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Protection and Custody of Children in United States Immigration Court Proceedings

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Abstract

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KEYWORDS: children, immigration, custody

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I. INTRODUCTION

The grave consequences to an individual of an order expelling him or her from the United States has long been recognized. Deportation has been described by the Supreme Court as a "drastic measure and at times the equivalent of banishment or exile. It is the forfeiture for mis-

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conduct of a residence in this country. Such a forfeiture is a penalty."[1]

In a recent United States Supreme Court case, *Ardestani v. INS*, Justice O'Connor, speaking for the majority, emphasized "the enormity of the interests at stake."[2] Justice Blackmun, speaking for the dissent, did not disagree with this proposition. He stressed that "the alien's stake in the proceedings is enormous (sometimes life or death in the asylum context) . . . ."[3]

These concerns over being forced to leave the country are especially important when children are involved. As a result, immigration proceedings recognize the right of children to special protection when their families are involved in deportation proceedings.[4]

The purpose of this article is to examine the current state of the law with respect to the treatment of children in immigration proceedings and to propose certain alternatives to further ensure their protection. To accomplish this purpose, the article first focuses on proceedings before the United States Immigration Court, and especially differentiation between exclusion and deportation proceedings. Then, the Immigration and Nationality Act's treatment of children will be explored and focus will be given to in-custody practices prior to exclusion proceedings. The article goes on to discuss the detention and release of aliens; pending litigation; and, children unaccounted for by the law. Finally, the authors conclude by offering alternatives to the existing

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1. Tan v. Phelan, 333 U.S. 6, 9 (1948) (citation omitted).

2. Ardestani v. INS, 112 S. Ct. 515, 521 (1991).

3. *Id.* at 522. It is important to note that deportation has never been considered as punishment or criminal in nature and, thus, the procedures and safeguards identified with criminal prosecutions have been held inapplicable in the deportation context. Bugajewitz v. Adams, 228 U.S. 585 (1913); Carlson v. Landon, 342 U.S. 524 (1952); United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 149-54 (1923). Rather, deportation proceedings are deemed civil matters. Harisiades v. Shaughnessy, 342 U.S. 580 (1952).

However, the United States Supreme Court has extended other constitutional guarantees and procedural safeguards to juveniles in non-criminal "juvenile proceedings," because the potentially severe consequences of a juvenile proceeding are similar to a criminal trial despite the former's ostensibly "civil" nature. John L. v. Adams, 750 F. Supp. 288 (M.D. Tenn. 1990).

The custody of minors who are in exclusion and deportation proceedings is a recondite and esoteric topic and is integrally intertwined with the issue of minor's rights in immigration proceedings. Although there is a plethora of identifiable classes of minors scattered throughout the Immigration and Nationality Act, there is a dearth of published cases, administrative or judicial, on the subject.

4. *In re* Gault, 387 U.S. 1 (1967).

standards.

II. An Overview of United States Immigration Court Proceedings

In deportation cases, jurisdiction over the hearing matter vests, and proceedings before a United States Immigration Judge commence, when the charging document is filed by the Immigration and Naturalization Service (hereinafter INS) with the Office of the Immigration Judge.[5] Immigration Judges are similar to administrative law judges and serve under the jurisdiction of the Executive Office for Immigration Review (EOIR), which is a component of the United States Department of Justice.[6]

Hearings before an Immigration Judge may be either in deportation or exclusion proceedings.[7] Aliens entering, or seeking to enter, the United States are dealt with an exclusion proceeding. However, once an alien has been admitted to the United States, and permitted to pass through an INS or border patrol check point, he or she can only be expelled through deportation hearings.[8] This is not so, however, when the admission was only on a parole basis, and upon termination of the parole the alien is dealt with in exclusion proceedings rather than deportation proceedings.[9] Parole occurs when the INS-released alien is in the United States for an unspecified period of time while an application for admission is being adjudicated.

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5. 8 C.F.R. § 3.14 (1991).

6. In 1983, the United States Department of Justice, by regulation, created EOIR as an administrative entity *separate* and apart from the INS. *See* 48 Fed. Reg. 8056 (1983) (amending 8 C.F.R. § 1, 3 & 100).

7. In deportation proceedings, the charging document is called an Order to Show Cause (hereinafter OSC) and Notice of Hearing. In exclusion proceedings, the charging document is called a Notice to Applicant for Admission Detained for Hearing before an Immigration Judge. With regard to minors in deportation proceedings, the statute specifically deals with service of an OSC on minors under the age of 14. 8 C.F.R. section 242.1(c) states that with respect to minors under the age of 14, the OSC and any warrant of arrest must be served in the manner prescribed in 8 C.F.R. section 242.1(c) upon the person or persons named in 8 C.F.R. section 103.5a(c). Service is made upon the person with whom the minor resides. Further, "whenever possible, service shall also be made on the near relative, guardian, committee, or friend". 8 C.F.R. § 103.5a(c)(2)(ii) (1991). Some of this refers more particularly to "incompetents," for whom the service is identical.

8. Matter of VQ, 9 I&N Dec. 78 (BIA 1960).

9. Matter of Lyy, 9 I&N Dec. 70 (BIA 1961).

In contrast, when an alien actually has entered the United States free from official restraint, even though the entry may have been surreptitious or in direct violation of law barring entry, the alien's removal can be accomplished only through deportation proceedings.[10]

III. Treatment of Children by the Immigration and Nationality Act

Complicating the matter is the fact that there is no uniformity of treatment of children by the Immigration and Nationality Act (hereinafter Act). The Act uses different nomenclatures for treating minors and, at times, differing age criteria. For instance, the word "child" is a defined term in the Act and children, in turn, are defined as legitimate, illegitimate, legitimated, step-children, adopted, and orphaned.[11] While the term "infancy" is not defined in the Act,[12] minors are categorized broken as juveniles[13] and minors under fourteen.[14] Additionally, some minors are classified as Special Immigrants.[15] Furthermore, the statute references foundlings,[16] and minors in foster care.[17] In this morass of terminology, specific rights involving each definition are hidden. We shall limit our study to those involving release from custody in exclusion and deportation proceedings.

Yet another statutory definition of what constitutes minority con-

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10. Matter of A, 9 I&N Dec. 536 (BIA 1961).

11. Immigration and Nationality Act of 1952 (INA) §§ 101(b), (c), 8 U.S.C. §§ 1101(b), (c) (1991). If the child is not the natural, legitimate child, there may be additional criteria which must be satisfied. For example, an adopted child must have been in the legal custody of, and reside with, the adopting parent or parents for at least two years. INA §101(b)(1)(E), 8 U.S.C. §1101(b)(1)(E) (1991).

12. INA § 212(a)(9)(b), 8 U.S.C. § 1182(a)(9)(b) (1991); INA § 237(e), 8 U.S.C. § 1227(e) (1991).

13. 8 C.F.R. § 242.24(a) (1991).

14. *Id.* § 242.3(a).

15. A Special Immigrant is one who has been declared dependent by a juvenile court and has been deemed eligible by that court for long-term foster care and for whom it has been determined in an administrative or judicial proceeding that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence. INA § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J) (1991).

16. A foundling is a person of unknown parentage found in the United States while under the age of five years until it is shown, prior to attaining the age of 21 years not to have been born in the United States. INA § 301(f), 8 U.S.C. § 1401(f) (1991).

17. INA § 101(a)(22), 8 U.S.C. § 1101(a)(22) (1991).

cerns persons of unknown parentage found in the United States while under the age of five years. They are presumed to be United States citizens, unless it is shown, prior to their attaining the age of twenty-one years, that they were not born in the United States.[18] This provision, however, does not often come into play and is of relatively little importance.

IV. In Custody Procedures in Exclusion Proceedings

When aliens apply for admission into the United States and the inspecting immigration officer finds that they are not clearly and beyond a doubt eligible for entrance, the officer serves them with a notice that they have been placed in exclusion proceedings.[19] If they are at a border station, they may be taken into custody by the INS and detained for a hearing before an Immigration Judge.

If they have arrived by ship or aircraft, they remain in carrier custody until the INS decides to take custody. Minors, as well as adults, may be taken into custody.[20] The INS does not administer facilities strictly limited to the custody of minors. Thus, they may be placed in a facility meeting the criteria required by regulation for all detained aliens.[21]

When the alien is an infant, special problems arise. The term infancy is not a defined term in the Act or the regulations, but the regulations do provide for an examination by public health authorities. The Public Health Service, after examination, may certify infancy.[22] If the infant is accompanied by another alien whose protection or guardianship is required by the infant, and the infant is ordered excluded or deported, such accompanied alien also may be excluded or deported.[23]

If the infant is in custody of a citizen or national of the United States, the Act is silent on custody. Furthermore, there are no known cases which have dealt with this issue. When the nationality of the

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18. INA § 301(f), 8 U.S.C. § 1402(f) (1991).

19. The form served upon the alien is a Notice to Applicant Detained for Hearing Before a United States Immigration Judge (Form I-122).

20. 8 C.F.R. § 235.3(d) (1991).

21. *Id.* § 235.3(f).

22. INA § 237(e), 8 U.S.C. § 1227(e) (1991). The Public Health Service appoints a medical officer who is a physician of the Public Health Service assigned or detailed by the Surgeon General of the Public Health Service to make mental and physical examinations of aliens. 42 C.F.R. § 34.2(e) (1991).

23. INA § 212(a)(9)(b), 8 U.S.C. § 1182(a)(9)(b) (1991).

child is known, the appropriate consular office may be advised in accordance with their parens patriae interest.[24] It would appear that release on parole to the custody of the appropriate consulate pending the proceedings would be the best course. An alternative to INS custody is to release minors, including infants, from custody during the pendency of the exclusion proceedings.

Release from custody in exclusion proceedings generally is by parole and may be with or without bond. Release on parole is not a matter of right but is left to INS discretion. That discretion is exercised by the INS in accordance with specific regulations.[25]

Although release of minors from custody in exclusion proceedings is referred to in the rules of release of minors in deportation proceedings, there are significant differences in application for release. Whereas release from custody in deportation proceedings is a matter of right, and it is the INS which must justify continued custodial detention, in exclusion proceedings parole is left to the INS discretion. While persons in deportation proceedings have a liberty interest under the Fifth Amendment to the United States Constitution, in exclusion proceedings, they have only the due process rights which Congress gives them.[26] In exclusion proceedings they are limited to requesting release by parole at the INS discretion.

Review of the denial of parole in exclusion procedures is by writ of habeas corpus to the appropriate United States District Court. The standard of review is abuse of discretion, a difficult burden to establish, even in cases where the detention is so seemingly without end as to be permanent.[27] This is the reason why there are so few cases generally dealing with release from custody in exclusion proceedings and no published cases specifically dealing with minors.

Taking custody of minors in either exclusion or deportation proceedings is a troublesome problem for the INS. In either case, since the release from custody of children involves not an actual release but a transfer of custody from the INS to someone else, the service is faced with having to screen prospective guardians for their suitability.[28] The

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24. *See* 8 C.F.R. § 242.2(g) (1991).

25. 8 C.F.R. § 212.5(a)(20)(iii) (1991) (citing 8 C.F.R. § 242.24(b) regarding a deportation regulation concerning detention and release of juveniles, defined as minors under 18 years of age).

26. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953).

27. *See* Lency May Ma v. Barber, 357 U.S. 185 (1958); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953).

28. 8 C.F.R. § 242.24(b) (1991).

transfer of custody can be an even bigger problem, especially in deportation proceedings.[29]

The only references to INS custody of minors is contained in the provision of the Act which deals with foster care and the regulation dealing with release from custody.[30] Other than these two provisions, there is nothing in either the Act or the regulations which directly addresses issues pertaining to the custody of minors.

V. Detention and Release

In contrast to the INS provisions above, which define minor as under the age of fourteen, the definition of juvenile for purposes of detention and release is an alien under the age of eighteen years.[31] With respect to juveniles for whom bond has been posted, for whom parole has been authorized, or who have been ordered released on recognizance, certain guidelines are applicable.[32] The order of preference to which the juvenile will be released to starts with the parent, then goes on to the legal guardian, and finally an adult relative who is not presently in INS detention.[33] There is a caveat that the juvenile should not be released if detention is required to secure the juvenile's timely appearance before the INS or the United States Immigration Court, or further, to insure the juvenile's safety or that of others.[34]

If neither parents, legal guardians, nor adult relatives not in detention are located to accept custody, and the juvenile has identified a person in one of these categories who is also in the INS detention, the decision of whether to simultaneously release the juvenile and the adult person is evaluated on a case by case basis.[35]

Where the juvenile's parent or legal guardian is in INS detention or out of the United States, the juvenile may be released to a person designated by the parent or the legal guardian in a sworn affidavit executed before an immigration officer or counselor officer as capable and willing to care for the juvenile's well-being.[36] Such individual must exe-

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29. *See infra* discussion on custody provisions.
30. INA § 101(a)(22), 8 U.S.C. § 1101(a)(22) (Supp. 1992); 8 C.F.R. § 242.34 (1991).
31. 8 C.F.R. § 242.24(a) (1991).
32. *Id.* § 242.24(b).
33. *Id.* § 242.24(b)(1).
34. *Id.*
35. *Id.* § 242.24(b)(2).
36. 8 C.F.R § 242.24(b)(3) (1991).

cute an agreement to care for the juvenile and ensure the juvenile's presence at all future INS or Immigration Court proceedings.[37]

In unusual and compelling circumstances, the district director or chief patrol officer may exercise discretion and release the juvenile to an adult other than those falling within the specified categories above, provided that the adult executes an agreement to care for the juvenile's well-being and to ensure the juvenile's presence at all future immigration proceedings.[38] Thus, the statutory provisions logically focus on the well-being of the juvenile, as well as ensuring that he or she will be present at future proceedings.

If a juvenile cannot be released into the custody of an adult and detention is determined to be necessary, the juvenile is referred to a "juvenile coordinator," whose responsibilities include finding suitable placement in a juvenile facility.[39] Further, if detention is determined to be necessary, the juvenile may be temporarily held by the INS authorities or placed in an INS detention facility having separate accommodations for juveniles, pending suitable placement made by the juvenile coordinator.[40]

In situations in which a juvenile does not wish to be released to his or her parents, who are otherwise suitable, the parents are notified and afforded the opportunity to present their views to the district director, chief patrol agent or Immigration Judge before a custody determination is made.[41]

Notice to parents also is required if the juvenile seeks release from detention, voluntary departure, parole, or any other form of relief from deportation, when the grant of such relief "may effectively terminate some interest inherent in the parent- child relationship and the juvenile's rights and interests are adverse with those of the parents,"[42] if the parent is presently residing in the United States. In such case, the parent shall be given notice of the juvenile's application for relief and afforded the opportunity to propound his or her views or interests to the district director or Immigration Judge prior to determination on the merits of the requests for relief.[43]

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37. *Id.*
38. *Id.* § 242.24(b)(4).
39. *Id.* § 242.24(c).
40. *Id.* § 242.24(d).
41. *Id.* § 242.24(e).
42. 8 C.F.R. § 242.24(f) (1991).
43. *Id.*

A distinction is made between juveniles who are apprehended "in the immediate vicinity of the border who reside permanently in Mexico or Canada," and all others. As to the former, before they are presented with a form for voluntary departure, they must be informed that they may make a telephone call to a parent, close relative, friend or an organization found on the free legal services list.[44] Other juveniles apprehended must be provided with access to a telephone and must, in fact, communicate with either a parent, adult relative, friend, or an organization found in the free legal services list prior to being presented with the voluntary departure form.[45]

Finally, when a juvenile is apprehended, he or she must be given a notice and request for disposition advising the alien of his or her rights.[46] Interestingly enough, the definition of minor, under fourteen years of age, is found only in this particular provisions, which provides that if the juvenile is under fourteen or unable to understand the notice, the notice shall be read and explained to the juvenile in a language that the juvenile understands.

As a practical matter, the better approach would be for agents of the INS to ensure the notice is read and explained to all juveniles in their native language, unless it is clear they understand English. This would have the effect of obviating the different age cutoff for juveniles, as opposed to minors.

VI. Pending Litigation

The INS policy of detaining alien children unless the regulatory requirements[47] have been met has been found unconstitutional by a majority of the en banc Ninth Circuit Court of Appeals in *Flores v. Meese*.[48] Since the appellate court concluded that the INS had acknowledged that the regulation was not necessary to ensure attendance at immigration proceedings or that release of the children so detained would create a threat of harm to the children or anyone else, the court's analysis was limited to the interests advanced by the INS.

The INS contended that detention of a child, when no parent or

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44. *Id.* § 242.24(g).

45. *Id.* If the juvenile, on his or her own volition, asks to contact a consular officer and, in fact, makes such contact, the requirements of this section are met.

46. *Id.* § 242.34(h).

47. *See* 8 C.F.R. § 242.24 (1991) (listing the applicable requirements).

48. 942 F.2d 1352 (9th Cir. 1991).

legal guardian was able to take custody, better served the child's interests than release to an adult whose living environment the INS was unable to investigate. In a related argument, the INS urged that the policy was necessary to protect the agency from potential litigation in the event harm should befall children so released.[49]

However, the court held that accepted principles of habeas corpus are applicable, citing *Carlson v. Landon*,[50] and that aliens have a fundamental right to be free from government detention unless a determination is made that such detention furthers a significant government interest. The court concluded the INS failed to support either of the above arguments as to the interests served by the regulations. Therefore, the INS failed to demonstrate the necessary furtherance of the significant government interest.

The dissent, led by Chief Judge Wallace, determined that the right involved was that of children to be released to unrelated adults without the INS approval and that it was a non-fundamental right. Accordingly, the appropriate test was not whether a significant government was furthered, but, rather, whether the INS interest, of protecting the children and avoiding potential liability, was legitimate and to which the regulation was rationally related. The dissent, affirmatively answered the latter question by emphasizing the significant deference courts traditionally have paid to immigration laws and to regulations promulgated by the political branches of government.[51]

The court majority affirmed the district court order which found the blanket detention policy unlawful. In addition, the majority ordered that children be released to responsible adults when no parent or legal guardian is available to take custody, where determined appropriate on a case by case basis. Further, the court directed that hearings be held before Immigration Judges for determination of the terms and conditions of such release.[52]

VII. Responsibilities for Unaccompanied or Abandoned Foreign National Children

While the above mechanisms appear to be in place for minors

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49. *Id.* at 1362.
50. *Id.* at 1359-60 (citing Carlson v. Landon, 342 U.S. 524 (1952)).
51. *Id.* at 1377. (Wallace, C.J., dissenting) (citing *inter alia* Mathews v. Diaz, 426 U.S. 67 (1976); Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984) (en banc)).
52. *Id.* at 1364.

under federal law, the next question is the protection to be afforded to a child who enters the United States without a parent or a legal guardian. This, in turn, raises a further issue: who is responsible and accountable for them pending the outcome of their deportation proceedings in Immigration Court?

Because federal law is silent on this issue, the ultimate answers may well be found by turning to the laws of those jurisdictions in which the Immigration Court proceedings are conducted. Since this article has been authored by judges situated in the Miami Immigration Court, it appears appropriate to reference Florida law in these issues, notwithstanding the fact that the ultimate status of alien children is governed by federal immigration law.

Moreover, most state laws, including those of Florida, make no distinction between a child who is a foreign national or a Florida resident. This is premised on the notion that the state has an overriding social and humanitarian interest in the welfare of *all* children, no matter what their citizenship or nationality, if they fall within the jurisdiction of the state.

In Florida, a mother and a father are jointly the natural guardians of their natural and adopted children during the latter's minority,[53] and if one parent dies, the natural guardianship passes to the surviving spouse and continues even if the surviving parent marries.[54] Moreover, guardianship generally follows custody.[55]

The circuit courts in Florida have authority to award custody, and therefore guardianship, to a father, a mother, or non-relative, as the circumstances may dictate.[56]

Florida law also clearly provides that a " 'child who is found to be dependent' means a child who . . . is found to have been *abandoned* . . . or neglected by his parents or other custodians."[57] The word dependent has also been construed to mean any person who is in need of aid, assistance, maintenance and care. Additionally, a dependent child may be taken into protective custody[58] or may have a guardian appointed to supervise, oversee, and provide for their needs and welfare.

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53. 28 FLA. JUR. 2d *Guardian and Ward* § 7 (1981).
54. FLA. STAT. § 244.301(a) (1991).
55. 39 AM. JUR. 2d *Guardian and Ward* §§ 65-66 (1968).
56. Smith v. Smith, 36 So. 2d 920 (Fla. 1948).
57. FLA. STAT. § 39.01(10)(a) (1991) (emphasis added).
58. FLA. STAT. § 39.401 (1991).

Since a child is classified as a minor under eighteen years of age,[59] then it naturally follows that they may not be competent to handle their own affairs and therefore are in need of protection.

What becomes of the unaccompanied or abandoned child who is placed in proceedings before the Immigration Judge and has no mother, father or other relative in the United States? Is this a dependent child or a child in need of services under the provisions of Florida law?

In Florida, the Department of Health and Rehabilitative Services normally has an affirmative duty to take steps for an unprotected minor, regardless of their legal residency or citizenship.[60] This would be one way to treat unaccompanied children, as described above. In the alternative, Florida law also allows for appointment of guardians ad litem. A guardian is one to whom the law has entrusted the custody and control of the person or incompetent[61] and one category of incompetency is one who because of minority is incapable of caring for him or herself.[62]

Most importantly, a guardian ad litem can only be appointed by a circuit court judge before whom litigation is pending, to represent the ward in that particular matter,[63] as governed exclusively by statute.[64]

In *Flores v. Meese*,[65] the Ninth Circuit confirmed the district court judge's determination that United States Immigration Judges should decide child custody decisions. Query whether it may be a necessary part of that responsibility for Immigration Judges to have the authority to appoint guardians ad litem on behalf of minors who find themselves before the Immigration Court?

VIII. CONCLUSION

Because of the importance of both proper enforcement of both the United States immigration laws and the need to insure that minors in immigration proceedings have their rights and personal well-being fully protected, this issue should be addressed by Congress. The legislature

59. FLA. STAT. § 744.102(11) (1991).
60. FLA. STAT. § 39.002 (1991).
61. *See* FLA. STAT. § 744.102(8) (1991).
62. *See* FLA. STAT. § 744.102(11) (1991).
63. *See* FLA. STAT. § 744.102(9) (1991).
64. Poling v. City Bank & Trust Co., 189 So. 2d 176 (Fla. 2d Dist. Ct. App. 1966).
65. 942 F.2d 1352, 1364 (9th Cir. 1991).

should give serious consideration to vesting such authority in the United States Immigration Judges, who directly adjudicate deportation and exclusion proceedings. This would seem to be the best way to protect the legal interests of those children without parents or other responsible persons to see to their needs, who are faced with the prospect of forced removal from the United States.