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# TRIAL



# REPORTER

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## Immigration

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- The Travel Ban and the Fourth Circuit – Much Ado About Nothing?
- Navigating Removal Proceedings
- The Future of DACA

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# Immigration

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# Family Contingency Plans for Undocumented Immigrant Parents of U.S. Citizen Children

By Nicole M. Whitaker

The 2016 election triggered a severe and sudden shift in the landscape of practicing immigration law. Immigrants—documented and undocumented immigrants—have become a political target and immigration law has become a hot button issue.

One month after President Trump's inauguration, the Department of Homeland Security published a memo expanding the enforcement priorities of Immigration and Customs Enforcement (ICE) for apprehending, detaining, and deporting undocumented immigrants. Under the Obama administration, the agency focused its efforts primarily on convicted criminals and people who threaten public safety. Under the Trump administration, the agency's focus is much more extensive and far-reaching. No class or category of undocumented immigrants is safe from arrest or deportation.

Fueled by sensationalized headlines in the press, undocumented immigrant parents of U.S. citizen children have begun to consider the grave possibility that they could be the next target for ICE. There have been reports of parents being arrested in their workplace, at their place of worship, and outside their children's schools.

In the first few weeks of media furor after Trump took office, I had clients calling my office after spending days locked in their homes with their children too afraid to go to work or walk their kids to school. Although the immediate terror has subsided, their fear remains. Undocumented immigrant parents face a difficult decision: If they are deported, what happens to their U.S. citizen children?

Every undocumented parent should have an appropriate plan for their own family in the event of their arrest or deportation. Counsel should facilitate this conversation by asking clients whether they have thought about where their children would go and who would care for them in such a scenario. Attorneys can advise clients on temporary and short-term solutions as well as more long-term plans for their children's care in the event their undocumented parent is arrested or deported. It is important to stress that advanced planning is necessary since a parent probably won't have the time or opportunity to do so once they are apprehended.

## Encouraging Family Communication

Apart from the fear of having their family separated, an undocumented parent worries about how their children will feel when their parent doesn't show up to pick them up from school one day or worse—how their children could be traumatized if their parent is arrested by ICE right in front of them and taken away in the middle of the night.

Every parent should discuss who would care for their children in the event of an emergency like an ICE arrest. Parents should discuss with their children and potential caregiver how they can get in contact with each other. Both the parents and the children should memorize the caregiver's phone number and parents should designate the caregiver to have authorization to pick the children up from their school or after-school program.

Every family should keep a file of important documents in a safe place. The file should include passports, birth certificates, powers of attorney or caregiver's authorization forms, and copies of driver's licenses or other identification cards. Parents should explain to children, family members, and emergency caregivers where to find this file. It might help to keep these documents in a brightly colored folder to make it easier to find.

The folder can also include contact information for the family's dentist and pediatrician, information on the children's health insurance, a list of the children's medical conditions, and a list of medications the children are taking or have allergies to. Financial documents in the file can include recent bank account statements, the family's current lease or mortgage documents, and titles to vehicles and real property in the U.S.

The file should also include a list of contact information for important people like faculty at the children's schools and after-school programs and any attorneys or nonprofit legal service providers the family has hired or consulted with.

Family members, potential caregivers, and older children should know how to use ICE's Online Detainee Locator System at [locator.ice.gov](http://locator.ice.gov) to find out where a parent is being held after an ICE arrest. The file should have a list of information needed to use the online system: either the parent's alien number ("A-Number") and country of birth or the parent's full name, country of birth, and date of birth.

## Power of Attorney

If a parent is in ICE custody or is deported to their home country, the remaining family members in the U.S. won't have an easy way to get their signature to write checks to pay the mortgage or rent and household bills. A power of attorney gives someone the legal authority to act on one's behalf to make financial decisions.

If someone has a power of attorney from the deported parent, they will be able to handle everyday matters like paying a mortgage or an electric bill and withdrawing funds to provide for the children's medical or educational expenses. A power of attorney can also be used for more formal responsibilities like executing tax returns, opening and closing bank accounts, accessing safe deposit boxes, paying real estate taxes, and selling and transferring the title to cars and real property. If the parent owns a business, an agent can pay the company bills and payroll, enter into contracts, and even sell the business.

Drafting a power of attorney in Maryland has become particularly straight-forward since the Maryland General Assembly passed legislation creating a statutory form power of attorney. Under the Maryland General and Limited Power of Attorney Act, individuals, banks, and organizations can be held liable for attorney's fees if they refuse to abide by the statutory form power of attorney.

A parent can choose whether to execute a general

or limited power of attorney. Both can be drafted using the Maryland statutory form.

A general power of attorney is very comprehensive. It allows an agent to act for the parent in all of the parent's business and personal financial matters. The agent would "stand in the shoes" of the parent and could do anything with the parent's money that the parent could do his self or herself.

A limited power of attorney is a power of attorney assigned for a specific purpose or time period. By selecting individual powers for an agent to have, a parent can limit the power of attorney to only the specific purposes that the parent chooses.

Since a durable power of attorney is effective immediately, it is wise for clients to consider implementing safeguards to ensure that their agent doesn't have unnecessary access immediately to their finances. I suggest that clients give the executed document to a trusted third party to store it until needed. The client can provide the third party with specific instructions on when to release the power of attorney to the agent. In some cases, the client may choose not to even inform their agent that a power of attorney exists until it becomes necessary for the agent to act.

For example, if a client is choosing to execute a durable power of attorney naming his brother as agent, he can give the document to his sister to keep. He can instruct his sister to only release the power of attorney to his brother in the event that he is detained by ICE or deported and it becomes necessary for someone to have a power of attorney to pay bills, manage bank accounts, etc.

A parent can also choose to limit their power of attorney to a specific time period. In this case, a parent might limit the power of attorney specifically to times when the parent is in ICE custody or living in their home country. One disadvantage of limiting the power of attorney to these specific times is that the agent would have the added burden of proving that the parent is actually in ICE custody or in their home country to use the document. The person or organization accepting the power of attorney might be more reluctant to abide by such a limited power of attorney because they have to evaluate both the validity of the power of attorney as well as the evidence the agent has to prove that the condition exists for them to use the limited power of attorney.

A parent can name a primary agent, a co-agent, and/or a back-up or successor agent for a power of attorney. It is very important that a parent trust implicitly the people they designate as agents because once an agent has an executed power of attorney, he or she can empty a bank



account, sell all assets in the parent's name, and skip town.

An attorney should discuss with undocumented clients the advantages and disadvantages of recording powers of attorney and/or revocations in the state land records. Recording a power of attorney will make it less likely that someone would question the validity of the document. Recording also makes it possible to obtain a certified copy of the recorded document if the original is lost or destroyed. If a client decides to revoke the power of attorney, recording the revocation helps ensure that the agent will not be able to act. If the power of attorney and revocation are not recorded, however, and an agent still has the physical document giving them power of attorney, a bank or individual examining the document wouldn't have any way of knowing whether it has been revoked since its date of execution. The greatest disadvantage for an undocumented immigrant recording a power of attorney would be making their county of residence and address public record. For many undocumented clients, this disadvantage may outweigh the benefits of recording.

## Notarized Childcare Authorizations

If a parent is arrested, a caregiver would ideally have documents already executed by the parent in order to care for the children with as few issues as possible. If a parent is deported, the family will have to decide whether their American children should stay in the U.S. with a caregiver or be reunited with their parent in a different country.

It may be possible to draft a comprehensive notarized consent authorizing an appointed person to act on behalf of the parent to make general childcare decisions for the children. This document can give a caregiver authority to:

- Send the child on domestic and international travel,
- Access medical records, consent to medical treatment, and handle healthcare insurance matters for the children,
- Communicate with the children's schools and afterschool programs, access academic records, and make decisions regarding the children's academics,
- Consenting to the child's application for a driver's license learners permit, etc.

Doctors and airlines are accustomed to receiving authorizations executed by parents specifically for the purposes of medical care and travel. Therefore, it may be

best to also have a notarized authorization specifically for healthcare decisions and specifically for international travel.

Most U.S. citizen children of undocumented parents have never visited their parents' home countries. In the event a parent is deported, a family may decide to stay together and have the children move to the parent's home country. A family may also decide that it is in the children's best interests to remain in the United States rather than uproot the children and move them to a country that may be more dangerous and have fewer educational opportunities for them. Even if a child stays in the U.S., they may want to travel to visit their parent.

Parents should make sure that their U.S. citizen children have U.S. passports. Parents should also investigate whether their children are eligible for dual citizenship. If the children are eligible for dual citizenship, they should apply for both a U.S. passport and a passport for their parent's country of origin.

Although there are many templates for parent consents and authorizations that are available online, attorneys should verify that the authorization forms comply with state law. Since matters regarding guardianship and custody of children are generally handled at the state level, the parents executed documents may be scrutinized in a state family court.

## Guardianship or Custody

The consent forms and authorizations discussed above are for perfect temporary situations. They can be used while a parent is in ICE custody and while a family decides what long-term plan is best for their children. If a family decides that it is in the U.S. citizen child's best interest to remain in America long-term with a caregiver, they will need a more permanent legal solution.

For a non-biological parent in Maryland, a long-term caregiver of a minor should consider petitioning the court for guardianship or third-party custody. A caregiver should not petition for guardianship or custody while the parent is still in the U.S. living with the children, but should do so when it becomes necessary because the parent is being detained long-term or has been deported.

An undocumented parent can execute a consent to guardianship even before the need arises for a caregiver to petition the court for guardianship. If possible, the consent should be notarized and accompanied by a copy of the parent's photo identification. If a parent already has a potential caregiver in mind, they can execute the consent and have an attorney or third-party hold it with

specific instructions that it be released, for example, in the event the parent is detained or deported. While a petitioner can obtain guardianship of a child without the consent of the biological parents, the process can go much faster with the consents.

If the consents are not already executed before the parent is detained or deported, it may be difficult to get a notarized signature while the parent is in federal detention or in a rural area in their home country. It is not impossible, however, and an attorney should counsel the parent on the risks and benefits of both options.

## Choosing an Agent and Caregiver

Choosing an agent for a power of attorney or a caregiver to name in a childcare authorization is an important and very personal decision. Oftentimes, parents already have someone in mind, but there are certain considerations you should address with undocumented parents before they make their final decision on who to appoint for these roles.

If both parents are in the picture, each parent should name the other as the primary agent in the documents. This way, a biological parent would be able to do things like obtaining a passport that require either the consent of both parents or proof that a single parent has full legal custody.

In naming a non-parent agent, one should consider the agent's immigration status, marital status, and appropriateness for a caregiver position.

An undocumented parent should choose someone with lawful immigration status as an agent or caregiver—ideally a U.S. citizen or lawful permanent resident (green card holder). The next-best option would be someone with long-term, but not permanent, immigration status like TPS (temporary protected status) which can be renewed. You should counsel a parent of the disadvantages of selecting another undocumented individual to serve as an agent or caregiver. In today's political climate, an undocumented caregiver may be fearful of placing their name on legal documents or advocating for the children in legal settings.

If the caregiver is married, consider whether their spouse should also be named in the document as an agent or back-up agent on a caregiver authorization. It could be much more convenient for the care givers, but one disadvantage of naming a caregiver's spouse as a co-agent or back-up agent is the possibility of their divorce.

Imagine that your client decided to name her sister as the agent on a general caregiver authorization. For convenience, your client named her sister's husband as a co-agent, but she would not want her brother-in-law to remain a co-agent in the event he divorces her sister. You can include language in the document expressing that the husband was named as a co-agent only because he is married to the client's sister. You can also draft a provision stating that a divorce between the sister and her husband would disqualify the husband as a co-agent.

It may seem obvious, but you should also ensure that your client chooses a caregiver that would be fit to have custody of the child. The caregiver should not have any criminal convictions or a history of drug or alcohol abuse.

## Conflict of Interests

Many of my prospective clients for this type of family deportation contingency planning have requested that the potential caregiver for their children accompany them to the initial legal consultation. It is important to explain to clients that you should meet only with the undocumented parents first. In addition to preserving attorney-client confidentiality, you'll be able to evaluate and discuss the parents' options without any outside influence or opening yourself up to unnecessary conflicts of interest.

For example, after discussing considerations in choosing an appropriate caregiver, a parent may decide that another person may be a better choice than the individual they were originally considering. That would be an awkward conversation if the original potential caregiver were in the same room during the conversation.

If the parent you previously counseled is deported and a caregiver wants you to represent them in petitioning for third-party custody or guardianship, there will almost certainly be a conflict of interest in representing the caregiver after counseling the parent in the same case. You should discuss this with the parent while representing them in the family contingency planning matter. If the caregiver later approaches you about representing them in petitioning for custody or guardianship, you can decide whether to refer the caregiver to another attorney or take the necessary steps to address the conflict.

## Conclusion

Having a family contingency plan in place in the event of an undocumented parent's deportation helps to alleviate at least some of the fear and apprehension many immigrant families are facing in today's political climate. Having a plan in place will help make sure that the parent, rather than a judge or the department of social services, will be able to make decisions regarding their child's care.

There is no one-size-fits-all approach to setting up these contingency plans since they depend on a number of personal factors. Explain to your clients that most of these documents and family law forms are based on state law and vary from state to state. Forms found on the internet and legal procedures discussed on national news stations probably need to be reviewed and modified to comply with Maryland law. Regardless of the plan you develop with your undocumented clients, executing some of these documents and being aware of legal options and resources will help ensure that a parent's wishes are carried out in the unfortunate event that they are separated from their children.

## Biography

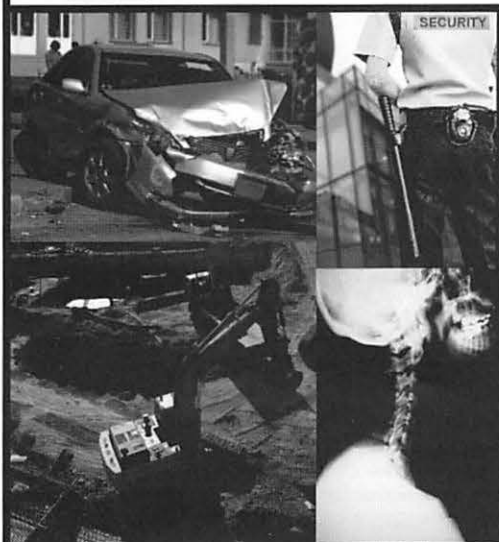
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