

# Parents, Children and Deportation

by Christine A. Lustgarten

With the increased focus on the return of undocumented persons to their countries of origin, a growing number of children of these persons are being left behind. These children have been referred to as the "collateral damage" of deportation.

The irony is, in those situations where mothers and fathers cross the border to fight for a better life for their children, the greater battle comes for them when they seek to reunite their families upon their arrival home following deportation.

Typically, when an undocumented parent is detained for deportation, his or her child either becomes an emergency ward of the state or the subject of guardianship proceedings. Some parents, upon incarceration, have completed a Delegation of Parental Powers, authorized by Neb. Rev. Stat §30-2604. This document requires a 'properly executed power of attorney' and allows for the delegation of parental powers regarding care, custody, or property of the minor child by the parent to another person for a period not to exceed six months. Absent the parents executing this delegation immediately prior to or upon deten-

tion, and the exercise of these powers by the person to whom they are delegated, it is likely the state will place the children in foster care or an 'interested person' would seek guardianship.

Children who are born in the United States of foreign parents have dual nationality and are considered citizens of both the U.S. and the country of their parents. Likewise, children born of a foreign parent and a U.S. parent have dual citizenship, which provides these children with all the rights and protections of both nations. Among these rights is the constitutionally protected right of biological parents to raise their children and the right of children to be raised by their biological parent. Cooperation and understanding between the nations through the court systems is imperative for the speedy reunification of families torn apart by deportation proceedings.

## Juvenile Court Proceedings

Section 43-247(3)(a) of the Juvenile Code provides that the Court has jurisdiction over children who are without proper parental support through no fault of his or her parent, i.e. absent allegations of abuse or neglect. Juveniles adjudged under this subsection (3)(a) may be placed under the custody and care of the Department of Health and Human Services and the courts have broad discretion as to the disposition of the children under these circumstances.

In the cases involving the disposition of children of undocumented persons, family members, if found, may be the most appropriate placement choice for these children. Juvenile courts have jurisdiction to appoint a guardian and it has exclusive jurisdiction to appoint a guardian if the juvenile is already under its jurisdiction. Likewise, County Courts have jurisdiction for the purpose of commencing guardianship proceedings.

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## PARENTS, CHILDREN AND DEPORTATION

In the event the children become wards of the state and are placed in foster care, services will be provided by the state for the care and custody of the children. Should evidence be uncovered indicating abuse or neglect by the incarcerated parent, it is likely that termination proceedings will begin. Alternatively, once the parent has been returned to his or her home country, upon the state's dismissal of the proceedings, the children can be returned to their parents.

### County Court Proceedings

Neb. Rev. Stat. § 30-2605 et seq provides the procedure for the appointment of a guardian for a minor child. Specifically, if, upon a hearing on the matter, the court finds that a qualified person seeks appointment, venue is proper, the required notices have been given, the requirements of section 30-2608 have been met, and the welfare and the best interest of the minor will be served by the requested appointment, it shall make the appointment. Neb. Rev. Stat. § 30-2611. Proper venue for proceedings for guardianship of a minor is the place where the minor resides or is present.

### Parental Preference

In either court, the parental preference principle protects the constitutional rights of the biological parent to rear his or her children without state interference. This right has been recognized by the United States Supreme Court as a fundamental liberty interest protected by the Fourteenth Amendment and a fundamental right derived from the privacy rights inherent in the constitution and is perhaps the oldest of the fundamental liberty interests recognized by the U.S. Supreme Court. See *Quilloin v. Walcott*, 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978); *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944); *Smith v. Organization of Foster Families*, 431 U.S. 816, 97 S.Ct. 2094, 53 L.Ed.2d 14 (1977).

The parental preference principle provides that a parent has a natural right to the custody of his or her child which trumps the interest of stranger to the parent-child relationship and the preferences of the child. For a court to deny a parent the custody of his or her minor child, it must be affirmatively shown that such a parent is unfit to perform parental duties or that he or she has forfeited that right. *In re Interest of Angelica L. & Daniel L.*, 277 Neb. 984, 767 N.W. 2d 74 (2009). *In re Guardianship of Cameron D.*, 14 Neb. App. 276, 706 N.W. 2d 586 (2005). *In re Estate of Jeffrey B.*, 268 Neb. 761, 688 N.W. 2d 135 (2004). *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238 (2004).

Recently, the Nebraska Supreme Court weighed the rights

of an undocumented immigrant to maintain custody of her children against the State's duty to protect her children. *In re Interest of Angelica L. & Daniel L.*, 277 Neb. 984, 767 N.W. 2d 74 (2009), is an important case when the children of deported individuals are the subject of guardianship proceedings. In determining the rights of a Guatemalan mother to have her children reunited, the Court held that deportation is not a de facto termination of parental rights. The Court guides us to uphold the constitutional right of families to be together, holding that the proper starting point for legal analysis when the courts involve themselves in family relations is always the fundamental constitutional rights of parents.

Of equal importance is the finding of the Court that a parent's right to be with his or her children cannot be ignored simply because a court determines that one set of circumstances may be superior to another. "The best interest standard is subject to the overriding presumption that the relationship between parent and child is constitutionally protected and that the best interests of a child are served by reuniting the child with his parent." *Id* at 1007. In other words, biases about perceived lifestyle in foreign countries cannot cloud our judgment when reunification of families is sought. Our courts do not require perfect parents. The presumption of the parental preference doctrine can be overcome only when a parent is proved unfit. *In re Guardianship of Cameron D.*, 14 Neb. App. 276, 706 N.W. 2d 586 (2005).

### Role of the Consulate

When a parent is deported, he or she cannot return to the United States for the purpose of asserting their parental rights and seeking the return of their children. 'Emergency visas' are unavailable to a deported person and an illegal entry would result in incarceration and deportation again, only delaying the process.

The Vienna Convention on Consular Relations, art. 37, Apr. 24, 1963, 21 U.S.T. 77, 102, and Nebraska law, Neb. Rev. Stat. 30-333 and 43-3801 to 3812, provide for notification to, and involvement by, the consular officials when subjects of their country are or may be interested parties of a guardianship or termination proceeding affecting the minor child of their nation.

Notification of the Consulate is not jurisdictional, but early involvement of the Consular officials can assist in the reunification process. If a guardianship has been put into place upon the incarceration of an undocumented person, a consular official fits the definition required for guardianship termination proceedings as a party "interested in the welfare of the minor child".

It is well understood that, in order to have standing, a litigant must assert the litigant's own legal rights and interests and cannot rest his or her claim on the legal rights or interests of third parties. *In re Interest of Natasha H.*, 258 Neb. 131, (1999).

