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Helping Lawyers Help Kids

The Impact of ASFA on Immigrant Children in the Child Welfare System

by Yali Lincroft and Bill Bettencourt

Mercedes Santiago-Felipe, an immigrant from Guatemala, lived in Grand Island, Nebraska with her two U.S. citizen children. She speaks a Mayan Indian dialect and speaks no English and very little Spanish. She was arrested in March 2001 for slapping her six-year old son. Her children were taken into protective custody and the then Immigration and Naturalization Service (INS) placed a hold on her through the Hall County jail because she was an illegal alien. Misdemeanor charges of abuse ultimately were dismissed.

Nebraska's Foster Care Review Board later "found that the children were inappropriately removed from the home given that "a 'slap on the face' was insufficient evidence to support a finding that [her son] was in imminent danger and that no evidence supported a finding that [her daughter] was at risk." The Review Board noted that "[t]here were no services offered to prevent removal, such as parenting classes, family support worker, or therapy..."

The immigration service deported Santiago-Felipe approximately two months after her arrest. While detained, she received no legal counsel or legal advice that she could contest her removal and remain in the United States to seek reunification with her children and that she had valid claims to legal status in the United States. Although the children had asked to see Mercedes she had no visitation with

them. Also, despite knowledge of the social workers, the guardian ad litem, and ultimately the judge, that Santiago-Felipe was held next door by immigration officials, the county court proceeded in her absence with hearings to adjudicate the fate of the children.

Santiago-Felipe's cousin made a request of state officials to have custody of the children. Social workers did conduct a study of the home of Santiago-Felipe's brother in Alabama and recommended placement of the children with him, noting he was "in the country legally, however, his wife [who does not work] applied for her papers in March and has not gotten a reply to date." A day after receiving notice that the children might be placed with their uncle in Alabama and his then unauthorized wife, the guardian ad litem and deputy county attorney motioned the Court for an order

preventing the removal of the minor children from the state of Nebraska.

In May 2002, the state filed a motion to terminate Mercedes' parental rights to her children, alleging as its sole basis for termination of those rights that the children had been in out-of-home placement for 15 or more months of the most recent 22 months.

The next month, the court entered an order terminating Santiago-Felipe's parental rights, with an added finding that the children had been abandoned.

On appeal, the Nebraska Supreme Court determined that plain error permeate[d] the entire proceedings and that such error denied fundamental fairness to Mercedes. In the wake of this appellate decision and resolution of immigration issues, and more than three years

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after her separation from her children, Santiago-Felipe was reunited with her children in Grand Island, Nebraska.¹

Introduction

As illustrated in Mercedes' case, inequitable treatment, differences in language and culture, and the workings of immigration law and deportation, all compounded by poverty, can lead to an improper termination of parental rights under the Adoption and Safe Families Act (ASFA) guidelines, to difficulty in placing children with relatives, and distressing experiences for children in care (such as lack of visitation). This article:

- analyzes how ASFA's expedited permanency process interacts with aspects of U.S. immigration law to affect decision making for immigrant families, potentially disadvantaging children (e.g., by hindering their placement with kin caregivers) and placing an added burden on families in meeting case plan requirements;
- discusses how the current surge in immigration law enforcement activities is creating great fears among immigrant communities that the deportation of parents can result in their legal separation from their children; and
- proposes revisions to ASFA, as well as improved policies and programs that will increase immigrant families' ability to reunify with their children.

Who Are Immigrant Families with Children in the United States?

The United States is experiencing a wave of immigration not unlike the prior wave over a century ago. One in four children in the U.S. live in immigrant families, with the majority highly concentrated in six destination states: California, Texas,

New York, Florida, Illinois, and New Jersey.² However, in the 1990s rapid growth also occurred in other states located in a wide band across the middle of the country, including many of the Rocky Mountain, Midwestern, and Southeastern states.³ North Carolina, Nebraska, Arkansas, Nevada, and Georgia have experienced more than 200 percent increases in their immigrant population in the past 10 years.⁴

Integration issues that California and New York have faced for decades are now confronting policymakers and service providers in states with little expertise or experience in providing bilingual/bicultural services. Immigrants moving to these new destination states also tend to be poorer and less educated, to speak English less well, and to be undocumented in larger numbers than immigrants living in the larger destination states.⁵

Unlike the large-scale immigration to the U.S. in the late 1800s and early 1900s, involving mostly immigrants from Europe, this new wave of immigration that began in 1960-70s is far more diverse, with the largest proportion of children (88 percent) coming from Latin America, the Caribbean, Asia, and Africa.⁶ These new immigrants also do not necessarily share the Judeo-Christian background of earlier immigrant generations, but include Buddhists, Hindus, Muslims, and Sikhs.⁷

Poverty rates are typically higher among children of immigrants than among children of natives. Over a quarter of young children in immigrant families are poor, compared with a fifth for native families.⁸ The primary reasons for this higher poverty rate are the lower skills/lower wages of their parents and the relatively low labor force participation among immigrant women.⁹

Poverty is also associated with higher food and housing hardship in immigrant families. In 2002, 39 percent of children of immigrants lived in families with one or more food-re-

lated problems, compared with 27 percent of children of natives.¹⁰ Children of immigrants were twice as likely as children of natives to live in families paying at least half of their income for rent and mortgage (13 percent vs. five percent) and four times as likely to live in crowded housing (26 percent vs. six percent).¹¹

Most immigrant families include a mixture of citizens and noncitizens.¹² A "mixed-status family" is one in which family members do not all share the same immigration status. They appear in many permutations, though the most common such family is one with an undocumented parent (or parents) and U.S.-born citizen children.¹³ Almost all children of immigrants under age six are citizens (93 percent), and most live in mixed-status families, underscoring how difficult it is to differentiate the undocumented immigrant community from the general immigrant population.¹⁴

How Many Immigrant Children Are in the Child Welfare System?

There are currently no reliable data about the immigrant population in the child welfare system, but only limited, regional research results.¹⁵ This information is generally not collected on a national, state, or local level. The public child welfare agency is under no mandate to collect data on an immigrant child or family's situation—such as primary language, country of origin, or number of years in the United States—so that these circumstances are rarely documented with any level of accuracy.¹⁶

For example, child welfare workers will often rely on physical appearance, surname, or ethnicity to surmise a child's or family's country of origin, and an immigrant from Somalia may be categorized as native-born African American, or a Filipino with a Spanish surname may be classified as Hispanic.¹⁷ Im-

migrant families as well as child welfare staff often fear that reporting immigration status can make a family vulnerable to investigation or deportation.¹⁸

A preliminary analysis by the National Survey of Child and Adolescent Well-Being (NSCAW), reveals that overall, Latino children represent 18.2 percent of children who come to the attention of child welfare agencies. Approximately 9.6 percent of all children involved with the child welfare system are children of immigrant parents and 2.3 percent of the overall total are immigrants themselves (60.7 percent are Latino; 4.1 percent are African American; 33.7 percent are white; and 1.5 percent are of other races).¹⁹

While most of the information cited in this article is about Latino, particularly Mexican, families, there are profound differences in the immigrant population throughout the U.S. However, the largest numbers involved with the child welfare system are Latino families. National child welfare statistics do not indicate which of these families has immigration-related issues. Yet interviews with frontline child welfare workers suggest that many Latino cases involve families with mixed immigration status issues.²⁰

According to testimony given by the Chief Children's Court Attorney of New Mexico to the U.S. House of Representatives Committee on Education and Labor, Subcommittee on Workforce Protection, the New Mexico public child welfare agency has not been able to reliably track citizenship status of parents in its data system and lists only 18 noncitizen children as being in protective custody; but she estimates that of the 2,300 children in care, "a significant number have at least one parent who is not a U.S. citizen."²¹

One study conducted by the Urban Institute in Texas does look at immigration status of children and families in the child welfare system, by matching birth records and child

welfare records. The researchers found that "Latin American immigrant children and Latin American children of immigrants are underrepresented, while Hispanic children of U.S. born parents are overrepresented in the Texas child welfare system."²² This may not be surprising, given the isolation of first-generation families from service providers and systems. Nonetheless, even if the proportion of first-generation children involved with child welfare is less than that for children of later generations, the total number remains large.

The 2006 national child welfare statistics indicate that approximately 80,000 or 28 percent of all child welfare cases involve Hispanic families.²³ In addition, immigrant children in the child welfare system may also include temporary care arrangements for unaccompanied children in exceptional circumstances such as trafficked children or children separated from deported parents against their will after immigration raids.²⁴ In Texas, New Mexico, Arizona, and California, Latinos/Hispanics have a large presence in the foster care population. In April 2008, Hispanics represented 47.9 percent of all children in care in California.²⁵

Interviews with social workers suggest that immigrant families often enter the public child welfare system for reasons not very different from those pertaining to the native population—poverty, domestic violence, substance abuse, mental and physical health problems.²⁶ However, a study of the Texas child welfare system by the Urban Institute found that the share of Latin American immigrant children in out-of-home care who were removed for sexual abuse is three times as high as the share of children of natives removed for sexual abuse, which suggests the need for greater research.²⁷ While the researchers had insufficient information to explain this difference, they hypothesize that it could be because only the most

serious cases of abuse in immigrant communities are reported to or substantiated by the Child Protection Services (CPS) agency, or because of unaccompanied children or commercial exploitation of children in major cities.

However, even when the reasons for child welfare intervention are the same as for other ethnicities, child welfare agency social workers often consider cases involving immigrant children to be the most time consuming and challenging because the issues they raise are unfamiliar for workers who have little state or federal guidance.²⁸ The immigrant demographics of Texas may not apply elsewhere, and more research is needed to fill out the national picture.

Key Issues that Affect Compliance with ASFA

The ASFA legislation shortened the timeframe for having a permanency hearing from 18 months to 12 months and imposed a strict timetable so that child welfare agencies were required to file termination of parental rights (TPR) petitions for children who had been in care for 15 of the previous 22 months. Exceptions were made for situations in which children were placed with relatives, or there were compelling reasons why TPR was not in the child's best interest, or the family had not received services that were part of the case plan.²⁹ The Mercedes Santiago-Felipe case discussed above illustrates how bias and discrimination, incarceration and deportation proceedings, language barriers, lack of services, and relative placements can complicate child welfare cases.

Incarceration, deportation, and child welfare

The passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Public Law 104-208, 110 stat. 3009.546

(1996) (codified as amended in scattered sections of U.S.C.) increased the ease with which immigrants, including legal permanent residents, could be deported.³⁰ The restructuring of immigration enforcement after September 11th through the creation of the Department of Homeland Security also made deportation easier, and the total number of deportations increased by more than 400 percent from 1995 to 2005.³¹ A January 2009 report by the Department of

on how many immigrant children enter the system as a result of their parents' deportation.³⁷ This intersection of criminal justice, child welfare, and immigration law is often overlooked by public policy researchers.

Advocates argue that the "silo" approach of isolating these issues and a lack of integration of the three systems punish immigrant families. The lack of data collection is a major problem for advocates who are seeing the trend intensify but cannot

ents in establishing a working alliance, engaging the family, and communicating with the family's network when searching for alternate caregivers.⁴² Language differences not only lead to fears of not being able to accurately convey one's concerns, but can also prompt clients to question the information they receive from the child welfare agency. Immigrant families are at a disadvantage in meeting case plan requirements within the prescribed time period when bilingual resources are not available or adequate.

Throughout the system, at all levels from child welfare workers to attorneys, not enough interpretation/translation services or bilingual/bicultural staff are available.

Homeland Security indicates that 180,466 alien parents of children with U.S. citizenship were removed between fiscal years 1998 and 2007.³² Approximately 63,000 of these removals involved criminal violations, while the rest involved individuals present without authorization, previous removals, or attempted entry without proper documentation.³³

The U.S. is among the few countries that do not consider family ties as an issue in deportation proceedings.³⁴ The fact that an undocumented parent may have U.S. citizen children is not pertinent to deportation determinations. As such, a permanency hearing may occur while the parent is incarcerated and awaiting such a determination.³⁵ If a child remains in care for 15 months, then a TPR petition could be filed.

In addition, anecdotal evidence suggests that a growing number of local governments are collaborating with Immigration and Customs Enforcement (ICE) through 287(g) programs that deputize local police departments to enforce immigration laws, and that this practice has led to increased placements of children in foster care.³⁶ ICE and child welfare agencies do not gather information

prove its scale. Advocates describe nightmare scenarios in which immigrant parents must complete a mandatory minimum drug sentence, then come under an ICE detainer, making it virtually impossible for them to complete the requirements of dependency court and thus to regain custody of their children before deportation.³⁸

Language barriers

Throughout the system, at all levels from child welfare workers to attorneys, not enough interpretation/translation services or bilingual/bicultural staff are available.³⁹ This is especially problematic for states witnessing new growth in immigrant populations, which often have fewer such resources to serve newcomers' children.⁴⁰ Effective communication is the cornerstone of good child welfare practice, and without linguistically and culturally appropriate services, the result can be trouble with family supports, erroneous psychosocial assessments, or a lack of family engagement.⁴¹

In a study of Hispanic clients involved with the child welfare system in New York City, the ability to speak Spanish was cited as equally important to both workers and cli-

Relative placement

Finding family members for relative placements depends heavily on a thorough assessment and a clear understanding of the population served.⁴³ A bilingual/bicultural social worker or a community-based agency under contract with the child welfare agency can be instrumental to this process, since information is often lost when using translation services.⁴⁴ Another problem is agency lack of experience in placing a child with relatives not living in the United States.⁴⁵ As in the Mercedes Santiago-Felipe case, a problem with the immigration status of someone in the household of a potential relative placement is a very common obstacle cited by frontline workers.⁴⁶ The Vericker/Kuehn study found that in Texas children of immigrants were far less likely to be placed with relatives than children of native-born Latinos (eight percent vs. 28 percent).⁴⁷

The authors hypothesize that the difference is owing to a lack of available recipient families within the U.S.; the immigration status of families, which hampers their becoming licensed foster caregivers; and the generally older age of immigrant children entering care in Texas (since older children and teens are more likely to go into nonrelative foster care, group care, or other

institutional care settings).⁴⁸

Existing research and federal law have generally supported giving preference to relative care when a child must be placed outside the home, under the premise that a child will fare better than with strangers. Nonrelative placements may be particularly upsetting for an immigrant child, who is new to the country, may not speak English, and may have a different cultural background from that of the caregiver.

Recommendations

Given the complexity of cases involving immigrant families, the limited availability of bilingual services, and the obstacles to prompt placement of children with relative caregivers, the requirements of ASFA create a risk of bad decisions and outcomes for children or inappropriate termination of parental rights among immigrant families. Clearly, the underlying challenges that immigration enforcement poses for family stability cannot be resolved through modifications to ASFA. Nonetheless, improvements to ASFA could enhance the quality of decision making for at least some of the most vulnerable children.

ASFA timelines should be reviewed and exceptions allowed in the event of complicated immigration cases. Immigrant families face many situations that call for exceptions:

- providing international relative searches,
- conducting thorough assessments with bilingual/bicultural staff, or
- working with the family on issues involving immigration court and deportation proceedings.

There is a need to consider specific provisions in federal legislation to address parents incarcerated due to immigration status and the impact on timelines and reunification services. Key issues include exceptions to TPR and other timelines where immigration-status dealings and

background checks on relatives are in play. These exceptions should clearly require demonstrating that they are in the best interests of the child toward achieving a timely yet optimal permanent plan. These changes can be crafted to ensure that ASFA's legislative intent is achieved in such special circumstances, understanding that the system unintentionally works against this intent in many instances.

Peer-to-peer education on how to provide child welfare services to immigrant families should be provided. Improving services to immigrant families is evolving, and the best method of education is to build upon the experience of public child welfare agencies in such places as New York, California, and Illinois, with their long history of outreach and service development, and to share their knowledge with communities in other states now facing a growing immigrant population.

One possibility is for the federal Administration for Children's Services to set a priority to fund and facilitate national peer-to-peer exchanges for greater use of the regional training centers. Finally, the federal government should begin working with county child welfare and immigration policy leaders to develop guidelines for states in pursuing best practices where child welfare interacts with the immigrant population. These recommendations must be based on the international principle of "best interest of the child" and integrated with the federal child welfare mandates of safety, permanency, and well-being.

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Endnotes

¹ Case description drawn from the following sources: Thronson, David. "Creating Crisis: Immigration Raids and the Destabilization of Immigrant Families." *Wake Forest Law Review* 32(2), Summer 2008; and Brief of Petitioner-Appellant at 14, In re Mainor, T., 674 N.W.2d 442 (Neb. 2004) (No 5-02-1229) (brief file in the Nebraska Court of Appeals as Case No. A-02-001229 on March 13, 2003); Kevin O'Hanlon. "Guatemalan Woman Regains Custody of Kids." *Associated Press Online*, Dec. 2, 2004, available at www.highbeam.com/doc/1P1-103029692.html.

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Reader Feedback:

Protecting Adopted Youth from Financial Identity Theft

Attorney Margaret Burt wrote us with some more helpful tips as a follow-up to Jean Clemente's article, "Protecting and Defending a Young Person in Foster Care from Financial Identity Theft," which appeared in the February 2010 CLP. The tips focus on protecting children from financial identity theft once they are adopted from the child welfare system. Here's Ms. Burt's advice:

After a foster child is adopted, it is crucial that the family bring the new birth certificate to the Social Security office and request that the child be assigned a new social security number with the new name, or even if they are not changing the child's name. I have always advised my adoptive parents to do this and on at least two occasions it was discovered that someone, other than the child or adoptive family, had been using the child's old birth certificate and social security number to collect benefits.

Sometimes the social security representative gives the adoptive parents a hard time and tells them that they cannot change the number. However, if a supervisor is requested, they will always change the number. Also, I have had one adoptee who had credit problems as a young adult when she did not change her name at adoption and her name was the same as a birth aunt who had credit problems. The birth aunt was using the young adult's birth date for improper reasons. I often advise that the adoptive child modify the name at least to the extent of a middle name spelling change to avoid such issues as well.