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## Implications of Important State Child Welfare/Immigration-Related Appellate Court Opinions

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One of the goals of the Migration and Child Welfare National Network is to improve knowledge of law and public policy related to the intersection of federal immigration statutes and state child welfare agency and court practices, all of which affect children and families. This analysis of a number of reported state appellate court decisions is presented as an aid to better understand how juvenile and family courts, in the context of child abuse and neglect cases (which also may involve foster care and adoption), grapple with reconciling immigration and child welfare law. These court decisions (citations are provided to the full opinions) highlight a variety of issues of which lawyers, judges, and other child and family advocates should be aware. As additional relevant cases are identified, this document will be updated.

*Note: Each of these state appellate court decisions is binding law only upon the state in which the opinion was written. However, published state court opinions are often cited by appellate courts in other states to support judicially-enunciated principles that their own cases may raise. That is, they may be considered by judges writing other court decisions as precedents their state may choose to follow.*

**In the Interest of E.N.C. et al.** (Supreme Court of Texas, 384 S.W.3d 796, October 12, 2012)

Child welfare agency took custody of children from mother, and obtained an order terminating parental rights of both custodial mother living in Texas and their father who resided in Mexico. Father was banned from re-entering the United States because of an old probation violation related to a decades-earlier arrest for a sexual relationship he had with an underage girl, long before his children were born. However, he kept in contact with them and their caseworker by telephone and his father visited the children while in foster care. The agency neither sought support from the father, nor offered him any service plan. Father appealed, and agreeing with the court of appeals that his deportation alone was insufficient to support a finding of child endangerment supporting termination, the Court remanded the case for retrial, holding his old offense, without more evidence, couldn't support termination of parental rights (TPR) and that there was insufficient evidence that TPR would be in his children's best interests. If the agency were to now offer father a service plan, the Court said the fact he "resides in Mexico should not seriously hamper the Department's efforts" (citing the Angelica L. decision, below).

### Case Implications:

When a child welfare agency takes custody of children due to abuse/neglect by their mother, but the non-custodial father had no involvement in that child maltreatment, his rights related to care and custody of his children must be respected, even where he isn't able to legally enter the United States. If the agency seeks to terminate his parental rights, it must first provide him with services and a case plan that indicates what the agency's goal is for the child. It should promote his opportunities for contact with and support of his children. The fact that a father resides in a foreign country does not absolve the agency from an obligation to provide services to the father. And, most importantly, the case stands for the proposition that parents' inability to reside in the United States alone doesn't support the termination of their parental rights.

**In Re. Y.M.** (California Court of Appeals, Fourth District, 144 Cal.Rptr.3d 54, 207 Cal. App.4th 892, July 13, 2012)

Y.M., a minor child from Guatemala, was sexually abused and allegedly trafficked by her father in California. After an altercation with him, she was declared a dependent of the juvenile court. Father was arrested and deported to Mexico, and upon her designation as a victim of sex trafficking, at the request of the county child welfare agency, Y.M. was placed in the custody of the Office of Refugee Resettlement (ORR), part of the U.S. Department of Health and Human Services. Although Y.M. was potentially eligible for T-Visa status, she also sought findings from the state dependency court to allow her to obtain Special Immigrant Juvenile Status (SIJS). However, her dependency case was dismissed, over her objection, and she appealed that decision.

The court of appeals found her "entitled to protections afforded by both systems" ("guided by concurrent jurisdiction principles") and, although there was a Guatemalan Protocol on sex trafficking and she was in ORR custody, those facts did not preempt state dependency law. The appellate court also pointed out that in the continuing dependency proceedings she would have the benefit of a court-appointed attorney. The order terminating dependency jurisdiction was reversed and her case remanded to provide for a new 6-month case review hearing and for prompt court consideration of her request for SIJS predicate findings. The appellate court affirmed the dependency court's decision to deny mother's petition to return Y.M. to her custody in Guatemala as well as its decision to deny Y.M.'s request to be removed from federal custody (where she had been placed in a locked psychiatric facility due to severe behavioral and mental health problems) and placed in a county foster home. See also, *B.F. v. Superior Court*, 207 Cal.App.4th 621 (2012) (probate court was authorized to make findings required for SIJS status).

### Case Implications:

If an undocumented immigrant child, separated from her parents, is taken into federal custody through a placement by the Office of Refugee Resettlement, does a state court that was hearing an abuse/neglect allegation involving that child lose its jurisdiction? This decision suggests the answer should be "no." Because this child was believed to be a sex trafficking victim, there was a basis for a child welfare agency to request a federal foster care placement for her, but that shouldn't deprive her of the opportunity for a state court to make requisite "findings" for her to be eligible for Special Immigrant Juvenile Status that would provide a basis for her to legally remain in this country. One other clear benefit of keeping state court cases open in this situation (or initiating a state court case on a child's behalf) is that in most states the child will receive court-appointed legal counsel, which is not a requirement under federal immigration law.

**In Re. Doe** (Supreme Court of Idaho, 281 P.3d 95, June 20, 2012)

Father, a Mexican citizen and resident, twice appealed a termination of his parental rights of a daughter born in the United States, based upon grounds of abandonment. Father and mother had married in Idaho, but later he was arrested in Oregon attempting to open a bank account with a false social security number. After being jailed he agreed to voluntarily leave the United States and returned to his parents' home in Mexico. Another child in the mother's home was found abused and neglected, and father's daughter was placed in agency custody. He informed caseworker that he wanted to be involved in his daughter's life, participated by phone in a case plan meeting at which reunification with her mother was originally the goal, and said if that wasn't possible he wanted her to live with him in Mexico. The girl had been in foster care for several years living with foster parents, one of whom was a child welfare agency employee who wanted to adopt her.

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With Mexican Consulate support, father obtained a favorable home study in Mexico, but it was never presented to the court because, as the caseworker testified, the Department had already decided to terminate father's parental rights. The case was ordered reopened upon father's petition to the appellate court that he had not been granted proper notice of the TPR hearing, but at retrial the court again terminated father's parental rights due to abandonment. The appellate court again reversed the TPR, finding there was no contention father had abused or neglected his daughter, nor that he was unfit to have custody, and that there was no evidence he had been given the ability to establish a relationship with her since he was legally barred from entering the United States. It noted that the "fact that a child may enjoy a higher standard of living in the United States than in the country where the child's parent resides is not a reason to terminate the parental rights of a foreign national." It again reversed the TPR and remanded the case with instructions "for the court to order the Department to take all reasonable steps to promptly place daughter with father in Mexico."

### Case Implications:

One of the paramount principles of child welfare law is that when one parent is found unfit to care for a child due to abuse or neglect, the other parent should be legally presumed to be entitled to custody of that child, rather than have that child placed in foster care or legally freed for adoption. In situations where there is no evidence that a non-custodial father had abused or neglected his child, or otherwise was unfit to have custody of his child, he must be given the opportunity through child welfare agency assistance to establish a relationship with his child that can lead to him being reunified with her. That opportunity is not negated by the fact that he resides outside the United States. One thing clearly stated in this case is that a state court can't consider, in cases involving such fathers who reside outside of the country, that the child "may enjoy a higher standard of living" in the United States as compared to where the father resides. And certainly, that can't be a factor in decisions to terminate a father's parental rights.

### In Re. Dependency of M.R. (Court of Appeals of Washington, Division One, 270 P.3d 607, February 16, 2012)

The appellate court reversed the trial court's order to remove M.R. from the Department of Social and Health Services' placement with her paternal grandparents, holding the trial court erred in concluding the paternal grandparents' undocumented immigration status was sufficient cause to remove the child from their care. The court relied heavily on the decision of *In re Dependency of J.B.S.*, 863 P.2d 1344 (1993), which found that in determining placement of a child in a dependency proceeding, the court's paramount duty is to protect the best interests of the child. The J.B.S. court identified several factors that should be evaluated when determining placement, noting that while immigration status alone is not a dispositive factor, the court does have discretion to consider it as one factor to the extent that it may affect the child's permanency. Further, the court relied on *In re Welfare of Aschauer*, 611 P.2d 1245, which held that multiple changes in custody as a result of judicial proceedings are to be avoided so as not to harm the child.

The court found that M.R. had a strong emotional and psychological bond with her paternal grandparents, that the paternal grandparents fostered the child's relationship with other family members, and that they provided an appropriate cultural environment. The record showed that removing M.R. from her paternal grandparents' care would be a detriment to M.R. The paternal grandparents had been in the United States for 17-18 years without any problems, which caused the court to believe that they were not in danger of deportation, and that M.R.'s placement with them would remain stable. Therefore, the appellate court found that the trial court erred in removing M.R. from the grandparents' home based solely on their immigration status.

### Case Implications:

Although most state child welfare agency policies are silent on the issue of placement of children with undocumented immigrant relatives, many caseworkers may be reluctant to place a child in such kinship care situations. This case is a good example of where an appellate court stepped in to overrule an agency's removal of a child from the home of undocumented immigrant grandparents, when such removal was based solely on their immigration status. It should not be surprising to see that courts would find such a removal as harmful to a child who had fostered a strong relationship with her relatives, and child welfare agencies should affirmatively support such placements, especially in the current pro-immigration reform climate where the importance of family ties is being recognized.

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**In Re. P.S.S.C. and P.D.S.C (Appeal of R.S.A., Father)**, (Superior Court of Pennsylvania, 32 A.3d 1281, November 29, 2011)

Mother of children abandoned them in Pennsylvania and child welfare agency took custody. Spanish-speaking father was incarcerated in Puerto Rico, and agency obtained that information and sent him case plans and notices of court hearings, but only in English. No attempt was made to ascertain whether he understood English or had actually received the materials. Agency later changed case plan to adoption, and even though father had been released from prison it did nothing to facilitate father-child contact. Agency claimed father lacked interest/contact with his children, and his parental rights were terminated. Upon father's appeal, court noted the agency's permanency plan didn't even list him or any goals related to him, that inadequate resources to help him keep in contact with his children were provided during his incarceration, that his language barrier impeded communication with his children and caseworkers, and that his lack of counsel until four months before the termination hearing made it impossible for him to adequately understand and act upon his parental rights and responsibilities regarding the termination proceedings. The termination of parental rights was reversed.

### Case Implications:

Similar to the R.W. and N.W. case below, this case indicates that state/county child welfare agencies must be diligent in providing timely notice of their having gained custody of a child, in a way that can be clearly understood, to a non-custodial father who does not speak English. The same should be true for case plans developed by the agency that specify the father's involvement with his child. There is also a continuing obligation to provide that father, in situations where the mother may have abandoned his child or otherwise be unfit to care for him, with support that can facilitate father-child contact and possible father-child reunification. Also, as soon as a state court begins to hear an abuse/neglect case related to his child, the court should appoint legal counsel for him. To wait until soon before a later termination of parental rights case is started is to risk reversal of any court decision to terminate his rights.

**In Re. R.W. and N.W.** (Supreme Court of Vermont, 39 A.3d, 682, November 18, 2011)

This termination of parental rights case considered appeals pertaining to mother's and father's respective rights to their two daughters, seventeen-year-old R.W. and thirteen-year-old N.W. The parents and children were citizens of Sri Lanka and, although mother and the children had been residents of Vermont for a number of years, father continued to reside in Sri Lanka and never had been to Vermont. The Department for Children and Families (DCF) petitioned to terminate both mother's and father's parental rights. The trial court granted the termination as to mother, but concluded it lacked personal jurisdiction over father. Mother appealed the termination of her parental rights, arguing that the trial court applied the incorrect standard of proof with respect to changed circumstances, and the Supreme Court agreed. DCF filed a separate appeal as to the father, arguing that even though father lacked "minimum contacts" with Vermont, the court did have jurisdiction to adjudicate the status of his children, who were within the court's jurisdiction.

As to jurisdiction over the father, the Supreme Court agreed with DCF, based on a conclusion that termination of parental rights actions are included in "custody proceedings" under the Uniform Child Custody Jurisdiction and Enforcement Act. However, it found that father (who had requested the opportunity to participate in the proceedings) had not been given the opportunity to participate in the hearing, such as through telephone participation, interpreter services, and assignment of counsel, and that there were no facts relied upon at trial to terminate his parental rights. The Supreme Court reversed the court's decision as to both parents and remanded the cases for further trial court proceedings. The Court also noted DCF's failure to notify the Sri Lankan consulate of the termination proceedings (pursuant to U.S. requirements under the Vienna Convention on Consular Relations), and during the pendency of the appeal the Court ordered that such notification take place. A lengthy concurring opinion chastised the agency and trial court for the "total lack of notice" to the father of the neglect proceedings involving his children, and making contact only at the point (over three years later) when the agency sought to terminate parental rights.

### Case Implications:

Does a state court have jurisdiction over a foreign national father who resides abroad of children who are residing in that state for purposes of terminating that father's parental rights? Generally, if the children were living lawfully with their

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mother in that state, there would be state court jurisdiction over abuse/neglect allegations, and there is also jurisdiction over the father. But he must be provided with adequate notice and an opportunity to participate in that state court case, such as through at least telephone participation, interpreter services, and assignment of legal counsel. The state must still prove he is unfit under the state's statutory grounds for termination. As soon as a child welfare agency takes custody of a child with foreign national parents, those parents (even if residing abroad) should receive notice of this, as well as the agency doing the requisite notification to their foreign consulate pursuant to the Vienna Convention on Consular Relations. To wait to make parental notification until the time a termination of parental rights petition is filed is clearly a violation of a parent's rights.

**In Re. Adoption of C.M.B.R.** (Supreme Court of Missouri, 332 S.W.3d 793, January 25, 2011)

Mother, a citizen of Guatemala, entered the United States in 2006 when she was pregnant with the child. In 2007, Immigration and Customs Enforcement (ICE) conducted a workplace raid in which she was arrested. Her son, then seven months old, was left in the care of her brother and his family, and they placed the child with mother's sister. The sister was referred to a local clergy couple for babysitting, and that relationship soon led to the couple being asked to care for the child. That couple knew a family interested in adopting the child, something the mother clearly objected to (and she was surprised to eventually learn that the child was not being cared for by a member of her family). Up to the time of the adoption proceedings in 2008, mother remained incarcerated out of state on a federal identity theft charge. Mother's parental rights were terminated and the adoption approved on the grounds of abandonment, with the court concluding she had made no efforts to locate her child. The Supreme Court agreed that there was clear and convincing evidence of abandonment, but that requirements of state law had not been followed (calling the case a "travesty in its egregious procedural errors, its long duration, and its impact"). It reversed the termination and ordered a new trial in which mother would have opportunity to present evidence (at that retrial, mother's parental rights were again terminated).

A joint concurring/dissenting opinion, in which several justices joined, said that the termination and adoption should be reversed without any new hearing, due to the "manifest injustice" resulting from the failure to give the mother notice, and the due process violation inherent in the conflict of mother being represented (at trial) by counsel hand-picked by the adoptive parents. These justices stated that the child should be returned to the mother's custody. Also, they found no evidence that mother had been given any opportunity to call her family to make arrangements for her son upon her arrest, that it was not unreasonable for her to assume her family would continue to care for him, and that she had no opportunity to contact her family to inquire about her son. It also noted evidence that she had asked for help in getting a passport for her son so he could go live with another sister of hers in Guatemala, that an application for his passport had been filed before the adoption petition was filed, and that the evidence was "entirely consistent with mother's assertion that she wished to take her son home with her after release." Finally, another concurring/dissenting opinion noted the fault of the trial court and counsel to observe the Vienna Convention on Consular Relations, saying that consulates should be viewed as "sources of help in these situations."

### Case Implications:

Parents being held in federal immigration detention, or in state or federal jail or prison, still must be provided with adequate notice of and opportunity to be heard in and present evidence at any state child welfare proceeding affecting their children, especially in a case to terminate their parental rights. They must also be given sufficient opportunities to find and arrange for an alternative placement for their children, such as with family members, that can help avoid their temporary or permanent placement with non-family members. Failure to do these things can result in the overturning of termination of parental rights decisions and subsequent adoptions. To aid foreign national parents in these situations, child welfare agencies should use the assistance of a foreign consulate that can be secured after making required consular notification under the Vienna Convention on Consular Relations.

**In Re. Interest of Angelica L. and Daniel L.** (Supreme Court of Nebraska, 767 N.W.2d 74, June 26, 2009)

This case involved the balancing of the conflicting right of an undocumented immigrant mother, Maria L., to maintain custody of her children, with the State's duty to protect her children who came with her or were born in this country. It was alleged that Maria failed to take her child, Angelica L., for a follow up doctor's appointment despite a diagnosis of a respiratory virus and her worsening condition, which failure led to Maria's arrest and deportation. Maria's other child,

Daniel L., and Angelica were placed in temporary emergency custody with the Nebraska Department of Health and Human Services (DHHS) and they were not allowed to reunite with Maria when she was eventually deported to Guatemala. Despite Maria's attempts to satisfy a DHHS case plan to regain custody, her parental rights were eventually terminated. The Supreme Court saw the children as caught in the clash of laws, culture, and parental rights that occur when their parents cross international boundaries. But, the Court ruled ultimate responsibility initially lies with child protection workers and courts in the State's juvenile system. The Court concluded that the evidence was insufficient to terminate Maria's parental rights, as it was not shown by clear and convincing evidence that she was unfit or that termination was in her children's best interests. It noted that home studies indicated that Maria had established a stable living environment in Guatemala and could provide for her children's basic needs. The Court noted that in this case, the task of the child protection workers, and consequently the courts, would have been much easier if the Guatemalan consulate had been included in these proceedings earlier, through prompt notice under the Vienna Convention on Consular Relations. In a follow-up case, *In re. Interest of Antonio O. and Gisela O.*, 784 N.W.2d 457, June 1, 2010, the Nebraska Court of Appeals affirmed a termination of parental rights, even though the Vienna Convention's notification requirement had not been followed, noting that it was not a jurisdictional prerequisite [citing 867 P.2d 706 (1994)].

### Case Implications:

What are the obligations of a state/county child welfare agency when it takes custody of children from an undocumented parent who is arrested, detained, and then deported? Sometimes there may be a concurrent allegation that the parent has neglected her child. Even when there is such an allegation, this case stands for the proposition that when a parent in such a situation seeks to be reunited with her child, the agency's legal obligation to make reasonable efforts to reunify does not end simply because the parent now resides across a national border. The trial court, when the agency files for termination of parental rights, still needs to hear evidence that proves "parental unfitness," which cannot simply be based on evidence of the parent's immigration status or their living in another country. The case also indicates the importance of following the Vienna Convention on Consular Relations when a foreign national parent has her child placed under the custody of an American child welfare agency, as this can help address issues related to the safety of a child's cross-border reunification, the obtaining of a home study in that country, and the identification and provision of any needed child welfare services in that other country.

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### The Migration and Child Welfare National Network

The MCWNN is a coalition of individuals and organizations focused on the intersection of immigration and child welfare. The Network serves as a resource to learn from the knowledge and strategies of colleagues, and participates in collaborative efforts to improve services for immigrant families in the child welfare system. MCWNN conducts and disseminates research, develops policy and practice recommendations, develops and disseminates resources, and works with federal, state, and local child welfare agencies to facilitate policy and practice improvements. Membership is diverse and consists of researchers, legal professionals, practitioners and administrators from state and federal agencies, immigrant service providers, children's advocates, and foundation staff. For more information, additional resources, or to become a member, please visit [www.mcwnn.uic.edu](http://www.mcwnn.uic.edu).

### About the Author

Howard Davidson, J.D., has worked in the field of child welfare law since 1974. He has directed the Center on Children and the Law since its start in 1978. He is the author or co-author of many books and articles on child protection-related legal issues and is a frequent speaker at trainings and conferences nationwide. Before joining the ABA, he advocated for juveniles in Boston. For more information, contact [Howard.Davidson@americanbar.org](mailto:Howard.Davidson@americanbar.org).