In the "Best Interest" of Immigrant and Refugee Children: Deliberating on Their Unique Circumstances

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Each year, state juvenile courts provide thousands of immigrant and refugee children with access to consistent and reliable caregiving and a stable environment. To examine how courts interpret "the best interests" of immigrant and refugee children, this article examines 24 cases in courts across the United States, which indicate they use a territorial approach when evaluating the best interests standard. Although legal status was not an issue, many related factors were. Consequently, the courts restricted immigrant parents' rights in caring, guiding, and visiting their children; increased the risk of wrongfully terminating parental rights; and intensified the unpredictability of immigrant and refugee children's welfare in the long run. This article suggests an approach that encourages communication between social workers and the courts to address the special needs and circumstances of immigrant and refugee children on three key topics: the material and moral welfare of the child, and social welfare for immigrant and refugee families.

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Thousands of immigrant and refugee children become mired in the U.S. court and child welfare systems each year. They include asylum-seeking children entering the United States without legal guardians and immigrants' children who land temporarily in the foster care system. Estimates indicate that in 2004, 5,000 unaccompanied minors arriving in the United States were detained in federal custody—a 50% increase from 1997 (Seugling, 2004). The number of unaccompanied minors who are not detained and thus are ineligible or unable to present claims to remain is probably much greater. For instance, Mexican consular authorities report that in 2002 alone, 9,900 unaccompanied minors were returned to Mexico (Thompson, 2003).

In addition to unaccompanied children, an increasing number of immigrant and refugee children are put in the foster care system each year as abused, neglected, or abandoned, regardless of their legal status. No statistics are available to tell how many end up in juvenile dependency court proceedings and foster care each year. According to federal data, however, about 1.6 million children under the age of 18 in the United States are undocumented immigrants (AB 1895 Assembly Bill, 2004). Considering that 14 million children were reported living with at least one foreign-born parent in 2002 (approximately 19% of all U.S. children), and that 2.7 million of these were foreign-born (Fields, 2003), the number of immigrant and refugee children in the child protection system should not be underestimated.

During the past several years, the plight of the 5,000 or so unaccompanied immigrant and refugee children in federal custody has garnered significant attention from the media, Congress, the legal community, and the public. The U.S. Citizenship and Immigration Services (USCIS) has been criticized for its poor performance in caring for these children, especially in light of its combined roles of jailer, prosecutor, and guardian (Navarro, 1998). In November 2002, Congress passed the Homeland Security Act (HSA), transferring basic care, custody, and placement functions
from the USCIS (called the Immigration and Naturalization Service [INS] until March 2003) to the Department of Health and Human Services (DHHS). The department claims it retains the exclusive authority to place detained children in state juvenile dependency proceedings and foster care (Nugent, 2004).

Immigrant and refugee children, therefore, depend on state juvenile courts to provide access to reliable caregiving and a stable environment. Although transferring the care and custody of unaccompanied children from the USCIS to DHHS was part of the U.S. government’s largest reorganization in the last 50 years (Manns, 2002), the conditions for immigrant and refugee children have not improved because the reorganization did not include necessary, substantive reforms.

One critical consideration is the paramount standard in the legal and social welfare fields: in the best interests of the child. How do the courts interpret the “best interests” of immigrant and refugee children? Based on a comprehensive review and analysis of different state case law and statutes, as well as 24 U.S. court cases, this article identifies certain factors that differentiate immigrant and refugee children from other children. To address their special needs and circumstances, the article then suggests an approach in which child welfare workers can communicate and negotiate with judges.

The Legal Spectrum for Protecting Immigrant and Refugee Children

International Law

The 1961 United Nations Convention Concerning the Powers of Authorities and the Law Applicable in Respect to the Protection of Infants is the most significant binding international treaty for the well-being of immigrant and refugee children. For the first time in history, a treaty aimed to protect the interests of the child as a central principle, a shift from earlier rules that premised solely on the competing rights of parents. This treaty was a precursor to
the 1989 Hague Convention on the Rights of the Child, which addressed children's rights far more comprehensively but still used the United Nations' best interests standard (Siberman, 2000). The 1989 Hague Convention established this standard as the one that nations must employ to shape their policies and practices affecting children (Jones, 2001).

A number of provisions in the 1989 Hague Convention presume that maintaining family unity best serves children’s interests of the child, describing the family as the natural environment for children’s growth and well-being. Article 7(1) grants each child "as far as possible, the right to know and be cared for by his or her parents," while Article 8(1) grants the “right of the child to preserve his or her identity, including...family relations...without unlawful interference.” Article 9(1) specifically bans separating children from their parents except under specific conditions.

The 1989 Hague Convention also imposes obligations on nations in situations where families have been split. For example, when children are separated from one or both parents because of divorce and child custody, the state must respect a child’s right to maintain personal relations and direct contact with both parents on a regular basis, unless that would conflict with the child’s best interests. If parents are separated from their children because of state actions—detention, exile, or deportation—the state must furnish the parents and children with any available information regarding their family members’ whereabouts. In cases where national borders separate children from their parents, states must allow families sufficient freedom to see one another regularly (Alston, 1994). Unfortunately, the 1989 Hague Convention has not been adopted by the United States.

United States Federal Statutes

United States federal and state judges rarely cite international law in family law rulings, including child welfare cases (Spiro, 1997). Regardless, they have applied the “best interests” standard in a wide variety of contexts, because the principle originally was
derived from U.S. family law (Alston, 1994). Although the federal government traditionally leaves child welfare issues to state courts, the recent Adoption and Safe Families Act of 1997 (ASFA) has become the main federal statute governing child welfare. The centerpiece of the ASFA emphasizes protecting the child over unifying the family—a shift away from the 1989 Hague Convention. State child welfare agencies and courts must initiate proceedings for terminating parental rights when an abused, neglected, or abandoned child has been in foster care for 15 months (Adler, 2001; Moye & Rinker, 2002).

The 1990 Special Immigrant Juvenile (SIJ) statute also protects abused, neglected, and abandoned children. To qualify for protection under the SIJ statute, an undocumented child must be declared a dependent of a state juvenile court, placed in the care of a child welfare agency, and deemed eligible for long-term foster care because of abuse, neglect, or abandonment. The child is then eligible to obtain an immigrant visa and apply for permanent residence (Chen, 2000).

A recent key legal development for immigrant and refugee children is the Unaccompanied Alien Child Protection Act of 2003, which is still being debated in Congress. Recognizing that undocumented and unaccompanied immigrant children face even greater hurdles than other children in juvenile courts, this law aims to protect an estimated 5,000 children by mandating that they receive legal counsel for their immigration proceedings (AB 1895 Assembly Bill, 2004). This proposed law is expected to reduce barriers that threaten immigrant and refugee children’s well-being, including limited English-speaking proficiency and the risk of deportation. This law would also assist prospective adoptive parents when a child’s immigrant status is pending.

Best Interests Standard in State Statutes

Congress recognizes that the states retain primary responsibility and administrative competency to protect children’s welfare
(Nugent, 2004). For state juvenile courts, the best interests standard is the sole criterion for protecting children’s well-being, especially in changing custody. Despite this apparent consensus, the standard’s meaning is highly contested and has been criticized for its vagueness. Current codes and statutes of the 50 states have limited common guidelines concerning the standard (Hall, Pulver, & Cooley, 1996; Pruett, Hogan-Bruen, & Jackson, 2000).

Although the prominence of the standard in child welfare cases varies across states, the prevailing approach to defining those best interests comes from U.S. family law. In 1974, the American Bar Association approved the 1973 version of the Uniform Marriage Divorce Act (Kay, 2000; Mercer, 1998) that defines a child’s best interests as encompassing
1. The wishes of the child’s parents as to his or her custody;
2. The wishes of the child as to his or her custody;
3. The interaction and interrelationship of the child with parents, siblings, and any other person who may significantly affect the child’s best interests;
4. The child’s adjustment to home, school and community; and
5. The mental and physical health of all individuals involved (402, 9A ULA 561 [1987]).

Most state courts have since adopted or elaborated on these factors (Nurcombe & Partlett, 1994; Pruett, Hogan-Bruen, & Jackson, 2000), establishing their own guidelines for interpreting the best interests standard. According to a comprehensive survey of statutes in the 50 states by Hall, Pulver, and Cooley (1996), the most frequently listed guideline for custody decisions (included in 24 state statutes) was the child’s wishes concerning placement. The next most frequently listed guideline (17 state statutes) was the observed interaction and interrelationship of the child with his or her parents, siblings, and other significant persons. In contrast, the least listed guideline was the evaluation of a parent’s ability to provide food, shelter, and other material needs (only four state statutes required this). Also, only two state statutes
stated that "courts should consider the willingness and ability of the parents to provide an environment that is consistent with the child’s cultural background" (p. 176).

While identifying state statutes and guidelines is easy, assessing their application is not because the courts must weigh and balance the "totality of the circumstances" (Brandes, 1999), in which no one factor determines a custody award. In Friederwitzer v. Friederwitzer (55 N.Y. 2d 89, 1982), for example, Judge Bernard S. Meyer wrote:

The only absolute in the law governing custody of children is that there are no absolutes...[W]e were at pains to point out many of the factors to be considered and the order of their priority. Thus, we noted that "Paramount in child custody cases, of course, is the ultimate best interests of the child" ...that stability is important but the disruption of change is not necessarily determinative... that the desires of the child are to be considered, but can be manipulated and may not be in the child’s best interests. (supra, 55 N.Y. 2d at p. 94)

In reviewing the legal spectrum on this issue, therefore, the meaning of "best interests" for the immigrant and refugee child is extremely ambiguous. For child welfare professionals—including social workers and lawyers—predicting juvenile courts opinions and judgments is difficult, and thus, advocating on behalf of their clients.

Methodology

This study explores the juvenile court judges' opinions in interpreting the best interests of the immigrant and refugee child. The author searched the computer database of state case laws from 1994 to 2004 using the key terms "best interests" and "immigrant or refugee" and identified and analyzed states' statutes and codes and related law and social work journal articles. The author also used
the ancestry approach to include a few federal cases, which were cited by state cases and are central to the best interests standard.

The original database search yielded just over 50 cases. After eliminating cases unrelated to child welfare, as well as custody disputes during marriage dissolutions, 24 were selected. Although state juvenile court judges clearly provided interpretations of the best interests standard in other cases, the author, for this exploratory study, selected cases that offered a descriptive snapshot of the general, wide-ranging circumstances of immigrant and refugee children in the system and highlighted their best interests from the various state courts' perspectives.

The 24 cases are drawn from 14 states: Arkansas, California, Georgia, Illinois, Iowa, Louisiana, Maine, Michigan, Missouri, New Hampshire, Ohio, Oregon, Virginia, and Washington. Eight (33.3%) are from California, while the remaining 16 (66.7%) are from 13 states. Four of the cases (16.7%) are from the state supreme court and 20 (83.3%) from the state appellate court.

Children in 12 cases (50%) were born in the United States from immigrants or refugees. In the other cases, the children’s legal status is not clear in five (20.8%), and in seven others (29.2%), the children are either immigrants or refugees. In regard to the parents’ legal status, seven cases (29.2%) involve undocumented parents and four cases (16.7%) involve refugee parents. Undocumented children are considered refugees because they qualify for asylum under the SIJ statute once they enter the child protection system.

**Best Interests Standard**

Whereas state courts are mandated to follow the best interests guidelines as outlined in the state codes, judges can be creative in interpreting those interests. Many factors, such as legal status and United States residency, concern only immigrant and refugee children; state judges showed substantial consistence in considering these factors in their analysis.
Legal Status

In a review of the cases, legal status was not a factor in determining the best interests of immigrant and refugee children. Of the two cases involving custody between the biological parents (Amin v. Bakhaty, 798 So. 2d 75, 2001, and Florentino v. Woods [In re Florentino], 2002 Wash. App. LEXIS 1896 [August 9, 2002]), the courts did not favor the parent with citizenship or legal status over the parent without. The courts clearly interpreted the best interests of the child without much consideration of the parents’ legal status. Although the courts did take into account the parent’s legal status as a factor, their concern was whether that status, especially an undocumented one, would change the child’s residency. In Florentino, the court granted custody to the undocumented father over the mother, who suffered from postpartum depression and posed a danger to her children. While discussing the best interests of the child living with a parent who could be deported any time, the court argued that “immigration status is not dispositive, but the trial court has the discretion to consider the undocumented status of a parent as a factor in the overall determination of the best interests of the child” (supra, 2002 Wash. App. LEXIS 1896 at p. 19). After finding that the undocumented father was not likely to return to his home country (at least voluntarily) because of his strong ties in the United States, the court granted him custody. In Amin, the court favored the mother seeking asylum over the father, who was a U.S. citizen, stating that “Ahmed [the child] lives with his mother in the United States, the country where both of his parents now live, rather than living one parent in Egypt, while the other lives in the United States” (supra, 798 So. 2d at 87–88).

Residency in the United States

The possibility of a guardian taking a child to another country requires special consideration. In this study, the judges of three cases—S.M. v. A.S., 938 S.W.2d 910 (1997), In re Coming Under the Juvenile Court Law, 2003 Cal. App. Unpub. LEXIS 5384 (May 29,
2003), and In re Abraham, A., Coming Under the Juvenile Court Law, 2004 Cal. App. Unpub. LEXIS 8512 (September 20, 2004)—considered keeping the children in the United States as the first priority for meeting each child’s best interests.

In S.M. v. A.S., two parties fought for custody over two orphaned refugees: their uncle, who was a Rwandan refugee (as were the children) and a permanent resident of Sweden; and the orphans’ American foster parents. Instead of considering residency as a factor, the court argued that keeping the children in this country served a valuable best interest:

The dilemma faced...was not whether the children should live with an unrelated American couple or an African uncle. Instead the trial court had to decide whether the best interests of the children would be served by appointing guardians who [foster parents] would maintain the sibling-like relationship of the children...in a caring, stable environment or by appointing guardians who [the uncle] would raise the children with a greater appreciation and understanding of their heritage, but who will take them to Sweden, separating them from the person [foster parents’ children] with whom they have their closest interpersonal bond. (supra, 938 S.W.2d at p. 921)

The court decided to give custody to the foster parents instead of their blood relative because it believed the children had established sibling-like relationships with the foster parents’ children; a move to a foreign country (Sweden) would place the children in an unstable situation again. The court stated that “placement with a relative benefits the children, the law of Missouri places a higher value on the quality of the children’s home environment and the stability of the home relationships” (supra, 938 S.W.2d at p. 921).

Similar arguments of favoring sibling relationships and a stable home environment over a blood relative can also be found in In re Coming Under the Juvenile Court Law. In this California
case, the child was born in the United States and the mother was an undocumented immigrant who lost custody due to mental illness. The child had three half-siblings, who were undocumented minors and had been put up for adoption. The appellate court terminated the biological father’s parental rights because it felt his living conditions and material preparation were not good enough to raise the child. The father suggested bringing the child back to his home in Mexico, where he could establish a better home environment for her, but the court did not consider this arrangement plausible. The court argued that the child had established strong relationships with her half-siblings; the best option for the child was to stay together with her half-siblings’ caregivers while the social service agency worked to secure legal residency status for all of them.

The idea of keeping the child in the United States as an essential interest for immigrant and refugee children was also applied to the parents in terms of their visitation rights. In In re Abraham A., a child was placed in the child welfare system because the undocumented mother was arrested and the father was living in Mexico where he was a citizen. Citing Viragh v. Foldes (612 N.E.2d 241, 1993), the court indicated that case laws in the United States did not mandate the return of a child to the noncustodial parent for visitation purposes. The court considered the child’s legal status and, for visitation rights, ordered weekly telephone contact and face-to-face visits with his father in the United States. Because of the child’s illegal immigrant status, the court was concerned that if the child went to Mexico for visitation, he could not legally regain entry into the United States. The child then would be separated from his mother and siblings, causing him substantial harm.

Culture

The courts in this study consistently faced the challenge of considering the value of culture and heritage. State juvenile courts
recognized the importance of maintaining the child’s culture and heritage but repeatedly compromised this factor for others that they considered more important. In In re Kafia M. (742 A.2d 919, 1999), the court recognized that the child was born to a Muslim family and that the termination of parental rights would cause the child to be placed with a non-Muslim foster family. The court stated that “the lack of [a] Muslim foster family does not change the best interests analysis. Although the trial court appropriately considered Kafia’s [the child’s] heritage, on these facts, the court was not compelled to find the lack of a Muslim foster family to be a determinative factor” (supra, 742 A.2d at p. 925-926).

In addition, the state courts in this study normally did not evaluate the best interests of immigrant and refugee children in a culturally sensitive context. In In re A.A. v. State (105 Wn. App. 604 [2001]), which concerned two Bosnian refugee parents and their children, the courts terminated the biological parent’s parental rights due to domestic violence and abuse. The court stated:

The trial court recognized that some cultures tolerate domestic violence to a greater degree than others. But this family is subject to the jurisdiction of Washington courts and the laws of Washington under which domestic violence is not tolerated...So the fact that...there is yet another culture whose fundamental values come into conflict with the values in the United States does not mean that the children should suffer for it...The children’s best interests are of paramount concern here, even if they conflict with...[the biological father’s] interests in living according to his Roma background. (supra, 105 Wn. App. at p. 610-611)

The state juvenile courts in this study tended to adopt a territorial approach when evaluating the best interests of immigrant and refugee children. The territorial approach not only shaped the courts’ decisions to keep the children in the United States regardless of other possible guardian blood connections, but it also led
the courts to some unilateral interpretations while addressing the cultural conflicts. Although the courts used psychological evidence to support their approach—in which best interests meant protecting the child emotionally, particularly in close relationships (Miller, 1993)—the territorial approach clearly values intimate relationships in the United States over the same relationships outside U.S. boundaries. The courts consequently restricted and limited biological parents’ rights in caring, guiding, and visiting their children; increased the risk of wrongfully terminating parental rights; and intensified the unpredictability of immigrant and refugee children’s welfare in the long run. Although adopting a territorial approach was probably a natural outcome of the courts having to implement laws in their own jurisdictions, state juvenile courts do have authority and flexibility to assess a child’s best interests without considering national border. As such, using the territorial approach, or the standard that is applicable to ordinary American children, to evaluate the best interests of the immigrant and refugee child requires thoughtful caution.

### Barriers Facing Immigrant and Refugee Parents

A universal assumption is that the family is the best environment for the growth and well-being of children, and that the family unit serves their best interests. This assumption is reinforced in 1989 Hague Convention on the Rights of the Child. In this study, a large portion of cases (19, or 79.2%) discussed terminating the biological parents’ rights. Fourteen (58.3%) ended with termination. The courts in this study considered factors that reflected unreasonable expectations for immigrant and refugee parents.

To terminate the parental rights, the courts follow state codes and base their decisions on clear and abundant evidence that (1) social services have been expressly and understandably offered or provided, including all necessary and reasonably available services capable of correcting the parental deficiencies within the
foreseeable future; and (2) there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future. For examples, see RCW 13.34.180(1)(d)-(e) of Washington, R.C.2151.414(B)(1)(a) & (E)(1) of Ohio, 22 M.R.S.A. 4055(1)(B)(2)(b)(i), (ii) of Maine. According to the AFSA statute, termination proceedings have to be initiated in any case in which a child has been in foster care for 15 months.

In this study, social services for immigrant and refugee parents ranged from seven months—\textit{In re K.J.P.}, 2002 Mich. App. LEXIS 1834 (November 26, 2002)—to 18 months—\textit{Alberto S. v. Andres S.}, 2004 Cal. App. Unpub. LEXIS 859 (January 28, 2004). Considering that 42\% of the cases studied involved parents with problems of depression, temper control, drug and alcohol addiction, or mental illnesses, social services provided to immigrants and refugee parents were very broad, including parenting and anger management classes, counseling, alcohol and drug addiction treatment programs, family reunification services, and housing referral. Most immigrant and refugee parents, however, found it difficult to navigate the complex U.S. child welfare and social service system and understand with instructions from social service agencies. In addition, social services were not always provided in the refugee and immigrants' native language and few services were culturally appropriate. In \textit{In re A. A. v. State}, case workers testified that culturally appropriate service providers were extremely limited in the area. In \textit{In re K.J.P.}, an interpreter was not provided for out-of-court mental treatments, though one was provided during court hearings. In \textit{Linker-Flores v. Ark. Dept. of Human Servs.} (2004 Ark. LEXIS 553 [October 7, 2004]), the father, an undocumented immigrant, had arranged to receive several social services. While the father did complete some of the required services, he said services were "too inconvenient for him to be there because of his job situation, work hours, and transportation" (\textit{ supra.} 2004 Ark. LEXIS 553 at p. 10).
Even though the social services provided were insufficient in several respects, courts usually were convinced that they were reasonable, without considering the special needs of immigrants and refugees. Failure to follow the social service agency’s procedures and instructions jeopardized those parents’ rights in the dependency proceedings. Although courts judged the reasonableness of the department of human services’ efforts according to the circumstances of each case, in several cases—Robin V. v. Superior Court (33 Cal. App. 4th 1158, 1995), and Lori B v. Superior Court of Los Angeles County (2001 Cal. App. Unpub. LEXIS 1248 [November 28, 2001]—the courts did not require a perfect delivery of services. Courts in this study cited In re Misako, R. (2 Cal. App. 4th 538, 1991), which states:

In almost all cases it would be true that more services could have been provided more frequently and that the services provided were imperfect. The standard is not whether the services provided were the best that might be provided in an ideal world, but whether the services were reasonable under the circumstance. (*supra*, 2 Cal. App. 4th at p. 547)

In addition, many immigrant and refugee parents, especially undocumented immigrants, face legal difficulties that further endanger their positions in dependency proceedings. In Candi v. Superior Court of San Diego County (2004 Cal. App. Unpub. LEXIS 855 [January 28, 2004]), the father was arrested by INS authorities and faced deportation. When the mother had been diagnosed with mental illness, their child was removed and their parental rights were eventually terminated. Although legal status was not an issue in the court’s consideration of the child’s best interests, many related factors were, such as parents’ involuntary separation from the child because of detention or deportation and voluntary separation caused by migration. In In the Interest of J.H. (686 N.W. 2d 236, 2004), the father had not seen his child for a month before the termination hearing because the USCIS had
taken him into custody for questions about his immigration status. This became the court’s evidence of abandonment and a weak relationship between the child and parent. In *In re Kirchner* (164 Ill. 2d 468, 1995) and *In of the Interest of V.S.* (249 Ga. App. 502, 2001), the courts examined whether the biological parent’s out-of-country visit constituted an intention of abandonment, and both found that it did not.

A few courts did acknowledge that the legal status of immigrant and refugee parents made it difficult for those families to maintain the same living standard as typical U.S. parents. For example, in *Sergio N. v. Maria M.* (2003 Cal. App. Unpub. LEXIS 4648 [May 9, 2003]), the court stated that “as an undocumented worker, mother will likely never earn more than minimum wage and will likely always have concerns about steady work. Her circumstances are not unique. These are the same problems shared by most poor immigrant families” (supra, 2003 Cal. App. Unpub. LEXIS 4648 at p. 24). In closing the case, the court encouraged social service agencies to set reasonable expectations for material standard of living.

The study indicated that, to evaluate the best interests of the child, state juvenile courts had adopted standard factors such as reasonable services provided in a timely and appropriate way, a sound material family environment, and a moral and intellectual environment for the child. Immigrant and refugee parents, however, cannot provide these conditions as readily as other parents. For example, many immigrant and refugee parents had difficulty complying with social service agencies’ instructions because of their limited English; others faced financial instability because of their ambiguous legal status, while more were coping with employment, housing insecurity, and legal troubles common to immigrants and refugees. Although courts did not consider the parents’ legal status as a determining factor, courts mostly did not consider these typical conditions as more difficult for immigrant and refugee parents to provide. In failing to recognize these unique and problematic situations, courts unfairly burdened immigrant and refugee families.
Communications with Courts

Because the best interests standard is invoked in both legal and social work arenas, it is often viewed to mean the same to both professions. This idea is not true. Social work professionals consider best interests as the ultimate principle in placement (Miller, 1993), whereas the courts tend to consider other principles, such as equal protection of parents' rights and society's needs. Although courts assert that best interests is a standard in legal practice, parental rights and best interests compete in *Nahid H. v. Superior Court* (53 Cal. App. 4th 1051, 1997). In this California case, a refugee mother sought to take custody of her children after several years of separation. The court stated:

> The care and companionship of a natural child is one of a parent’s most basic rights, which must be balanced against the child’s fundamental, independent interests in belonging to a family unit, being protected from abuse and neglect, having a placement that is stable and permanent. *(supra, 53 Cal. App. 4th at p. 1071)*

Negotiation and communication between social workers and courts are not only necessary but essential. Whereas the best interests of the child is always about the material, intellectual, and moral welfare of the child (Downs, 2004), a communication model would encourage social workers and courts to exchange ideas on the material and moral welfare of the child and social services for immigrant and refugee families.

**Material Welfare of the Child**

The material welfare of immigrant and refugee children closely relates to their immigration status. Studies indicate that children with undocumented immigrant parents or in mixed-status households suffer higher risks of poverty and poor health than children in "legal" households (Kanaiaupuni, 2000). After observing this
new dimension of social stratification, parents' and children's legal status definitely should be considered as a factor concerning the best interests of the child. Immigrant status carries considerable challenges to a family's survival and mobility in U.S. society. From this study, state juvenile courts favored children's U.S. residency as a decisive factor in considering best interest, but not parents' legal status. The courts' adoption of this approach is based on a belief that the material welfare of the child is better committed in the United States than in other countries.

Regardless of whether U.S. courts can legitimately evaluate foreign practices or a foreign system's capacity, they should pay attention to the inequalities in U.S. society that immigrant and refugee families endure, especially differences in the context of the material realities and cultural specificities. A new approach is needed, one that takes into account economic, race, and gender inequalities.

Professional social workers work with individuals, families, and communities to help these individuals and groups realize their potential to enjoy full, active, and creative lives (National Association of Social Workers, 1996). Thus, while child welfare workers aim to protect the children's rights as their major duty, they are also responsible to advocate for immigrant and refugee families' rights and privileges. Assessing immigrant and refugee parents' fitness based on typical U.S. material welfare standards could endanger the rights and well-being of their children and family.

**Moral Welfare of the Child**

Moral welfare is a highly contingent social construct based on political and social judgments and on objective or scientific data about what is best for children in an ideal society (Bartlett, 1988). Depending on the cultural context, the best interests standard has been interpreted in diverse, even contradictory ways (Alston, 1994). Separating children from their biological parents has been criticized as cultural genocide—undermining children's sense of cultural identity by completely disconnecting them from their birth communi-
ties (Lynch, 2001). Thus, the moral welfare of immigrant and refugee children inevitably should include cultural factors. In the rulings in the 24 cases in this study, the state juvenile courts were split. On one hand, child welfare laws actually seek to protect children’s cultural heritage. Some courts were sensitive to the child’s cultural heritage when selecting alternative care arrangements if separation from the biological parents was unavoidable. Where the courts may not actively protect cultural practices, child welfare laws preserve children’s cultural heritage by focusing on parents’ rights and their rights to their children (Lane, 1998; Levesque, 2000).

On the other hand, some courts did not hesitate to place the child in a transracial family environment. These court decisions responded to current federal law that prohibits agencies or courts from delaying or denying adoption on the basis of race, color, or national origin of the child or foster parents (Hollinger, 1998). In the legal arena, considering the child’s home culture as a factor in the best interests analysis has engendered considerable debate. The main concern is the danger of judging different interpretations of morality embedded in different cultures (Lane, 1998).

Social workers have historically battled against certain child welfare practices, which had functioned as a means of moral correction (Axinn & Stern, 2000). In addition, social workers can best maintain balance between preserving children’s cultural identity and protecting their best interests. Most child welfare workers have been trained to hold great respect for diversity, and they are required by professional associations to develop a competence in cultural awareness (National Association of Social Workers, 1996). Given the prevailing patterns of immigration, social workers have tried to acquire cultural information about several areas in the world and knowledge necessary for effective intervention with these families (Arrendo, Orjuela, & Moore, 1989; Das & Kemp, 1997; Russell & White, 2001). Social workers’ negotiations with the courts, therefore, would positively contribute to culturally appropriate placements of immigrant and refugee children.
Social Services for Immigrant and Refugee Families

When a child has been in foster care for 15 months and termination proceedings have to begin under the AFSA, the reunification services provided by any social services department end. Immigrants and refugees, however, risk encountering multiple difficulties such as health problems, psychosocial upheavals, substance abuse, economic and housing difficulties, English proficiency, and intergeneration conflicts, most of which are common and due to their at times traumatic and violent migration experience (Potocky-Triodi, 2002). As such, 15-months reunification services fall far short of most immigrant and refugee families’ needs.

In addition, initial child removals are often preventive in nature (McCarthy, 1998; Starr & Brilmayer, 2003). In this study, for example, history of drug abuse, intoxication, and domestic violence, miscommunication with social service agencies because of language barriers, and temporary detention by federal immigration agency were factors that led to children’s removal from the home. The system’s misunderstanding of immigrant and refugee families’ difficult circumstances increases the threat of permanent termination of parental rights.

As the cases in this study indicate, courts can authorize social service agencies to continuously provide services after the 15-month period pending a decision on permanently separating children from their families. Social workers—who know about the psychosocial processes and effects associated with migration, as well as the traumatic effects of involuntary or partly voluntary migration (Arrendo, Orjuela, & Moore, 1989; Kinzie, 1989; Russell & White, 2001)—could communicate with the courts and argue for cases to be re-opened to further advocate for the children to stay with their biological parents.

Conclusion

The widely used best interests standard is vague, indeterminate, and inapplicable across a variety of cases. Such indefiniteness
causes a lack of uniformity and predictability in judicial decisionmaking. The courts must use an appropriate, adequate, and universal standard to determine the true best interests of immigrant and refugee children. Without a standard based on objective elements, the personal values and biases of judges may influence their decisions (Linares-Fierro, 1999; Schwartz, 1991). Courts and social welfare departments can jointly generate a guideline for child welfare professionals about the best interests standard. This guideline needs to adopt the principles and rules of the 1989 Hague Convention and incorporate special considerations for the unique circumstances of immigrant and refugee children. Considering the history of child welfare and the legal tradition of U.S. family laws, an approach that encourages negotiations and communications between the courts and social workers is plausible and beneficial in the long run. This conversational approach represents an extension of social work practices with cultural competence into the legal system. Gaining cultural competence would take time for social workers and judges to acquire, but it would be worthwhile considering the positive effect on the lives of thousands of immigrant and refugee children and families.

References


