

LEGAL FACT SHEET

Help Arranging Care for Children when Parents are Facing Deportation

Parents^[2] who are at risk of deportation face difficult decisions regarding the care of their citizen minor children. If they choose to leave children here in the United States — even temporarily — they must decide how to provide a non-parent with the legal authority for caregiving.^[3]

New strategies for parents and children are needed because of the dire circumstances and widespread dragnet of persons at risk of deportations that are sweeping across the country. Federal enforcement agencies, Homeland Security, or U. S. Citizenship and Immigration Service (USCIS), are at the center of media and advocate reports on the ramping up of searches, arrests, detentions, and deportations of undocumented residents.

In June of 2018, New York Governor Andrew Cuomo signed into law two new provisions aimed to improve strategies for non-parental care of children by amending New York’s standby guardianship (Chapter Law 79) and parental designation (Chapter 80) laws. This memo will outline the legal and political landscape that has made these laws imminently necessary, as well as two procedures for designating parental authority to non-parents.

Who Is Facing Detention and Deportation?

Statistics from national surveys, administrative data and other sources of information regarding the number of persons who may face detention and deportation vary,^[4] but estimates generally place the total population at about 11.1 million, or approximately 3 percent of the U.S. population.^[5]

Detention is the practice of incarcerating immigrants while they await a determination of their immigration status or potential deportation. Once detained by Immigration and Customs Enforcement (ICE) and its Enforcement and Removal Operations (ERO), bond is unlikely and deportation likely, because of a recent U. S. Supreme Court decision that permits indefinite detention. A detainee may now be held until either the application proceeding is completed or until removal proceedings have been completed, denying bond hearings to thousands of immigrant applicants and asylum seekers.^[6]

In 2016, the United States government detained nearly 360,000 people in a sprawling system of over 200 immigration jails across the country.

In addition to millions of undocumented immigrants, persons who are potentially subject to deportation also include Deferred Action for Childhood Arrivals Program (DACA) and persons with Temporary Protective Status (TPS).

LEGAL FACT SHEET

DACA allows individuals who were brought to the United States as children to receive a renewable two-year period of deferred action from deportation and become eligible for a work permit in the U.S. A reported 793,026 people have received DACA initial approval, while 895,574 have received renewals.[7] These figures include 292,070 applications accepted and 273,000 approved in New York State.[8] Many DACA children are now adults who have children who were born in the United States. Plans to phase out DACA were initiated by the Trump Administration on September 5, 2017, allowing Congress six months to pass — a more permanent solution. [9]

The Trump administration has also said that it will terminate Temporary Protected Status for nearly 60,000 Haitians in July 2019, more than 262,000 Salvadorans in September 2019 and 57,000 Hondurans in January 2020.

Citizen Children Who Are Minors

Children who were born in the United States are citizens. They have birthright citizenship pursuant to the 14th Amendment of the U.S. Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside.

Among the millions facing deportation, there are many parents with children who are United States citizens because they were born here, but who have not reached adulthood. Almost six million citizen children under the age of 18 live with a parent or family member who is undocumented.[10] Additionally, a recent report from the Center for Migration studies estimates that more than 273,000 U.S.-born children have a parent with TPS from these countries.[11] The number of DACA dreamers with minor citizen children is not known.

Options for Care of Citizen Children

In New York, a variety of custodial arrangements can provide care for children. Most involve court proceedings: state care and custody (foster care) via Family Court Act Article Ten abuse and neglect proceedings, surrenders for adoption (N.Y. Soc. Serv. Law §383), voluntary placement agreements (N.Y. Soc. Serv. Law §384a), or destitute child status (N.Y. Fam Ct. Act 10-C). In addition to state care, there are also private court ordered arrangements: adoption (N.Y. Dom. Rel. Law. §112b, guardianship (N.Y. Surr. Ct. Proc. Act §1700) and N.Y. Fam. Ct. Act §661, legal custody (N.Y. Fam. Ct. Act §651). A few informal custody arrangements do not require court proceedings: parental designation (N.Y. Gen. Oblig. Law §5 1551ff; and “persons in parental relationship” (N.Y. Educ. Law §3212; N.Y. Pub. Health Law §§2504, 2164).[12]

Court proceedings invariably will include scrutiny of the proposed non-parent caregiver and their household. Investigations may involve criminal record checks, home studies, orders of protections records, domestic violence, sex offender, and child abuse registry checks, and caregiver residential histories.

For persons who may become caregivers of children whose parents are facing deportation, there are fears that such investigations may bring the unwelcome attention of federal immigration authorities.

LEGAL FACT SHEET

Risk of ICE Identifying Undocumented Residents Because Of Court Proceedings

This memo does not attempt to describe how ICE may identify persons involved in family court proceedings who are subject to deportation. However, it is important to provide some relevant information that illustrates the issues.

It is not uncommon for immigration authorities to obtain family court information by requiring individuals who are applying for immigration benefits or relief from removal to produce their family court records. Individuals are frequently compelled to produce records regardless of the privacy protections afforded by the New York Family Court Act and other state regulations. In other cases, immigration authorities discover family court information automatically through data-sharing agreements between state, local and federal agencies.^[13] Harmful immigration consequences can also be triggered when an Order of Protection is issued by the Family Court and entered into the New York State Order of Protection Registry (“OP Registry”).^[14]

An NYS Office of Court Administration Advisory Council on Immigration Issues in Family Court Memo: “Adverse Consequences to Family Court Dispositions”, examines in detail when family court proceedings may result in federal authorities identifying immigrants who may be subject to detention or deportation. The memo lays out the limited circumstances when information may reach federal authorities. But despite the apparent limitations, families are understandably suspicious and fearful that court proceedings could lead to arrests and detentions.

Standby Guardian and General Obligations Laws Provide “Springing” Powers for Provision of Care

At the end of the 2018 legislative session, New York’s Legislature passed two amendments that Governor Cuomo signed into law at a signing ceremony on June 24th in the Bronx. The two chapter laws amend statutes that provide for the designation of parental powers that may “spring up” upon the arrest, detention or deportation of a parent. The standby guardian written designation is valid for sixty days whereupon the named standby must file a petition for appointment (NY CLS SCPA § 1726(2)(d)(iv)). The parental designation (NYS General Obligations Law §§ 51551–55) does not require court appointment and thus may be of special importance when families wish to avoid the risks of unwanted attention from federal immigration officials.

Standby Guardianship Chapter Law 79 of the Laws of 2018

The Surrogate’s Court Procedure Act (SCPA) provides that a standby guardian can be appointed (NY CLS SCPA § 1726(1)(a)). “Standby guardian” means (i) a person judicially appointed ... as standby guardian of the person and/or property of an infant whose authority becomes effective upon the incapacity, administrative separation, or death of the infant’s parent, legal guardian, legal custodian or primary caretaker or upon the consent of the parent, legal guardian, legal custodian or primary caretaker; and (ii) a person designated ... as standby guardian whose authority becomes effective upon the death, administrative separation, or incapacity of the infant’s parent, legal guardian, legal custodian or primary caretaker or upon the debilitation and consent of the parent, legal guardian, legal custodian or primary caretaker.

LEGAL FACT SHEET

The Chapter Law^[15] amends the Surrogate’s Court Procedure Act to expand §1726, allowing designations for a “standby guardian” to include parents facing “administrative separation” *i.e.*, detention or deportation, etc.

Administrative separation is defined as “A parent, legal guardian, legal custodian or primary caretaker’s (I) in connection with a federal immigration matter: arrest, detention, incarceration, removal and/or deportation; or (II) receipt of official communication by federal, state or local authorities regarding immigration enforcement which gives reasonable notice that care and supervision of the child by the parent, legal guardian, legal custodian, or primary caretaker will be interrupted or cannot be provided.”

Originally, this statute was enacted at the height of the AIDS crisis, to facilitate the immediate transfer of guardianship powers when a parent or a guardian can foresee their inability to care due to debilitating illness or death. In 2000, SCPA §1726 was amended to add a legal custodian or certain primary caretakers to designate or seek appoint of a standby guardian. Until June 27, 2018, the statute allowed a written designation of a standby guardian for their child in the event of their 1) incapacity, 2) debilitation and consent, or 3) death. Designated standby guardians’ powers are valid upon the occurrence of the springing event, but only for sixty days, wherein the standby should seek to petition for guardianship. With the 2018 amendment, parents facing deportation can now complete the statutory designation form and know that if they are detained, their designated standby guardians can immediately care for children and can petition for appointment as their guardian.

Parental Designations Chapter Law 80 of the Laws of New York

The Chapter Law amends NYS General Obligations Law §§ 51551 and 1552 to extend the time period from six months to twelve months that a parent or guardian is permitted to name a caregiver as a person in parental relation, who has limited authority to make most decisions about schooling and medical care for a minor child or an incapacitated person. Designation for periods beyond one month must be notarized and contain certain information. No court involvement is required for the designations, ensuring privacy for many parents who may be reluctant to bring attention to caregivers and their kin. By extending the designation period to twelve months, the requirement of notarization becomes less onerous, particularly for parents residing outside the United States. Importantly, the authority may spring up upon a designated event or date.

The state Office of Children and Family Services (OCFS) has published a sample designation form. The form is available at the NYS Kinship Navigator and at OCFS web sites. *See* OCFS Form 4940 (06/2018). The form’s section 4(d), pursuant to the statute, allows for the authority to spring up when a designated event happens.

The springing power is an especially useful tool for parents facing potential deportation or immigration detention because, just like the standby guardian springing power, it can be used to arrange care for children that springs up upon a stated condition, *i.e.* arrest, detention, etc.

In Chapter Law 79, the term “administrative separation” is defined as a suspension of care between parent and child caused by incarceration, removal and/or deportation, in connection with a federal immigration matter. In drafting designations for parents facing detention/deportation, the springing power can borrow the language of the standby guardian Chapter Law regarding “administrative separation.”

LEGAL FACT SHEET

The following language (copied from the standby guardianship amendment) can be inserted in section 4(d) of the designation form to allow a person in parental relationship to be designated in the event of a parent's administrative separation:

4. Any authority granted to the person in parental relationship pursuant to this form shall be valid (check appropriate box and initial):

___ d. commencing upon the date I become subject to an administrative separation such that care and supervision of the child(ren) will be interrupted or cannot be provided and continuing until administrative separation has ended or until the date of revocation, whichever occurs first.

Notarization in Other Countries

The standby guardianship designation does not need to be notarized but the parental designation must be notarized by a parent and by the designee for periods greater than thirty days. For parents who have left the country and need to notarize abroad, federal law states that notarizing officers at any United States Embassy or Consulate abroad can provide a service similar to the function of a notary public in the U.S. For information relating to notarial services with respect to specific countries, including office locations, consult the U.S. Department of State's website.^[16] While for periods greater than thirty days, the designee must also notarize, the designee notarization does not have to be concurrent with the parent's (and designee notarizations could be performed in the United States).

The parent must personally appear at the embassy or consular office and bring the document with him. The office will establish their identity; establish that they understand the nature, language and consequences of the document to be notarized; and must be satisfied the act does not come within the purview of a regulatory basis for refusal. Then they will provide the notarization.

Most notarizing officers may also authenticate documents, which means that the consular seal is placed over the seal of a foreign authority whose seal and signature is on file with the American Embassy. The authentication merely attests to the seal and signature of the issuing foreign authority. Notary and authentication services may be performed for any person regardless of nationality so long as the document in connection with which the service is requested is required for use within the jurisdiction of the United States.

It is also possible to have a document notarized by a local foreign notary (instead of going to the embassy or consular office) and then have the document authenticated by the proper authority in the foreign country for use in the United States.^[17] In accordance with 22 CFR, Part 131, the Office of Authentications provides signed certificates of authenticity for a variety of documents to individuals, institutions, and government agencies. Examples of documents that may require authentication for use abroad include: company bylaws, powers of attorney, trademarks, diplomas, treaties, warrants, extraditions, agreements, certificates of good standing, and courier letters.

LEGAL FACT SHEET

The U.S. Department of State only issues apostilles for federal documents to use in countries that are members of the 1961 Hague Convention.^[18] In countries that are a party, this is a simplified process. An Apostille certificate is attached by the foreign notary regulator, verifying that the notary certificate on the document is authenticated. This means the individual may have the document signed by a local notary, and then contact the country's notary regulator office to have the Apostille certificate attached.

If a country is a party to the Hague Apostille Convention, the US automatically would accept the local foreign notary as long as an Apostille certificate is attached. Note that Haiti is not a party to the Hague Apostille Convention.

Conclusion

With so many parents facing deportation, immigration attorneys, as well as estate planners and other attorneys who are assisting families with future planning, now have new tools that can assist in keeping children who are citizen in the United States and in the care of persons chosen by their parents or caregivers. Unfortunate as it may be, parents who make the hard choice to leave their children here, can do so without the risks of court appearances. It is hoped that circumstances will not always remain so dire but until then, New York's statutory amendments provide improved strategies for care that should assist many families who are facing deportations of parents or caregivers.

Note: This article was first published by the Government Law Center (GLC), available at <https://governmentreform.wordpress.com/2018/08/31/nys-enacts-help-for-parents-facingdeportation/> and then included in the GLC and NYS Bar joint publication on immigration law.

For more information about non-parental care, visit www.nysnavigator.org.

LEGAL FACT SHEET

- [1] While this memo often refers only to parents, it is important to note that the standby guardian statute also permits guardians, legal custodians, and certain “primary caretakers” to petition or designate a standby, and the parental designation, in addition to parents, also permits guardians to designate.
- [2] See, Camila DeChalus, *More US children could be separated from immigrant parents*, Chicago Tribune (July 14, 2018)
- [3] Jeffrey S. Passel & D’Vera Cohn, *Unauthorized immigrant population stable for half a decade*, Pew Research Center — Fact Tank (September 21, 2016). <http://www.pewresearch.org/fact-tank/2016/09/21/unauthorized-immigrant-populationstable-for-half-a-decade/>
- [4] *Illegal immigrant population of the United States*, Wikipedia, The Free Encyclopedia, (last edited April 8, 2018), https://en.wikipedia.org/wiki/Illegal_immigrant_population_of_the_United_States, citing *Pew Research Center*. 2017–04–27. Retrieved 2017–08–22.
- [5] In *Jennings v. Rodriguez*, 138 S. Ct. 830, (Feb. 27, 2018), (Alito, J.) in a 5–3 decision, the US Supreme Court reversed and remanded a Ninth Circuit decision which concluded that detained aliens have the right to periodic bond hearings during the course of their detention. As a result, indefinite detention is allowed for applicants for admission and detainees.
- [6] DACA Factsheet, Numbers USA, https://www.numbersusa.com/sites/default/files/public/assets/resources/files/DACA_factsheet.pdf
- [7] *Number of Form I-821D, Consideration of Deferred Action for Childhood Arrivals by Fiscal Year, Quarter, Intake*, U.S. Citizenship and Immigration Services, https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca_performancedata_fy2018_qtr2_plus_may.pdf, Biometrics and Case Status Fiscal Year 2012–2017 (U.S. Department of Homeland Security, 2017).
- [8] Michael D. Shear and Julie Hirschfeld Davis, Trump Moves to End DACA and Calls on Congress to Act, The New York Times, Sept. 5, 2017, [Trump Moves to End DACA and Calls on Congress to Act - The New York Times \(nytimes.com\)](https://www.nytimes.com/2017/09/05/us/politics/trump-moves-to-end-daca-and-calls-on-congress-to-act.html)
- [9] *Fact Sheet, U.S. Citizen Children Impacted by Immigration Enforcement*, American Immigration Council (May 23, 2018), <https://www.americanimmigrationcouncil.org/research/us-citizen-children-impacted-immigration-enforcement>

LEGAL FACT SHEET

- [10] Robert Warren and Donald Kerwin, *A Statistical and Demographic Profile of the US Temporary Protected Status Populations from El Salvador, Honduras, and Haiti*, Center for Migration Studies, *Journal on Migration and Human Security*, Volume 5 Number 3 (2017): 577– 592, <http://cmsny.org/publications/jmhs-tps-elsalvador-honduras-haiti> .
- [11] Numerous statutes codify procedures and standards regarding various custodial arrangements. Listed here are just a few of the most relevant.
- [12] Under the Trump administration’s executive orders, access to family court information can bear special risks because undocumented immigrants who were not previously targeted for immigration enforcement are now priorities whenever they engage in conduct that “constitutes a criminal offense” or is deemed by any individual immigration officer to “pose a risk to public safety.” This wide discretion and broadly worded language suggest that any arrest or other conduct deemed “a risk” may prompt Immigration and Customs Enforcement (“ICE”) to apprehend a noncitizen, regardless of whether the conduct results in criminal prosecution and conviction.
- [13] Information from orders of protection are immigration-related triggers for several reasons. A family court finding that an individual has violated an order of protection, even a temporary one, is grounds for deportation. Even if an order is not violated, the existence of a temporary or permanent protective order can be grounds for denying an individual an immigration benefit or relief from removal. An order of protection may also prompt questions about the underlying conduct, and additional requests for family court records.
- [14] New York State Senate, Bill S6217, 2017–2018 Legislative Session, Diane J. Savino, sponsor, <https://www.nysenate.gov/legislation/bills/2017/s6217/amendment/a>
- [15] For instance, services provided in the Country of Haiti can be found at: <https://ht.usembassy.gov/>
- [16] U.S. Department of State, Bureau of Consular Affairs, Office of Authentications, [Travel.State.gov.](https://travel.state.gov/content/travel/en/legal/travellegal-considerations/internal-judicial-asst/authentications-and-apostilles/office-ofauthentications.html), <https://travel.state.gov/content/travel/en/legal/travellegal-considerations/internal-judicial-asst/authentications-and-apostilles/office-ofauthentications.html>
- [17] *See*: <https://travel.state.gov/content/travel/en/legal/travel-legalconsiderations/internal-judicial-asst/authentications-and-apostilles/Notarial-AuthenticationServices-Consular.html>. Countries that are parties to the Hague Apostille Convention can be found here: <http://www.internationalapostille.com/hague-apostille-member-countries/>.

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