2007

Family Court and the Unique Needs of Children and Families Who Lack Immigration Status

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I. INTRODUCTION

Language abounds in the New York Family Court Act on the Court's duties to aid families in crisis,[1] to maintain families whenever appropriate,[2] to safeguard children's well-being,[3] and to provide children with permanency in their lives.[4] These are not narrow obligations, and as the population served by the New York City Family Court changes, its judges, practitioners, and agencies must adapt. The Court today must meet the challenge of a dramatically changing demographic: the ever-rising number of children and families in New York City who do not have legal immigration status. This Article examines the complex interplay between immigration issues raised by non-documented families and the Court's obligation to serve every family and every child who come before it. The Article first presents statistical and anecdotal background to illustrate the rising number of families without legal status and the increasingly harsh laws affecting them. The Article then describes the two most common ways

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1. N.Y. FAM. CT. ACT §§ 255, 1015-a (McKinney 2006). *See also* Douglas J. Besharov, *Practice Commentaries*, in N.Y. FAM. CT. ACT § 111 (McKinney 2006).

2. N.Y. FAM. CT. ACT § 1089(c)(4) (McKinney 2006).

3. *Id.* § 1011.

4. *Id.* § 1086.

that family court matters and immigration issues interrelate — special immigrant juvenile cases and the collateral consequences of Family Court admissions for immigration proceedings — to illustrate the areas in which a basic level of competence in immigration law is most vital for Family Court judges and for practitioners and agencies who come before the Court.[5] Finally, the Article makes several proposals for what these judges, practitioners, and agencies can do to attain the level of proficiency in these areas that is required to meet their obligations and duties to *all* children and families, including those who lack legal immigration status.[6]

II. STATISTICS AND STORIES, AND WHY FAMILY COURT SHOULD CARE

The number of undocumented arrivals in the United States has risen steeply in recent years. Conservative estimates put the number of individuals who lack legal immigration status at 10.3 million,[7] 1.6 million of whom are children.[8] The rate of unauthorized arrivals into the United States has risen from about 140,000 per year in the 1980s, to about 450,000 per year in the early 1990s, to about 700,000 per year in the first half of this decade.[9] In New York, the numbers are equally remarkable. Approximately 650,000 unauthorized immigrants live in New York,[10] and foreign-born residents and their children currently comprise over 60 percent of New York City's population.[11]

The amount of attention policy-makers and law enforcement agencies have given to the issue of illegal immigration has also

5. While these are currently the most common immigration issues where interplay with Family Court is essential, there are many others, such as self petitions under the Violence Against Women Act, which also can affect, and be affected by, Family Court matters. *See* Immigration and Naturalization Act (INA) § 204, 8 U.S.C. § 1154 (2006).

6. This Article does not directly address the special concerns that *legal* immigrants may also have. This is primarily because they are less vulnerable than immigrants without legal status.

7. *See* JEFFREY PASSEL, PEW HISPANIC CTR., UNAUTHORIZED MIGRANTS: NUMBERS AND CHARACTERISTICS 3 (2005), *available at* http://pewhispanic.org/files/reports/46.pdf.

8. *Id.* at 18.

9. *Id.* at 6.

10. *Id.* at 11.

11. Sam Roberts, *Immigrants Swell Numbers In and Near City*, N.Y. TIMES, Aug. 15, 2006, at B1.

increased. As harsh laws have been more strictly enforced, life for illegal immigrants has become ever more difficult.[12] The individual stories are heart-wrenching. One Fordham University law student who had moved to the United States from Morocco thirteen years earlier was caught in a round-up of Muslim men in the aftermath of 9/11. He was ordered deported because he had never filled out the proper paperwork to obtain legal status.[13] A cook at a New York catering company — a father of two who came to the United States to escape political violence in his native Guatemala — was ordered deported and separated from his young children after a driver's license check revealed that he did not have legal immigration status.[14] A star student from Senegal at an East Harlem High School whose parents had left him to fend for himself at age fourteen was nearly deported because his visitor's visa had expired. The immigration authorities backed off only because of the press coverage and intervention of prominent politicians. Meanwhile, there are hundreds of other children in similar predicaments in New York.[15] Equally disturbing, unscrupulous lawyers around the country frequently take advantage of desperate immigrants seeking any means to remain in the United States.[16]

What does all of this have to do with Family Court? The number of families and children without legal immigration status who are seen by judges, represented by practitioners, and served by agencies in Family Court is growing and likely will continue to grow. While there are no exact figures, the demographics strongly suggest that the youth and families who are more likely to be without legal status are those who are more likely to be in Family Court. Undocumented immigrants, for example, tend to have attained lower levels of education in comparison to the gen-

12. *See generally* Barbara Hines, *An Overview of Immigration Law and Policy Since 9/11*, 12 TEX. HISP. J.L. & POL'Y 9 (2006) (describing the increasing harshness of immigration laws since 9/11).

13. Andrea Elliott, *Caught in a Net Thrown for Terrorists; A Family of Strivers Faces Deportation to a Country They Barely Recall*, N.Y. TIMES, May 24, 2005, at B1.

14. Nina Bernstein, *Routine Check On License Can Mean Deportation*, N.Y. TIMES, May 5, 2005, at B1.

15. Nina Bernstein, *Senegalese Teenager in Deportation Fight Wins Right to Study in America*, N.Y. TIMES, July 29, 2006, at B2.

16. Gary Rivlin, *Dollars and Dreams: Immigrants as Prey*, N.Y. TIMES, June 11, 2006 (describing instances of attorneys charging from $10,000 to $36,000 — life savings for many immigrants — and then doing essentially no work on the case).

eral population, work at less stable employment, have lower incomes, have a higher rate of poverty, and are more likely to lack health insurance.[17] The same characteristics predominate among the families seen in the City's family courts.[18] In addition, most illegal immigrants come from Caribbean, Central American, and South American countries,[19] and therefore are members of minority groups that are already strikingly over-represented in Family Court.[20] As the number of illegal immigrants in the United States and in New York City continues to grow, the number who find themselves in Family Court also increases.

The growing number of children and families in Family Court without legal status demands attention because of the truly profound consequences that can result from the action — and inaction — of family court practitioners and judges. When illegal immigrants become subject to the court's determinations, rulings, and orders, they face severe consequences with which families with legal status need not contend, such as detention in an immigration facility, deportation to another country, and permanent geographical separation from their homes and families. These ramifications compound the challenges already faced by many families served by the Court. Consider, for example, youths who leave the foster care system. In a recent survey, foster alumni had disproportionately more mental health disorders, significantly lower employment rates, and a higher rate of homelessness compared to the general population.[21] Lack of legal status adds new barriers that foster alumni must face. They will not be able to procure any legal employment; only a minute number of colleges will accept them for admission; they are extremely unlikely to have health insurance; and, most daunting of all, they will be at constant risk of deportation and, consequently, exploitation by employers and others who can take advantage of their

17. *See* PASSEL, *supra* note 7, at 22, 26, 30, 34, 35.

18. *See* Symposium, *The Rights of Parents with Children in Foster Care: Removals Arising from Economic Hardship and the Predicative Power of Race*, 6 N.Y. CITY L. REV. 61 (2003).

19. *See* PASSEL, *supra* note 7, at 4; Rick Lyman, *New Data Shows Immigrants' Growth and Reach*, N.Y. TIMES, Aug. 15, 2006, at A1.

20. *See Rights of Parents*, *supra* note 18.

21. P.J. PECORA ET AL., IMPROVING FAMILY FOSTER CARE: FINDINGS FROM THE NORTHWEST FOSTER CARE ALUMNI STUDY (2005) at 1–3, *available at* http://www.casey.org/Resources/Publications/NorthwestAlumniStudy.htm (last visited Jan. 20, 2007).

precarious status.[22] With so much riding on the immigration status of the children and families seen in Family Court, judges and attorneys must — at a minimum — be aware of how decisions, findings and orders in court cases can affect that status.

Most importantly, the increase in families without status matters to the Court because judges, practitioners, and agencies can not meet their statutory and ethical obligations without understanding how immigration issues interplay with court matters. For example, a judge can not reach an informed decision about a maltreated child's permanency plan without understanding that certain judicial findings are necessary to legalize the status of an undocumented child. By understanding the consequences of their actions, judges can prevent the child's deportation to another country, enable the child to work legally when old enough, qualify the child for health insurance, and give the child the opportunity to pursue an education beyond high school. Similarly, a practitioner can not competently advise a respondent parent about making an admission in an abuse case, without first providing information about the potential immigration consequences of the admission — such as deportation. The Court's integral and vital obligations to help families, to protect children, and to provide permanency are utterly meaningless for a family without legal status if the Court's judges, practitioners, and agencies are ignorant of these immigration-related issues.

III. THE SPECIAL IMMIGRANT JUVENILE CASE

One of the most profound ways an informed New York City Family Court can better serve immigrant families is under the auspices of a Special Immigrant Juvenile (SIJ) petition.[23] For children and youth without status who end up in the Family Court system through abuse, neglect, guardianship, and delinquency cases, this petition offers some hope for escaping the bleak life of an undocumented immigrant. These children — who number over 1.6 million in the United States and at least 110,000 in New York State alone[24] — are at constant risk of deportation to

22. *See* PASSEL, *supra* note 7, at 3.

23. INA § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J) (2006) (defining "special immigrant"); 8 C.F.R. § 204.11(a) (2003) (requirements for "special immigrant juvenile" status).

24. *See* PASSEL, *supra* note 7, at 3.

a country they often barely remember. Fewer than half have health insurance. It is nearly impossible for them legally to pursue an education beyond high school.[25] Even worse, there are scant opportunities for these children to gain legal status in the U.S. as permanent residents. Almost every legal method, such as political asylum applications[26] or family petitions,[27] is available only in very limited circumstances, and children are far less aware of these options than are undocumented adults.

In 1990, however, Congress enacted a provision of the Immigration and Nationality Act that allows children who are under the jurisdiction of a state's family or juvenile court to seek permanent legal residence (commonly called a "Green Card") through a SIJ petition.[28] The provision recognizes that children for whom the state has become a guardian already have many challenges in their lives and should be provided a unique and compassionate method for becoming legal residents.[29]

A. THE ESSENTIAL ROLE OF THE FAMILY COURT

Family Court plays an indispensable role in enabling children to obtain SIJ status. While the SIJ petition itself must be brought with the Department of Homeland Security (DHS), these petitions can not be brought until the family court has made "special findings."[30] These factual findings concern matters within the Family Court's traditional purview — whether family reunification is a viable option and where it is in a child's best interest to reside. The Family Court does not make a final determination on the child's immigration status — this decision remains solely within the power of DHS. Without the Family Court's special

25. *Id.*

26. INA §§ 101(a)(42), 208.

27. *Id.* § 201.

28. *Id.* § 101(a)(27)(J): 8 C.F.R. § 204.11(a)–(c).

29. An additional, unpassed, federal statute, the Development, Relief, and Education for Alien Minors (DREAM) Act, which has been stalled in Congress since 2001, would allow temporary conditional legal status for undocumented youth who are high school graduates and have lived in the United States for at least five years. See Josh Bernstein, *Help for Immigrant Youth?: The Dream Act*, 39 CLEARINGHOUSE REV. 274 (2005) (discussing legislative history and benefits of the DREAM Act).

30. 8 C.F.R. § 204.11(c)(3); *see also In re* Menjivar, Case No. A70 117 167, at 4 (A.A.U. Dec. 27, 1994).

findings, however, DHS can not grant permanent legal status to the child.

The sad truth is that many youths age out of the Family Court and foster care systems before anyone ever notices their eligibility for SIJ status. Neither agency caseworkers, law guardians, nor judges routinely determine whether youth have legal status. Nor do they routinely ask what their obligations are on behalf of these youth. No policy or legislation exists to compel any of these groups — all of whom are charged with looking after children in family court — to make these inquiries. Even when someone does advocate appropriately for special findings for an undocumented youth, it is often too late because SIJ status must be granted before the child turns 21, and because DHS often takes years to process the SIJ application. Such failures and delays have a devastating effect on undocumented youth, as they lose their best, and usually their only, opportunity to obtain legal immigration status. Our courts, social service organizations, foster care agencies, and law guardians should all take steps to quickly recognize the children who are eligible for SIJ status, thus vindicating Congress' intent in passing the statute and beginning the process of providing those children a promising future.

In order to obtain special findings, the child's representative in the abuse, neglect, guardianship, or delinquency case must bring a written motion, accompanied by an affidavit from the child.[31] The motion asks the family court to make the following findings in the form of written orders: (1) that the child is dependent on the juvenile court; (2) that the child is eligible for long-term foster care based on the fact that her parents have abandoned, abused, or neglected her; and (3) that it is not in the best interest of the child to be returned to her country of origin.

Each of the special findings has specific meanings in the federal statutes and regulations. For purposes of immigration law, a child is "dependent" on the Family Court if the Court has jurisdiction over a case involving the child. The Court need not find the child financially dependent on the state nor place her in the

31. While special findings can also be sought through an oral application, bringing a motion is the better practice, especially in courts that may be unfamiliar with special findings and the SIJ process. These motions are almost always unopposed.

custody of the state (for example, by placing her in foster care) to satisfy the dependency requirement.[32]

To find a child "eligible for long-term foster care," the Family Court must make a two-part determination: (1) family reunification is not a viable option for the child, (2) due to abuse, neglect, or abandonment by the child's parents.[33] A child can be deemed "eligible" for foster care even where she is not placed in foster care and is not the subject of an abuse or neglect case. In many guardianship cases, for example, a relative who has been caring for a child is petitioning the court to legalize that caretaking relationship. The Court may make a finding of foster care eligibility if there exists no reasonable possibility of the child being returned to her parents and if there is evidence of maltreatment or abandonment by the parents. The maltreatment or abandonment can be shown through an affidavit of the child or other witnesses or through oral testimony.[34]

Finally, DHS specifically delegates to the Family Court the responsibility to find that it is not in the child's best interest to return to her country of origin.[35] As in other cases, in determining what is in a child's best interest, the Court must consider the welfare of the child, the child's current placement, and her current and future psychological health, physical health, and happiness.[36] The Family Court's authority to make this determination gives it significant influence over the child's future.

After — and only after — the special findings are obtained in Family Court, a petition may be filed with DHS for SIJ status.[37] DHS incorporates the Family Court's special findings in its consideration of the child's petition.[38] This portion of the process can

32. 8 C.F.R. § 204.11(c)(3); *see also In re* Menjivar, Case No. A70 117 167, at 4 (A.A.U. Dec. 27, 1994).

33. 8 C.F.R. § 204.11(a).

34. A finding of "foster care eligibility" is even possible in delinquency cases, so long as the two conditions are satisfied. Advocates should, however, proceed with caution on delinquency cases. Certain criminal offenses make an undocumented individual ineligible for any kind of legal status. While many of these offenses do not apply for special immigrant applicants, some do. The specific grounds are listed at INA § 212(a), 8 U.S.C. § 1182(a) (2006), and the exemptions for special immigrant youth can be found at INA § 245(h)(1), (2)(A).

35. *See* 8 C.F.R. § 204.11(c)(6); *see also* 58 Fed. Reg. 42847 (1993).

36. Eschbach v. Eschbach, 436 N.E.2d 1260, 1263 (N.Y. 1982).

37. The forms can be found at http://www.cis.gov (last visited Jan. 20, 2007).

38. 8 C.F.R. § 204.11(a).

drag out over many months,[39] and culminates in an interview of the child by an immigration officer who makes the ultimate decision on whether to grant the child permanent legal status.[40]

B. THE IMPORTANCE OF SIJ COMPETENCY IN FAMILY COURT

The most powerful argument for increased awareness of the Family Court's role in SIJ cases comes from the stories of the children and youth themselves who end up in court through abuse, neglect, guardianship, or delinquency cases. Some come to the United States on their own to escape abusive home environments; some are kicked out of their homes and illegally sent to the United States by parents who refuse to care for them anymore; and some are brought to the United States illegally by their parents and then abused, neglected, or abandoned once the family is here. Here are some experiences of undocumented youth in their own words:[41]

> *Maria Q.*: I was born in Nicaragua on November 9, 1990. When I was about three, my mother left me with my grandmother and left Nicaragua. I last saw my father when I was five years old. When I was seven, my grandmother got sick and could not take care of me anymore. She sent me to the United States. When I got here, my mother was living with her boyfriend. He did things to me I did not want him to do. He sexually abused me. My mother did not believe me. I did not want to stay with them anymore and I was placed in a foster home. I don't want to go back to my mother. She and her boyfriend still live together, and I do not want to live with them. I don't want to go back to Nicaragua. There is nobody there who would care for me.

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39. Anne Chandler et al., *The ABCs of Working With Immigrant Children to Obtain Special Immigrant Juvenile Status for Those Abused Neglected or Abandoned*, in AMERICAN IMMIGRATION LAWYERS ASSOCIATION IMMIGRATION & NATIONALITY LAW HANDBOOK 308 (2006–2007).

40. INA § 101(a)(27)(J).

41. Adapted from their affidavits in SIJ cases in which they were represented by the Hofstra Child Advocacy Clinic. Names and other identifying information have been changed to protect the confidentiality of the Clinic's clients.

Mia L.: I am sixteen years old. I was born in a small village in China. My parents' home and my village are not safe places for me to live. My father beats me and my mother, and he is a longtime abuser of alcohol. I have seen him beat my mother many times. My parents made me work around the house since I was five years old, and have not let me go to school since I was seven. When I came to the United States, I was detained in Chicago for two months while Immigration tried to locate a relative that I could live with. Thankfully, Immigration found my uncle, and I was sent to New York to live with him while Immigration decided when to deport me back to China. I am going to high school now. I try to keep my grades up.

Ali K.: I was born on September 7, 1989, in Thailand. My father never liked me. When I lived in Thailand, he beat me with a whip every day when he came home from work. I think my mother cared for me in her own way, but she was not able to stop my father from beating me. When I was eleven, my father sent me to New York. Another family that I did not know brought me there. I did not want to go. I was afraid. When we arrived in New York, the family left me on the doorstep at a house while they went to a hotel. The man in the house only let me stay there for one month, and then he sent me to another house. I stayed there for two years. We were not like a family, but I was glad to have a safe place to live.

These individuals were all fortunate that someone close to them — a teacher, a friend, a relative — knew enough about SIJ petitions to encourage them to seek legal help. Unfortunately, many children and youth like them slip quietly through the cracks, condemned to the difficult and marginalized status of an illegal immigrant. Lawyers, judges and court agencies who are knowledgeable enough about SIJ, and their role in procuring it, can ensure that immigration status of youth and children in the Family Court system does not become an additional obstacle to navigate.

IV. COLLATERAL CONSEQUENCES OF FAMILY COURT ADMISSIONS

While Family Court determinations can be necessary components of immigration applications like those in the SIJ cases described above, determinations in Family Court can also have devastating *negative* consequences for undocumented immigrants or even immigrants with legal status who are not citizens.[42] The harshest of these consequences, including deportation or a later denial of re-entry into the United States,[43] can easily result from the kinds of admissions frequently made in Family Court, including child abuse, child neglect, child abandonment,[44] domestic violence,[45] violation of protection orders,[46] and substance abuse.[47]

Making matters even more difficult for individuals without legal status, Congress has repeatedly increased the number of possible negative consequences of admissions of criminal conduct while the federal government has simultaneously increased enforcement of those consequences over recent years.[48] More noncitizens who make admissions are being identified and reported to immigration authorities, and the deportation proceedings are being conducted much more quickly.[49] Individuals who make admissions that would make them subject to removal are therefore much more likely to be deported than was once the case.

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42. While this paper focuses on illegal immigrants, who are a particularly vulnerable population, collateral consequences are one area where Family Court determinations interplay with issues for immigrants with legal status as well.

43. Most of the crimes and acts discussed here subject an individual who is currently in the United States to deportation and are grounds for denying an individual admission to the U.S. in the first place. *See* NATIONAL LAWYER'S GUILD, IMMIGRATION LAW AND CRIMES §§ 1.7, 3.6 (2006).

44. INA § 237(a)(E)(i); 8 U.S.C. § 1227(a)(E)(i) (2006); *see also* Guerrero de Nodahl v. INS, 407 F.2d 1405 (9th Cir. 1969) (willful infliction of injury to a child constitutes moral turpitude thereby subjecting individual to deportation); *In re* Phong Nguyen Tran, 21 I. & N. Dec. 291 (BIA 1996) (assault with intent to harm spouse or parent of one's child is an act of moral turpitude thereby subjecting individual to deportation).

45. INA § 237(a)(E)(i).

46. *Id.* § 237(a)(E)(ii).

47. *See id.* § 212(a)(2)(A)(i).

48. *See, e.g.*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (1996); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009-546 (1996); Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 (1990).

49. MANUEL D. VARGAS, REPRESENTING NONCITIZEN CRIMINAL DEFENDANTS IN NEW YORK STATE § 1.1 (1998).

A. HOW FAMILY COURT ADMISSIONS AFFECT IMMIGRATION STATUS

While pratitioners are generally aware that admissions in *criminal* cases can lead to harsh immigration consequences,[50] few Family Court practitioners and judges are aware that many admissions in that Court can be equally harmful. The federal law concerning acts of moral turpitude and drug use provides a particularly relevant example: ". . . any alien convicted of, or who admits having committed, *or who admits committing acts which constitute the essential elements of* (I) a crime involving moral turpitude . . . or (II) a violation of . . . any law or regulation . . . relating to a controlled substance . . . is inadmissible."[51]

In 1990, Congress added a new ground for excludability and deportability: admission to acts relating to criminal use of a controlled substance.[52] The crucial aspect of this legislation for Family Court judges and practitioners is that the admissions need not be in criminal court. Immigration officials have long had the power to deport, or to refuse entry to, immigrants who engaged in conduct involving moral turpitude or illegal drug possession, even if the conduct did not lead to a criminal conviction.[53] Thus, if an individual admits to acts that constitute the essential elements of a crime of moral turpitude or possession of illegal drugs, the immigration official can draw a negative inference of guilt and refuse admission or order deportation.[54] Such admissions need not be in a criminal court and have included admissions to a medical doctor[55] or merely checking off a box on a customs form.[56] An ad-

50. *Id.*

51. *See* INA § 212(a)(2)(A)(i) (emphasis added).

52. *See* Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 5067 (1990) (codified as amended in 8 U.S.C. § 1182(a)(2)(A)(i)(II)) (amending classes of excludable aliens); *id.*, Pub. L. 101-649, 104 Stat. 5080 (current version at 8 U.S.C. § 1227(a)(2)B)) (amending grounds for deportation).

53. S.Rep. No. 1137, 82d Cong., 2d Sess. 8 (1974). Under the 1917 Act, exclusion and deportability were only permitted if the individual admitted both the factual elements of the crime, and specifically to the fact that she had committed the crime. *See* United States *ex rel.* Jelic v. District Director, 106 F.2d 14 (2d Cir. 1939); Howes v. Tozer, 3 F.2d 849 (1st Cir. 1925); *Ex parte* Rocha, 30 F.2d 823 (S.D. Tex. 1929).

54. *See* INA. § 212(a)(2)(A)(i), 237(a)(2)(A)(i).

55. Pazcoguin v. Radcliffe, 292 F.3d 1209 (9th Cir. 2002).

56. Argaw v. Ashcroft, 395 F.3d 521 (4th Cir. 2005).

mission in Family Court clearly meets that level of legal formality.

In addition, the INA definitions of moral turpitude and controlled substance encompass many admissions that might occur in family court.[57] The Bureau of Immigration Appeals (BIA) and federal courts have held, for example, that harming a child[58] and battering a spouse[59] both constitute acts of moral turpitude. Neglect and abuse of children, drug abuse by parents, and domestic violence are issues that the family court confronts many times every day. Often the resolution of those cases involves an admission. Because of how these admissions are considered by immigration officials, such routine acts in court can have devastating effects on respondents, as well as on their families. Consider the following scenarios:[60]

Selena and Rodrigo L: The Administration for Children's Services (ACS) filed a case against Selena and Rodrigo L for neglect. The petition alleged that Mr. L engaged in domestic violence against Mrs. L in the presence of their six-year-old daughter, Ana. The court did not remove Ana, but issued an Order of Protection excluding Mr. L from the home. In violation of the Order of Protection, Mr. L went to the home shortly thereafter to see his daughter. Mrs. L called the police, and Mr. L was arrested. Mr. L admitted in Family Court that he violated the Order of Protection. He eventually made an admission to the petition filed by ACS, and was allowed back into the home contingent on his successful completion of a batterer's program and individual counseling. As the Family Court proceedings progressed, Mr. L was also in the process of applying for legal immigration status. When the immigration officer checked for any arrests, he

57. There is one exception which is particularly relevant to Family Court. Acts of juvenile delinquency are generally not considered convictions for crimes within the contexts of immigration law. *See In re* Ramirez-Rivero, 18 I. & N. Dec. 135 (BIA 1981). The status of Juvenile Offender and Youthful Offender admissions is less settled.

58. *See* Guerrero de Nodahl v. INS, 407 F.2d 1405 (9th Cir. 1969) (willful infliction of injury to a child constitutes moral turpitude); *In re* Phong Nguyen Tran, 21 I. & N. Dec. 291 (BIA 1996) (assault with intent to harm spouse or child is act of moral turpitude).

59. *See* Grageda v. INS, 12 F.3d 919 (9th Cir. 1993) (willful injury to spouse constitutes act of moral turpitude).

60. The fact patterns in these cases are based on actual cases; all identifying facts have been changed to protect the confidentiality of the parties.

discovered the violation of the Order of Protection. When the officer asked for more information, Mr. L explained his admissions to both the domestic violence allegations and the violation. The officer denied Mr. L's application, and DHS subsequently commenced deportation proceedings against him. Ana has not seen her father in two years.

Roderick and Leonie T: The T's moved to this country from Haiti when Leonie was pregnant with their older son, now age two. They came to the country illegally, but applied for political asylum, claiming that because of their political affiliations they would be tortured and even killed if they returned to Haiti. While their political asylum application was pending, the police stopped the T's during a routine traffic check and discovered two bags of marijuana in the car. The police arrested the T's for possession of marijuana. Because the children, aged two years and six months, were with the T's at the time of the arrest, the police notified ACS. ACS filed a case in Family Court and placed the children in foster care. The T's eventually avoided an admission in the criminal case by agreeing to an adjournment in contemplation of dismissal. In Family Court, the case was referred to family treatment court (FTC).[61] On the advice of their lawyer, the T's made an admission in order to qualify for the services of FTC. During their interview with the Department of Homeland Security for political asylum, they were asked about any pending litigation. They explained that they have a case for child neglect, and the immigration officer subsequently discovered they made an admission to drug possession in family court. The T's will most likely be denied political asylum and ordered deported back to Haiti. Their children remain in foster care in New York.

The parents in these cases would almost certainly not have made the admissions in Family Court if they had been properly advised. The admissions lead to the parents' deportation and consequent separation from their children. They left the children

61. Family Treatment Court serves respondents where the allegations in the neglect petition concern drug or alcohol use.

without their parents, the families broken up. Poor lawyering crushed any hope of helping either family become a healthy unit — a consequence completely anathema to the goal of Family Court intervention in the first place.

B. THE IMPORTANCE OF UNDERSTANDING COLLATERAL CONSEQUENCES

Just as Family Court judges and practitioners have educated themselves on the potential collateral consequences of Family Court findings in criminal matters, they also should be cognizant of the potential collateral consequences of Family Court findings on immigration matters for families like the L's and the T's. There are several reasons for doing so. First, admissions in Family Court can lead to immigration consequences considered by many to be far harsher than the criminal consequences.[62] Indeed, admissions to drug use or crimes of moral turpitude, like child abuse, could lead to deportation and a permanent bar from reentry into the United States, even for individuals who have lived, raised families, and worked in this country for many years.

Second, Family Court practitioners can have a significant impact on the consequences of admissions in Family Court. If aware of the potential effects of an admission, practitioners can intelligently negotiate the allegations to which a respondent admits, and can understand the potential importance of obtaining a "consent" admission,[63] under which the respondent never states on the record that she committed any of the acts in the petition. The potential for a properly informed practitioner to have an impact is especially high in the context of Family Court, where nearly every case begins with a goal of family reunification or, in a case in which the children have not been removed, maintenance

62. In a case testing the retroactive application of the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. 104-132, 110 Stat. 1214 (1996), Federal District Court Judge Jack Weinstein wrote that:

Deportation to a country where [an immigrant] has not lived since childhood; or where the immigrant has no family or means of support; or where he or she would be permanently separated from a spouse, children and other loved ones, is surely a consequence of serious proportions than any immigrant would want to consider in entering a plea.

Mojica v. Reno, 970 F. Supp. 130, 176 (E.D.N.Y. 1997).

63. *See* N.Y. FAM. CT. ACT § 1051(c) (McKinney 2006).

of the family structure.[64] Deportation obviously makes both of those goals a near impossibility, especially where the children are legal citizens and would therefore not be subject to deportation. As a result, judges, as well as ACS and law guardians, may be significantly more open to crafting admissions and findings in a way that limits the potential for deportation and subsequent destruction of the family unit.

Third, and perhaps most important, lawyers have a duty to inform their clients adequately about the consequences of any admission. Lawyers have an ethical duty to represent their clients competently.[65] In the context of criminal court admissions, it has long been recognized that this duty of competence includes properly informing a client of the potential immigration consequences of the criminal proceeding. The ABA Standards for Criminal Justice suggest that defendants who may be subject to deportation due to an admission should be advised properly,[66] and the National Legal Aid and Defender Association states that defense counsel has a duty to ensure clients are fully aware of consequences of conviction, including deportation.[67] Because the immigration consequences are the same for the types of Family Court admissions described above as they are for admissions in criminal court, there is no basis for distinguishing the ethical duty of family lawyers to inform their clients of those consequences from that of criminal lawyers.

V. RECOMMENDATIONS FOR ENSURING THE COMPETENCY OF THE FAMILY COURT

It is imperative that the bench and bar of Family Court find ways to ensure that the determinations made by judges, the advice given by practitioners, and the services provided by agencies in the course of Family Court proceedings account for the immigration status of the youth and families the Court serves. Failing to do so would be irresponsible given the number of individuals

64. *See id.* § 1089(c)(4).

65. N.Y. STATE BAR ASS'N, LAWYER'S CODE OF PROF'L RESPONSIBILITY DR 6-101 (2005), *available at* http://www.courts.state.ny.us/attorneys/clientattorneyrel.shtml.

66. ABA STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY 75 (2d ed. 1982).

67. *See* NLDA PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION 6.2(a)(3) (1994).

who are not in the United States legally, the dramatic impact that immigration determinations can have on a family, and the collateral consequences that many common Family Court actions can have on immigration determinations. The remainder of this Article offers some recommendations — none of which impose any substantial costs — for raising the level of competency in the Court on relevant immigration issues.

A. JUDGES SHOULD HOLD CHILD PROTECTION AGENCIES RESPONSIBLE FOR TAKING PROPER ACTIONS ON BEHALF OF IMMIGRANT CHILDREN IN THEIR CARE

Child protection and foster care agencies, as the temporary custodians of many children in the Family Court system, are responsible for ensuring that eligible children in their care petition for SIJ status. These agencies should identify which children are eligible and communicate with each child's lawyer (or hire a lawyer for the child) to be sure the child does not leave the foster care system at risk of deportation and with no real potential for future employment, education, and health care. Some states formally place this responsibility on agencies. In California, for example, legislation requires local child welfare agencies to submit reports which verify that youths in their care have proof of citizenship or residence before they age out of the foster system.[68] Agencies in California must also teach all undocumented youth in their care how to acquire and complete a SIJ application.[69] New York's child protection and foster care agencies should follow this example. Especially with older foster children, courts should actively inquire of agency workers whether they are aware of a youth's immigration status, and, where appropriate, what actions the agency has taken to legalize the status of undocumented youth and children.

68. CAL. WELF. & INST. CODE § 391(b)(2) (West 2004).
69. CAL. CODE REGS § 31-236(i)(4)(D) (West 2004).

B. CHILDRENS' REPRESENTATIVES SHOULD BE REQUIRED TO INQUIRE ABOUT THEIR CLIENTS' IMMIGRATION STATUS AND TAKE APPROPRIATE ACTION ON BEHALF OF CLIENTS WHO LACK LEGAL STATUS

Law guardians should file special findings motions for undocumented clients and should work to ensure that petitions for SIJ status are filed with DHS. Indeed, law guardians' statutory obligation to advance their clients' interests requires them to do so.[70] The law guardian ought to investigate the child's immigration status, the likelihood of the child's reunification with her parents, and any history of abuse, neglect or abandonment, for every client in a guardianship, abuse, neglect or delinquency case. Whenever appropriate, law guardians should zealously advocate for special findings for their clients and assist in the preparation of the documents that must be filed with DHS. Legal clinics and non-profit organizations in New York already do SIJ work on behalf of children. The Door,[71] a legal services organization for youth in Manhattan, has been handling SIJ cases for several years; the lawyers at the Juvenile Rights Division of the Legal Aid Society[72] regularly seek special findings for their clients in abuse and neglect cases; and some law school clinics represent children in both the Family Court and DHS portions of the SIJ process.[73] Yet these organizations can provide only so much legal support. Every law guardian in New York should be trained to identify child clients who are eligible for special immigrant status and to properly advocate for those clients.

C. PARENTS' ATTORNEYS SHOULD BE REQUIRED TO BE AWARE OF THEIR CLIENT'S IMMIGRATION STATUS AND HOW IT MAY BE AFFECTED BY AN ADMISSION

Admissions can have dramatic and devastating consequences on an immigrant's ability to stay in the United States. This is

70. N.Y. FAM. CT. ACT § 241 (McKinney 2006).

71. *See* The Door Home Page, http://www.door.org.

72. *See* Legal Aid Society of New York Home Page, http://www.legal-aid.org.

73. *See, e.g.*, Hofstra Law School Child Advocacy Clinic Website, http://law.hofstra.edu/Academics/Clinics/clinic_descriptions.html; Columbia Law School Child Advocacy Clinic Website, http://www.law.columbia.edu/focusareas/clinics/childadvocacy.

true even when the admission is made in Family Court. The lawyers for parents must know those consequences in order to give competent, informed legal counsel when advising their clients on whether to make an admission, and when negotiating the acceptable terms of any admission with the lawyers for child protective services agencies, the law guardians, and judges.

D. JUDGES SHOULD BE AWARE OF THEIR ROLE

Judges in the Family Court should ensure they are fully familiar with their limited but vital role in assisting undocumented immigrant youth.[74] While Family Court judges cannot make any determination about a child's immigration status, they are specifically granted the power and responsibility to make the special findings that are a necessary precursor to a SIJ petition to DHS and collateral consequences. Similarly, judges should only accept an admission that has been made after a respondent has been fully advised of the potential consequences of that admission on any immigration matters which the respondent may have pending, or with which the respondent may be involved in the future.

E. FAMILY COURT AGENCIES SHOULD CREATE WRITTEN RESOURCES FOR JUDGES AND ATTORNEYS

Criminal defense agencies and organizations have for many years developed resources to ensure that defense attorneys are aware of the collateral consequences of criminal court convictions and admissions.[75] They publish handbooks and sponsor conferences that produce written recommendations.[76] The agencies that regularly work in Family Court, including the New York City Judges Association, the Legal Aid Society, the 18-b Panel, and ACS's Family Court Legal Services, should take similar actions for Family Court findings and admissions. These resources

74. See *In re* Zaim R., 822 N.Y.S.2d 368 (N.Y. Fam. Ct. 2006), for an example of how a lack of awareness by judges of the meaning of the SIJ statutes can have devastating effects on youth.

75. *See* ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 66; VARGAS, *supra* note 49.

76. The New York State Judicial Institute at Pace Law School, for example, has for the last two years hosted successful conferences on the collateral consequences of criminal convictions, including immigration consequences.

should be provided to all Family Court attorneys and judges so that no determinations are made with immigration consequences that ultimately destroy the child's chance of reuniting with her family or achieving a permanent placement in the United States.

F. COURTS SHOULD DEVELOP A CENTRAL RESOURCE ON IMMIGRATION ISSUES FOR ATTORNEYS, FAMILIES, AND YOUTH

Family Court already has experts — both court-employed and volunteer — who are available in the court itself for families involved in litigation. Many boroughs, for example, already employ court attorneys with expertise in a variety of issues. Each borough could do the same for immigration issues, by either hiring an attorney or training one on staff. This recommendation would work, however, only in conjunction with training for all attorneys and judges in recognizing potential immigration issues that would require the advice of an expert. Another possibility is to provide an office or table in a visible section of the Family Court for an agency with immigration expertise, such as The Door or the Safe Horizon Immigration Law Project.[77] This centralized area would become a resource not just for attorneys and judges, but for the families who come to Family Court. The arrangement would be similar to the current one for the educational consultant, health insurance, and Legal Information for Families Today tables.

G. FAMILY COURT JUDGES AND LAWYERS SHOULD ADVOCATE FOR LEGISLATIVE OR RULE CHANGES

There is much room to make the laws and rules that govern Family Court more responsive to immigration issues. Lawyers and judges should take the lead in reform efforts, just as they have taken the lead on issues such as reforming how permanency hearings are conducted[78] and getting long overdue raises in the

77. *See* Safe Horizon Legal Services Website http://www.safehorizon.org/page.php?nav=snb&page=legalservices.

78. *See* CITIZENS' COMM. FOR CHILDREN OF N.Y., INC., THE ADOPTION AND SAFE FAMILIES ACT (ASFA) AND THE FAMILY COURT (2002), *available at* http://www.cccnewyork.org/publications/ASFAReport.pdf.

pay rates for 18-b attorneys.[79] There are laws in other states that can serve as a model for legislative change here in New York. For example, the California law described above requires caseworkers to assist any foster youth who have immigration-related problems.[80] Among these changes, during every allocution at an admission the Court should be required to ask whether the respondent has been advised about the potential immigration consequences of her admission.

H. THE COURT AND BAR ORGANIZATIONS SHOULD PROVIDE ONGOING MANDATORY TRAINING FOR JUDGES AND ATTORNEYS ON IMMIGRATION ISSUES

Finally, in order to address the immigration needs of the Family Court clients, the Court must provide ongoing training for judges and attorneys. Immigration law is a constantly changing area, and the changes often can have dramatic effects on an immigrant's ability to remain in this country. Not only should attorneys be kept abreast of the basics of any new law, but new attorneys and judges should receive mandatory training on immigration issues as part of their initial training for practice in Family Court.

VI. CONCLUSION

New York City has long served its residents in many ways regardless of their immigration status.[81] The Family Court is serving a growing number of families and children without legal status. As this number grows, the judges, practitioners, and agencies that work in the Court must ensure that they accommodate the different kinds of legal issues and problems that this population brings with it. The recommendations made in this Article are only an opening slate of suggestions to reach that goal.

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79. Gary Spencer, *Proposal to Boost 18-B Fees Gains Broad-Based Support*, N.Y. L.J., June 3, 1999, at 1.

80. See *supra* notes 68–69.

81. The City's Administration for Children's Services includes a written policy of providing services to all families and children in need regardless of their status. *See generally* NYC ADMIN. FOR CHILDREN'S SERVS., IMMIGRATION AND LANGUAGE GUIDELINES FOR CHILD WELFARE STAFF (2d ed. 2006) *available at* http://home2.nyc.gov/html/acs/downloads/pdf/immigration_language_guide.pdf.

They are designed to increase the competence of court professionals and advocates through education and training; to force judges, agencies, and advocates to be watchful over each other's actions to ensure that significant immigration-related issues are not missed; and to provide court professionals and advocates with resources, such as handbooks and "in-house experts," to improve their understanding of collateral immigration consequences. Only with competence, vigilance, and access to expert knowledge can the judges, agencies, and lawyers of the Court meet their vital obligation to serve all families and children in need, regardless of immigration status.