in their case. The state had argued that the court should not review the case as an interlocutory appeal.

Second, the appellate court held that children's fundamental liberty interests and rights include the right to the "affection and care of his parents," "freedom of personal choice in matters of family life[.]" and reiterated that a foster "child has a strong liberty interest in the parent-child relationship that is equal to or greater than that of parents." (Citations omitted). The state had defended the trial court's finding that J.A.'s interests in his case were "not that great."

Third, the appellate court held that "[b]ecause a case-by-case analysis allows wide room for judicial discretion, subjective determinations can magnify the risk of erroneous fact-findings." The trial court had argued that its team (social worker, GAL, assistant attorney general, and parents' attorneys) would adequately protect J.A., at the same time acknowledging they had failed to keep him out of detention after a recent "meltdown."

Fourth, in a footnote, the appellate court noted that lawyers are "especially important [. . .] to a child with a disability." The department and the trial court argued that his disabilities would limit an attorney's role and thus diminished the need for him to have one.

Finally, the appellate court rejected the argument that Pierce County's limited resources to pay an attorney outweighed the other factors.

The appellate court indicated that its holding was limited to J.A.'s right to counsel under a discretionary statute, not under either constitution. This holding was despite the court's use of the *Mathews* due-process test that the *MSR* court indicated was necessary to determine whether a child had a constitutional right to counsel.

—Casey Trupin, Columbia Legal Services

June 11, 2014

Comprehensive School Discipline Consensus Report

On June 3, the Council of State Governments Justice Center released a [report](#), three years in the making, regarding school disciplinary policies nationwide. The bipartisan effort included over 700 interviews with advisors and consultants ranging from school administrators, teachers, lawmakers, students, parents, and advocates to other stakeholders. The report expanded on the January 2014 federal guidance by the Departments of Education and Justice, which discussed how to impose discipline in academic settings without discrimination on race, color, or national origin.

The general theme of the report is that schools need lower suspension rates, and get more engagement from students. Millions of students, mainly nonwhite, disabled, and LGBT youth, are suspended for minor misconduct and often end up facing lapses in academics, dropping out, or becoming involved with the juvenile-justice system.

The report's overall goals include identifying behavioral and mental health issues of students through support teams and services; improving school climate by fostering a positive learning environment where students feel safe, welcome, and supported; adapting school-police partnerships to reach mutual ends; and minimizing student engagement with the juvenile-justice system. To reach these goals, the report puts forth 60 recommendations, such as using a "graduated system of responses," or other steps such as peer conferences and restorative practices prior to suspension, leaving removal from school as a last result. The report recommends multidisciplinary approaches and practicality to ensure the efficacy of plans to change the school environment. The report is meant to be a guide for all involved in the nation's education system and an impetus for change to be made on a federal, state, and local level.

—*Jessalyn Schwartz, Member of Massachusetts Bar*

EDITORIAL BOARD

Committee Director/Newsletter Editor

» [Catherine Krebs](#)

Web Editors

» [Marlene Sallo](#)

» [Jen Baum](#)

Committee Cochairs

» [Rosa Hirji](#)

» [Lourdes M. Rosado](#)

» [Casey Trupin](#)

Staff Editor

» [Michelle Oberts](#)

The views expressed herein are those of the author(s) and do not necessarily reflect the positions or policies of the American Bar Association, the Section of Litigation, this committee, or the employer(s) of the author(s).

ABA Section of Litigation Children's Rights Litigation Committee
<http://apps.americanbar.org/litigation/committees/childrights>