

# The Intersection of Family Law and Immigration: Virginia and the Big Picture

by Lynne Marie Kohm



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Family law stabilizes and strengthens marriage, reorders broken families, and protects the best interests of children. Family law is a creature of state government, governed by state statute. By contrast, immigration law and policy is federal law and when it intersects with family law, confusion and error can result.

Federal law has intervened in family law through various legislative actions such as the Defense of Marriage Act, Temporary Assistance for Needy Families, and the Uniform Interstate Family Support Act, all of which pave new avenues for federal and state cooperation. Federal constitutional intervention also has influenced family law through the *Meyer-Pierce* doctrine of parental rights, the *Griswold-Eisenstadt-Lawrence* doctrine of sexual privacy, and the *Roe-Casey* doctrine of abortion.<sup>1</sup> Sometimes federal intervention in the family regarding children can even be violent, such as when the U.S. Department of Justice removed seven-year-old Elian Gonzales by gunpoint from his guardians' home in Miami despite previous court orders.<sup>2</sup> In another instance, a recent executive order did not deport otherwise non-criminal illegal aliens in order to keep international same-sex couples who cannot marry from deportation.<sup>3</sup>

Recognizing that immigration functions as family policy is the starting point for lawyers who may find themselves addressing challenges for families in immigration cases.

Legal immigration reflects national values through the promotion of reunification of families and the admission of skilled educated foreigners to enrich the national community.<sup>4</sup> This article will not only focus on immigration law, but will discuss concerns that family law lawyers encounter working with immigrant clients.

In a statutory context, immigration jurisprudence applied as functional family law is more regulatory than state family law. It defines children in several different ways, has unique rules for

parentage, and regulates fiancés and fiancées.<sup>5</sup> These edicts complicate legal immigration, and could contribute to illegal immigration. Add to these regulations what some see as a lack of federal enforcement of current immigration law, and we find states stepping in.<sup>6</sup>

Scholars suggest that objectives for immigration and family law could be driven by principles focused on a desire to “least intrude on state family law’s policy objectives while still fulfilling the goals of federal immigration policy.”<sup>7</sup> This would allow for minimal damage to state law understandings of marriage in judicial interpretation of immigration regulations. Such an attitude may also be the best way to prevent immigration from weakening the nation that can be strengthened by immigration. An example includes children left behind after illegal parents are deported. States are trying to discern if this accomplishes the best interests of the child.

Fiancé(e) over-regulation is evident, as the parties must have met within the previous two years. Immigration laws provide for a U visa to allow the immigration of victims of domestic violence, but family courts remain the local prosecutors of domestic violence cases. When it comes to marriage, America’s national policy of deferring to another nation’s laws reflects a desire to accommodate multiculturalism, but that can be problematic (and even dangerous for women and children) when only one gender can petition for certain rights<sup>8</sup> or be protected from prosecution of criminal behavior.<sup>9</sup>

These examples require family lawyers to know immigration law and policy in the context of families and their restoration or reunification. Migration is a household decision, yet our nation's laws seem to reveal a natural tendency to complicate immigration. Understanding these legal issues and procedures involving families is necessary to be able to handle the small details of the law.

With that, let's turn to some particulars for the Virginia lawyer.

### Family Court Standing

There is generally no requirement for citizenship or foreign national legal documentation to petition a family court for any claim. All that a petitioner needs to prove is state residency requirements, depending on the cause of action being filed. If anything, a petitioner's legal immigration status may only become a factor when determining custody, support, or sometimes in divorce (to challenge a sham marriage or to assert a Violence Against Women Act [VAWA] claim<sup>10</sup>). Virginia's population includes foreign-born legal residents (legal immigrants) who are also able to bring petitions in family court. Hence, the intersection of family law with immigration law involves more than solely those who fall under the umbrella of illegal immigration or that of U.S. citizens.

### Marriage

In Virginia, the requirements for entry into marriage are minimal, and they do not include citizenship; nor is immigration status a part of those minimal requirements. It is nonetheless important to be familiar with the laws enough to know that marriage is the fastest track to U.S. citizenship.

Marriage to an American citizen remains the most common path to U.S. residency and/or citizenship for foreign nationals, with more than 2.3 million foreign nationals gaining lawful permanent resident (LPR) status in this manner between 1998 and 2007.

More than 25 percent of all green cards issued in 2007 were to the spouses of American citizens. In 2006 and 2007 there were nearly twice as many green cards issued to the spouses of American citizens than were issued for all employment-based immigration categories combined. The number of foreign nationals obtaining green cards based

on marriage to an American has more than doubled since 1985, and has quintupled since 1970.<sup>11</sup>

Furthermore, if a petitioner spouse was himself a beneficiary of immigrating under a spouse visa within the previous five years, or has filed two or more fiancé petitions with at least one approved in the last two years, he cannot petition for a new spouse's immigration.<sup>12</sup> It is important to know your client, and his or her status.

A family law practitioner who is considering filing immigration documents for the spouse or fiancée of a United States citizen will inquire from the United States citizen whether her history is one that includes arrest, charge, conviction for domestic violence, as well as international online dating, as either or both will almost certainly hinder speedy resolution of th[e] case.<sup>13</sup>

A good practitioner will discern the status of his or her client at the outset: whether he or she is the U.S. citizen, or the legal (permanent) resident (resident alien), or the foreigner/foreign national or non-immigrant, or an illegal alien.

Be familiar with fiancé visas — known as K visas. Here, the U.S. citizen spouse will file an I-129F petition for his or her non-citizen fiancé to

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get a K visa. Furthermore, though Virginia does not recognize common law marriage, if a state does recognize common law marriage, cohabitation may constitute a valid marriage for immigration purposes.<sup>14</sup> Rules against marriage fraud are important to know so that a lawyer is not taken advantage of by a client avoiding the immigration rules.

### Divorce

Divorce in Virginia requires residency, but does not require citizenship. It can, however, cut off an immigrant's eligibility for immigration as a spouse, and depending on the circumstances legal

separation may cut off immigration opportunities.<sup>15</sup> A lawyer would be wise to advise his or her client to pursue separate cohabitation, rather than divorce, if the client is in the midst of securing his or her legal permanent resident status. A valid marriage, not a viable marriage, is required for immigrating as a spouse.<sup>16</sup> Divorce can subject a not-yet-legal permanent resident to deportation. Divorce or legal separation (rather than simply

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residing separately) can cut off an immigrant's eligibility for the spousal immigration benefit.

### **Domestic Violence**

Should a domestic violence victim petition in family court, citizenship or legal residency of that victim is not required by Virginia law to prosecute the violence and protect the victim. The Immigration and Nationality Act (INA) provides U visas for domestic violence victims,<sup>17</sup> and the Violence Against Women Act (VAWA) enables "qualified abused fiancées, spouses, parents, and children of U.S. citizens and legal permanent residents to apply for a green card in a manner that removes the abuser from the picture...If all criteria are met, the abuse survivor may get to remain in the United States as a green-card holder."<sup>18</sup>

These victims can also get relief in a state family court where merely domiciliary is necessary. Furthermore, a perpetrator of domestic violence can be deported, even during the legal immigration process.<sup>19</sup>

### **Children**

In many ways, children in Virginia may be greatly affected by immigration laws. Parentage may be controlled by some immigration codes. For example, the INA allows that a child's relationship with a father legitimizes that child for immigration purposes.<sup>20</sup> Adults with a record of crimes against children are prohibited from filing for residency status on behalf of a child.<sup>21</sup> This policy is designed to protect children from abuse and sexual exploitation.

Furthermore, the constitutional rights of parents are not confined to citizens. Immigrant par-

ents have a right to the care and custody of their own children, but may be deported for illegal immigration status. "In fact, immigration assumptions are often based on the assumption that after deportation, children and parents will be reunited in the parents' country of origin," but a child born here may be left behind when illegal parents are deported. These are unintended effects of immigration law, and indeed, the child left behind has become the face of illegal immigration reform.<sup>22</sup> Some family courts in southwestern border states have encountered this scenario in child abuse cases and promoted a duty to protect the best interests of children, regardless of their immigration status.<sup>23</sup>

A non-citizen child can be placed in foster care where a family court finds that the child should not be returned to the home country in cases involving dependency, abuse, neglect or abandonment.<sup>24</sup> Married alien children have tougher issues — for example, child brides, trafficked girls and prostitutes married to their trafficker, etc., may be eligible to use a U visa,<sup>25</sup> or T visa. The T visa gives temporary legal status to immigrant victims of human trafficking, allowing them to remain in the U.S. to assist in an investigation or prosecution of human trafficking. At the same time, the T visa makes it possible for law enforcement officers to better perform their duties. With the help of victims, officers have a greater ability to investigate and prosecute individuals charged with or suspected of human trafficking.<sup>26</sup>

Child abduction can occur when children are taken on international travel with just one parent. The traveling parent is required to provide proper documentation of the written consent of the other parent. If such consent is not provided the traveling parent cannot leave or re-enter the U.S. until the child is returned to the custodial party.<sup>27</sup> This rule, however, does nothing to protect a child from never being returned to a custodial parent when the traveling parent refuses to return to the United States. A Hague Convention application is required in such circumstances and particular procedures must be followed to gain international assistance.<sup>28</sup>

### **Custody**

Comity may affect a custody decision, where a family court may choose to grant deference to a foreign custody ruling if that ruling does not offend a state public policy, but in a Virginia family court (and really any state family court) the best interests of the child will generally control.

Other considerations may apply. For example, the immigration status of the parents is a permissible factor in a best interest analysis. Safe haven cities (those unwilling to enforce federal immigration laws) argue that they have chosen not to prosecute immigration violations so as to not inhibit domestic violence claims, abuse claims, and neglect reports. A mixture of custody and immigration law can be very complicated.<sup>29</sup>

### Adoption

A common mistake in adoption is a failure to ensure that a final adoption has occurred in the original national jurisdiction. Orphans adopted by U.S. citizens in the foreign country and in their own U.S. state jurisdiction get automatic citizenship, once the United States Department of Homeland Security is notified of the adoption. If the child is not an orphan, a two year custody or residence with the U.S. parent(s) is required.<sup>30</sup> Adopted minor children may also acquire automatic citizenship if they have one U.S. citizen parent, and they acquire permanent resident status prior to their eighteenth birthdays.<sup>31</sup> Furthermore, orphans must be under the age of sixteen and unmarried at the time of the adoption.<sup>32</sup>

### Child Support

Child support, though regulated by the state, raises the specter of approval for an immigration petition, and may be a factor in such a petition. For example, parent non-citizens who are in arrears in child support cannot get citizenship, cannot renew their green cards, and cannot freely travel. Willfully failing to meet child support obligations also precludes naturalization.<sup>33</sup> These rules in their application seem to assist in the enforcement and collection of child support.

### Illegal Immigration

Several matters have already been discussed dealing with illegal immigration, revealing that such status does not preclude a petitioner from an action in family court, but may be a key factor in many family law matters.

Smuggling family members is a general problem as well. Because legal immigration can be complex, and because families generally want to be together, they may go to great lengths to get family members into the country. Though the Immigration Code places family reunification as one of two top priorities, it may still be challenging to reunite a family. Understanding this, INA has made a waiver possible to green-card holders

and applicants for immediate family members.<sup>34</sup> Immigrants here illegally, however, have no waiver benefits, and on the contrary can be fully prosecuted and deported for crimes against the family.

Furthermore, mere marriage to a U.S. citizen alone does not alter the status of an immigrant illegally present in the United States. Upon divorce, an illegal immigrant spouse can face deportation. It is extremely important to note that practitioners “who file immigration documents for the undocumented must ensure that the strategy to acquire the benefit sought is well thought out, and the risk to the client has been fully comprehended by both attorney and client.”<sup>35</sup>

In summary, it is most important to understand how key family law notions and policies may intersect with immigration. A recognition that immigration functions as family policy is the starting point for addressing challenges for families in immigration. It is also helpful to understand that children are more often than not caught in the middle of their family’s immigration problems. Virginia juvenile and domestic relations district courts are not released from their duty of protection, and will consider the best interests of the child in all circumstances. Challenges of the immigration code to legal immigration affect children the most.

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A proper application of immigration law to families can build national strength. It can also be a formidable tool to restore families. Wise family law practitioners can make a great deal of difference to their foreign national clients.

Endnotes:

- 1 See *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Roe v. Wade*, 410 U.S. 113 (1973); and *Casey v. Planned Parenthood*, 505 U.S. 833 (1992).
- 2 From *The New York Times* archives at <http://www.nytimes.com/2000/04/26/us/elian-gonzalez-case-overview-senate-will-hold>

- hearings-raid-house-miami.html?pagewanted=all&src=pm.
- 3 See e.g. Ari Burak, “Gay couple’s deportation case dropped,” *The Examiner*, Aug. 22, 2011, also available at <http://www.sfexaminer.com/local/2011/08/gay-couple-s-deportation-case-dropped>.
- 4 Immigration and Nationality Act (INA), 8 U.S.C., Aliens and Nationality (2006).
- 5 See 8 U.S.C. §§ 1101, 1151-1154.
- 6 Consider the example of Arizona, as detailed in Kris Kobach, “Fact or Fiction? Setting the Record Straight on S.B. 170,” 23 *Regent U.L. Rev.* 353 (2011) (outlining the rationale for that state passing immigration law).
- 7 Nicole Lawrence Ezer, “The Intersection of Family Law and Immigration Law,” 40 *FAM. L. Q.* 339, 363 (2006).
- 8 See, e.g., Brenda Walker, “Maryland Court Denies Islamic Divorce: ‘I Divorce You’ Can’t Circumvent State Law,” *Vdare.com*, May 8, 2008, at <http://www.vdare.com/posts/maryland-court-denies-islamic-divorce-i-divorce-you-cant-circumvent-state-law> (where Islamic law allowing for men only to divorce their wives cannot circumvent state law).
- 9 See, e.g. John T. Bennett, “Sharia Law is Already Here,” *American Thinker*, Nov. 30, 2010, also available at [http://www.americanthinker.com/2010/11/shaira\\_law\\_is\\_already\\_here.html](http://www.americanthinker.com/2010/11/shaira_law_is_already_here.html) (where a New Jersey family court ruling that applied sharia law to a case of marital rape was overturned as rendered in contravention of state law).
- 10 See 8 U.S.C. § 1154(e)(bona fide marriage); 8 U.S.C. § 1101 (51)(VAWA claims).
- 11 David Seminara, “Hello, I Love You, Won’t You Tell Me Your Name: Inside the Green Card Marriage Phenomenon,” Center for Immigration Studies, Nov. 2008, available at <http://www.cis.org/marriagefraud>.
- 12 See Richard Tasoff, *Family Law and Practice*, Ch. 60 Immigration and Family Law, § 60.03 (Matthew Bender & Co., Inc. 2011).
- 13 Ezer, *supra* note 7, at 349.
- 14 *Id.* at 350.
- 15 See Tasoff, *supra* note 12, at § 60.03(2)(b).
- 16 Ezer, *supra* note 7, at 352-53.
- 17 INA § 204(a)(1)(A).
- 18 Ezer, *supra* note 7, at 351.
- 19 See *id.*, at 353. See also Tasoff, *supra* note 12, at 4, discussing the options for a battered spouse.
- 20 Ezer, *supra* note 7, at 360.
- 21 Adam Walsh Child Protection and Safety Act of 2006 § 1, 42 U.S.C.A. § 16901 (2006), amending INA § 204.
- 22 See Marcia Yablon-Zug, *Separation, Deportation, Termination*, 2010, manuscript available at <http://ssrn.com/abstract=1648999>.
- 23 See Keila Molina, “El Sue o de los Ni os, Safeguarding the Best Interest of Abused Mexican Children Regardless of Immigration Status,” *Family Restoration*, Mar. 10, 2011, manuscript available at <http://regentfamilyrestoration.blogspot.com/2011/03/restoring-abused-children-to-protective.html>.
- 24 For example, Rifqa Bary, an Ohio teen who ran away from home to Florida was placed in foster care while an abuse investigation ensued, revealing the illegal immigration status of her family; she filed for legal immigration status based upon these facts. For more details see Adrienne S. Gaines, “At 18: Rifqa Bary Gains Long Awaited Freedom,” *Charisma.com*, Aug. 10, 2010, available at <http://www.charismamag.com/index.php/news-old/29091-now-18-rifqa-bary-gains-long-awaited-freedom>.
- 25 INA § 101(a)(15)U).
- 26 “Victims of Human Trafficking: T Nonimmigrant Visas,” U.S. Citizenship and Immigration Services, Sept. 14, 2011 at <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=02ed3e4d77d73210VgnVCM10000082ca60aRCRD&vgnnextchannel=02ed3e4d77d73210VgnVCM100000082ca60aRCRD>.
- 27 INA § 212(a)(10)C).
- 28 For a thorough review of how to proceed on such a matter, see Kathleen A. McKee, “A Primer on International Parental Abduction,” 6 *Regent U. J. INT’L L.* 37 (2008).
- 29 See Richard Crouch, “What if Your Child is Abducted?” at <http://patriot.net/~crouch/flnc/abd.html> (1997).
- 30 8 C.F.R. § 204.2(d)(2)(vii)(C); INA § 1101(b)(1)(D).
- 31 Child Citizenship Act § 320, 8 U.S.C.A. § 1431 (2000).
- 32 See *In re Repuyan*, 19 I. & N. Dec. 119 (BIA 1984).
- 33 Ezer, *supra* note 7, at 362.
- 34 INA § 212(d)(11).
- 35 Ezer, *supra* note 7, at 359.