

1. Child Custody

In the face of deportation, you may face wrenching decisions about child custody. This section outlines the basic custody issues you may face as an immigrant parent and offers guidance on protecting parental rights before, during, and after deportation. This section addresses the following issues:

[Understanding Child Custody and Guardianship: Basic Definitions](#) > [Who Can Seek Custody or Guardianship and How Does a Court Determine It?](#) > [Planning Child Custody Arrangements before Detention or Deportation](#) > [Protecting Parental Rights During Detention](#) > [Options for Parents Facing Deportation](#) > [Barriers an Immigrant Family May Face in Court](#)

Each Chapter is intended to provide generalized information on a particular topic. In many cases, laws may differ from state to state. Therefore, this information is not intended to replace state-specific legal assistance. Nothing in this manual is intended to create an attorney-client or fiduciary relationship.

Understanding Child Custody and Guardianship:

Basic Definitions

“Child Custody” is a collection of various legal rights to care for a child and make major decisions about that child’s life. These various legal rights – physical custody, legal custody, joint custody, and sole custody – are described below.

“Custodian” is the person to whom a court grants custodial rights. This may be a parent or another person, as a court may deem appropriate.

“Physical Custody” is the parent or custodian’s right to have a child live with the parent or custodian. The person with physical custody may make decisions about the routine day-to-day activities of the child.

“Legal Custody” is the right to make decisions about the child’s upbringing. A person with legal custody may make decisions about how to raise the child, including decisions about schooling, religion and/or medical care.

“Sole Custody” is when one parent has all the custodial rights. This could be sole physical custody, sole legal custody or both.

Note: In a number of states, courts will not award sole custody to one parent unless the court deems that the other parent is “unfit,” meaning the parent is not capable of caring for the child. Examples of being “unfit” include a parent’s alcohol or drug dependency or history of child abuse. Also, even if a court awards sole physical custody to one parent, it may still grant visitation rights to the other parent.

“Joint Custody” is an arrangement where both parents share custodial rights of their child. It may be joint physical custody, joint legal custody or both. Courts in some states regularly award joint legal custody, which means that both parents share the right to make decisions about a child’s upbringing.

“Legal Guardian” is a person -- other than the child’s parent -- who is granted the legal right to care for and make certain decisions for a child by court order or another process accepted by the state. For example, some states allow a parent to name a guardian through signing a document without court involvement. Other states require a petition to be filed for guardianship and place duties on the guardian, such as regular reporting to the court on the child’s well-being.

“Visitation” or **“Parenting Time”** is a legal right granted by the court that gives a parent or others the right to spend periods of time with the child. A person granted visitation rights may not have the right to make major decisions about the child’s wellbeing or upbringing depending on what the court orders. Once a court determines visitation rights, all parents and custodians are bound by the court’s order. Visitation rights often can only be changed by a new court order.

Visitation rules may vary by state. Below are some examples of visitation rules:

- **California:** *In California, courts have the discretion to grant reasonable visitation rights to anyone who has an interest in a child’s welfare, provided that it would be in the best interest of the child. This may include a parent, pursuant to a custody order. It also may include a child’s grandparents or, if one of the child’s parents is deceased, the children, siblings, parents and grandparents of the deceased parent.*
- **New York:** *In addition to provisions for visitation by parents and grandparents, New York law contains a procedure for brothers and sisters of minor children to petition the court for visitation rights.*
- **Texas:** *In Texas, grandparents and other relatives, in addition to people caring for a child including foster parents, may seek visitation rights, although it can be challenging because the court typically will prioritize the parent’s wishes for their child’s upbringing*

Who Can Seek Custody or Guardianship and How Does a Court Determine It?

Typically, children born during their parents' marriage are considered jointly in the custody of both parents unless a court orders otherwise. That means either parent can make legal decisions for the child or care for the child without a court order. Where there is no court order to the contrary and the other parent is available to care for the child, the parent facing deportation may not need to take any steps to provide for custody of the child.

Typically, if the parents were not married when the child was born, the mother may choose the child's last name. The child may take the mother's last name, father's last name or a hyphenated double last name or even a different last name from both parents on the birth certificate. In instances where the mother has been granted sole custody rights in a divorce or other legal proceeding, then she is typically the sole custodian of the child. However, it is not always the case that the mother is the sole custodian. For example, if a father is not named on the birth certificate, but there has been a court determination of paternity and/or the father has always been regularly involved in the child's life, a court may determine that the father has equal custody rights. Some states, however, limit custody rights of unmarried fathers. If both parents are named on the child's birth certificate, then they both will be joint custodians in many states.

If the parents are divorcing or previously divorced, then child custody rights are usually determined in the divorce documents. As explained below, a court can change these custody rights.

The child's parents, other adult family members, or other adult individuals designated by a child's parents may be able to initiate child custody proceedings in court. Family members who can initiate a custody proceeding may include siblings, grandparents, aunts, uncles or cousins, depending on state law. Other people who have cared for the child may be permitted to seek custody rights as well. In some states, but not all, courts will not grant custody to a third party (non-parent) over the parents' objections unless the parents are found unable to care for the child.

Note: A custody order may be the easiest or only way for parents to ensure visitation rights after deportation, although a judge in a child welfare proceeding could also order visits.

Selecting a temporary guardian for your child in the event of an unforeseen circumstance typically does not put your parental rights at risk. In many states, a parent may revoke a temporary guardianship at any time and select someone else as the child's temporary guardian by completing and notarizing a new guardianship designation form.

The “Best Interests of the Child” Standard

Regardless of who seeks custody of a child, a court will determine custody (and visitation rights) by using the “best interests of the child” standard. The “best interest” of the child typically will be the most important factor in the determination of custody. In determining the best interests of the child, the court may consider:

- The preference of the child, considered in light of the child's age and understanding;
- The physical, emotional or educational needs of the child;
- The length of time that the child has lived in a certain environment and the likely effect a change will have on the child;
- The age, sex, background or other relevant characteristics of the child;
- The likelihood of harm that may be suffered by the child;
- The capability and willingness of the parent, or other person asking for custody, to meet the child's needs and to put the child's needs before his or her own; and
- The moral fitness of the person asking for custody.

Under most state laws, a request for custody must be filed in the child's “home state.” The “home state” is the state where the child lived for at least six consecutive months before the child custody proceeding. If the person seeking custody is not the legal or biological parent of the child and lives in the same state as the child, the request for custody can be filed in the county where they live or where the child resides.

How Does a Court Establish Legal Guardianship?

Each state has a specific procedure for petitioning a court to have a legal guardian appointed for a minor child. Generally, these procedures are described in detail in the state's domestic/family relations statutes or in the state's probate statutes. The person interested in becoming guardian often must file a petition with the appropriate court. Then, the court will set a date for a hearing and decide whether it would be in the best interest of the child to have this person appointed as the child's legal guardian.

When someone who is not the child's legal or biological parent asks to be appointed as the child's legal guardian, it is helpful to have a sworn affidavit from both parents stating that the parents' wish to have the person appointed as the legal guardian of their child. If there is only one parent listed on the child's birth certificate, that parent alone will sign the sworn affidavit. If both parents are on the child's birth certificate, or if the parents previously divorced and were granted joint legal or physical custody, then both parents should provide such an affidavit. Without the affidavit from both parents, it is likely that courts would require a showing of a serious attempt to locate the missing parent and that obtaining the affidavit would be practically impossible.

In addition to having a formal court process to have a guardian appointed, some states permit a parent to designate a temporary guardian, as discussed below, who can make medical and school decisions for the child and, in some cases, travel with the child. Because not all states recognize this type of authorization and some limit the amount of time and circumstances where it can be used, it is important to check with a local legal expert before attempting this kind of an arrangement.

When Will a Court Determine Custody or Guardianship?

The time it takes, from start to finish, for a court to determine custody or guardianship is highly variable and may take anywhere from several months to over a year. Many factors will affect the amount of time a custody or guardianship case will take before the court makes its final decision. These factors include, among other things, whether the custody or guardianship petition is contested, the specific procedure for determining custody or guardianship in the jurisdiction, and how busy the court is.

Planning Child Custody Arrangements Before Detention or Deportation

If you believe you are at risk of being detained or deported by immigration officials or otherwise separated from your children for an uncertain period of time for another reason (e.g., arrest, medical incapacity), establishing a plan to have someone care for your child early will allow you to preserve parental rights where possible and prevent the children from entering foster care.

Because parental rights may be very limited once you are detained or deported, it is best to establish these plans in advance and carefully discuss them with your children, your spouse, other parents, relatives, and any other people who may be involved in caring for your children in your absence.

Parents at risk for detention, deportation, or other sudden separation from their children may take the following preparatory steps.

1. Identify people who will take care of the children

If you may be detained, deported, or otherwise unable to take care of your children, it is important to find a person that you trust to act as a caretaker that can take on the responsibility of caring for the children.

You should first identify people who may currently have legal custody. As explained above, where parents share joint custody of the children, the other parent can step in to make legal decisions for a child, especially if they are not at risk of detention/deportation.

If another parent or person with legal custody is unable to take care of your child, or such person does not exist, you should identify another caretaker. Depending on the state, the caretaker may not need to have valid immigration status of the caretaker's own to serve as your child's guardian or custodian. Always check state-specific forms and guidelines, as these policies may be subject to change.

Tip: You should be sure that the designated caretaker is someone you fully trust. You should also be sure to carefully consider and discuss various points when choosing a caretaker, such as the person's physical and financial capacity to care for children over a long and indefinite amount of time, other people in the household that will have regular contact with the children, and any special medical or other needs the children might have.

2. Prepare temporary guardianship arrangements, if applicable

Formalizing caretaker and temporary guardianship arrangements will grant the other person the proper legal authority to quickly step in and act on behalf of your children. Verbal agreements usually are not enough to grant another person legal authority to make certain decisions for your child.

Tip: A caregiver who already is the child's legal guardian does not need to seek legal custody through the courts, but should always determine how to exercise his or her existing rights as a legal guardian.

Other Reasons to Formalize Guardianship Plans Include the Following:

- Some health insurance companies will not insure a child that is living with a caretaker who is not the child's parent or legal guardian;
- Many schools require that a child enroll through the child's parent or legal guardian or their current caregiver. The current caregiver could enroll the child in school if the child would be homeless if they did not live with the current caregiver (some states permit the use of a "school affidavit," which allows another person to enroll the child in school);
- A caregiver generally cannot obtain medical care for a child without the signature of the child's parent or legal guardian or a court order;
- A child may not obtain a U.S. passport without the consent of the child's parents or legal guardian; and
- Courts may decline to grant legal guardian status to someone other than a parent without some indication that the parents desire to grant guardianship power to others.

What is a Temporary Guardian and How Can a Temporary Guardian Care for Someone's Children?

If a detained individual is the sole custodian of a child, or if the non-detained custodian is also unable to care for the child, he or she should consider appointing a “temporary” guardian to temporarily care for the child if permitted by the state in which the child resides. Temporary guardianship is a legal arrangement that grants an individual the authority to care for a child for a limited period of time when the child’s parents are unable to do so. The person appointed as a temporary guardian should be a person that the parent completely trusts to care for the child.

An individual may appoint a guardian by filling out and notarizing the applicable guardian designation form for that state, where the state permits it. This document authorizes who may care for the child and make important decisions for the child, such as:

- Decisions about medical and dental care;
- Decisions about education and any special needs; and
- Decisions about travel.

The name of the form and information needed to complete a temporary guardianship varies by state. In some states, it is possible to place the designation of guardian on file with the court. For example, in Florida, parents may sign a written statement in which they name a “preneed” guardian for their child. The parents then file the statement with the court for the county in which they reside. If something happens to the parents and the child needs a guardian, the court will pull the parents’ statement from the court’s files and consider it in the guardianship proceeding. The parents’ statement is considered a “rebuttable presumption” that the person named in the statement should be the guardian. This means that the court would assume and appoint that person as guardian unless it was proven otherwise and that the person is not qualified to be the guardian.

Completing guardianship forms may be different from the court custody process, depending on the state law. Depending on the state, notarized guardianship forms may or may not be legally binding. The legal weight given to a notarized guardianship form is determined on a state-by-state basis, so the guardianship may or may not be recognized if a child is taken to another state.

In states that do not recognize the parents' ability to designate a temporary guardian for the child, parents who want to grant legal rights to the caregiver in advance of their detention/deportation will need to consider other options. These options could include seeking to have the caregiver granted custodial rights by filing a petition for custody which the parent can support. Parents should weigh their options carefully and consult with local legal assistance because granting custodial rights to another person in anticipation of deportation may cause parents to lose legal rights over their children if they are not deported.

A court is not required to honor any temporary guardian form if it becomes necessary to appoint a permanent guardian for the child. Although the temporary guardian form is one factor the court generally will consider where recognized, the court's final decision will be based on the child's best interests. Accordingly, a parent should think carefully about whom to name as guardian in the document. Selecting someone a court will consider fit to care for the child will increase the chances that the court will follow the parent's request.

Custody Orders and Consent Decrees

When planning for potential deportation, you should also review any existing child custody orders to determine whether any changes need to be made. Because the process of changing custody orders can take months, you should consider starting that process as soon as possible, if appropriate.

You may also consider obtaining custody consent decrees from a court or appropriate authority in advance where recognized by state law. Typically, the custody consent decree gives physical custody to the caregiver but allows parents to retain legal custody of the children. It may also establish visitation arrangements.

As with any process that involves the courts, many undocumented parents may be reluctant to attend court proceedings. This may limit their ability to provide legal protection to their children and their caregiver in advance in states which do not recognize informal arrangements, such as privately prepared guardianship designations.

Other potential challenges that could arise when planning child custody arrangements include documents that require the signature of both parents. You should also keep in mind that granting someone other than the parent custody of the child gives the custodian in loco parentis (in place of the parent) standing. This means that the custodian of the child has standing to petition for custody or to oppose custody challenges that

may arise in the future. So if the custodian does not agree to return the child to the parent or does not agree to enter into a new custody agreement, a court will decide who has custody. It is advisable to consult with a lawyer before entering into any custody agreements.

Formal custody arrangements, as explained above, may be made after a person is detained or ordered deported. After you are detained or deported, caregivers, guardians or others with standing can file for legal and/or physical custody of your children. Going through formal custody proceedings in advance of detention or deportation may cause you to lose certain parental rights unnecessarily, but it may be the only way to ensure that a caregiver is designated in advance and has legal authorization to care for and make necessary decisions for your children. Therefore, you should carefully consider your options and consult state-specific information before making any decisions that would involve the potential to diminish their parental rights.

Caregiver Authorization Affidavit

You also may consider naming a caregiver for your children using a Caregiver Authorization Affidavit. A Caregiver Authorization Affidavit is a form which allows you to name a caregiver and to grant that caregiver the ability to make healthcare and education decisions on the child's behalf when you are not present. A Caregiver Authorization Affidavit does not give the caregiver legal custody of your child and it does not affect your parental rights—the parents maintain custody and control of the child. A Caregiver Authorization Affidavit is not enforceable by a court and does not need to be filed with a court. However, a Caregiver Authorization Affidavit does need to be filed with the child's school, medical providers, or institutions where the caregiver is authorized to make decisions. The procedures for these affidavits vary by state, education district, and medical provider.

Important Legal Documents and Other Papers

It is important to be organized and to know where to find all legal documents relevant to the care of a child and to make sure all documents are up to date.

Tip: Families should keep all legal documents and any other important papers in a safe location. Parents and custodians should also inform others, including older children, of where to find the documents in case they are detained or otherwise unable to care for the child.

Tip: Parents and custodians should keep all original copies of all documents and only provide copies to immigration officials.

The following are examples of essential legal documents to prepare or gather, with more information on each type of document below:

- Child's birth certificate and social security card;
- Child's passport;
- Emergency contact forms;
- Current custody orders, guardian designations, and other consent/authorization forms;
- Last will and testament with guardian provisions; and
- Child's school and medical records.

Child's birth certificate and social security card

If your child was born in the United States, they should have a U.S. birth certificate and a social security card. Instructions on how to obtain a birth certificate can be found at:

<https://www.cdc.gov/nchs/w2w/index.htm>.

Social security card applications can be found at:

www.ssa.gov/online/ss-5.pdf

Tip: You should review your child's birth certificate to make sure that all the information is correct and nothing is missing. Whoever is named on a birth certificate is assumed to have custodial rights in many states. Therefore, if you are at risk for getting detained and you are the only parent listed on the birth certificate, you should consider amending the birth certificate to add the name of the other parent, if applicable. This process is simpler and likely less expensive than having custody determined through court orders.

Child's passport

If your child is not a U.S. citizen and does not have a passport, you can contact the consulate of the country where the child is a citizen to determine how to apply for a passport for the child.

If your child was born in the United States and does not have a valid U.S. passport, you should consider obtaining one for them as soon as possible. If you are deported and choose to have your child remain in the United States, they will need a passport to visit you in your home county.

Passport applications for minors are available at:

http://travel.state.gov/passport/get/minors/minors_834.html. Keep in mind, the U.S. Passport office has strict rules for who may and may not get passports for minor children. The passport application for a minor child must be submitted at a U.S. Post Office by both parents of the minor child. The only exceptions are:

- (i) if there is only one parent named on the child's birth certificate,
- (ii) if there is a court order granting sole legal and physical custody to one parent,
- (iii) if the parent has a special notarized letter, called a "Notarized Statement of Consent or Special Circumstances" (DS-3053), from the other parent who consents to getting a passport for the child,
- (iv) if one of the child's parents has died, or
- (v) if there is a court order naming a legal guardian for the child.

During the application process, you will be asked to show proof that the child is a U.S. citizen, which can be shown by presenting the child's U.S. birth certificate. You must also present proof that you are the custodian of the child either by presenting the child's U.S. birth certificate or a court custody order.

If one parent has died, the surviving parent may present the death certificate to show that he or she is now the sole custodian of the child. The surviving parent will also be asked to provide his or her own valid picture identification.

Tip: Child passport applications must be completed in person. If you try to obtain a passport for your child while detained, you must complete and notarize the Notarized Statement of Consent or Special Circumstances (DS-3053) form, available here:

http://travel.state.gov/passport/forms/ds3053/ds3053_846.html.

If a detained parent does not have sole custody and the other non-detained parent is unavailable, the non-detained parent must also fill out the DC-3053. If a non-detained parent is available, he/she can accompany the child to apply for a passport with the notarized DS-3053 form. The detained parent does not have sole custody of the child when the non-detained parent is named on the child's birth certificate or was granted legal or physical custody by a court order.

Many countries allow children born in the U.S. to have dual citizenship, which may make it easier for the children to travel between the U.S. and the country of the deported parent. You can contact the consulate of their home country for more information.

Current custody orders and guardian designations

As discussed above, you may be able to sign a form that names someone to serve as the temporary guardian of the child if you are unable to care for them. If you sign this form, you should keep the original with the other important papers. You should also give a copy of the form to the person named in the document as the temporary guardian.

Last Will and Testament with guardian provisions

Although the focus of this chapter has been on child custody issues arising during a deportation proceeding, it is also extremely important that you plan for the care of your child upon your death. This is essential if the non-detained parent is not alive or has no custody rights.

In a Last Will and Testament, an individual says who should receive his or her property upon death. A Last Will and Testament may also name someone to care for any minor children upon the parent's death. If an individual is married and shares physical custody with a spouse, the guardian named in the Will does not take care of the children unless both spouses have died. Alternatively, if an individual is the sole custodian, the guardian may be able to take over care of the children as soon as the individual passes away.

After the parent's death, the person named as guardian in the Will may need to petition the appropriate court to be formally appointed as guardian. The Will may serve as a guide for the court as it decides who should be appointed as the child's guardian. However, the court's final decision typically will be based on the best interests of the child. The requirements for a valid Will vary on a state-by-state basis; therefore, it is advisable to consult with a lawyer to make sure that the document is prepared properly.

Standby Guardianships and Power of Attorney

Where permitted, parents may also choose to grant another person a power of attorney or standby guardianship. These agreements allow another person to care for children and make medical or school decisions only when a specific event takes place in the future (e.g., detention or deportation). The procedures needed to establish a power of attorney or standby guardianship vary by state. Once granted, powers of attorney or standby guardianships may be revoked at any time by the parent, where permitted by state law.

Emergency contacts

You should prepare an emergency contact list that includes multiple ways to contact critical family members, schools, childcare and healthcare providers, coaches (etc.) and the family's support network. Share the list with key contacts and keep one with you.

Medical and school records

Keep each child's medical and current school records organized and accessible for your emergency contacts. Be sure to include contact information for all medical, dental, and behavioral health care providers – including counselors and specialists. Request a current immunization record from your pediatrician and clearly document any current medications, allergies and treatment plans for each child. Note the location of current medications and be sure that they are clearly labeled with the correct frequency and dosage. If your child has supplemental services, individualized education plans (IEPs) or accommodations plans (504s) at school, gather the most current copies in one place.

In general:

- Discuss custody plans to prepare entire family; and
- Seek additional legal or other help where needed.

Protecting Parental Rights During Detention

This section discusses how parents can protect their rights if they are picked up by U.S. Immigration and Customs Enforcement (“ICE”), separated from their children, and facing time in detention with the possibility of being deported.

Parental rights are the rights that you have as a parent to make decisions about the wellbeing of your children, including who cares for them and who they live with.

Remember: even if ICE is trying to deport you, you still have the right to make these decisions for your children. It does not matter if the children are not U.S. citizens—parents still have parental rights.

Even if you are detained, you can still advocate strongly for yourself as the parent of your children, particularly if being reunited with, or at least maintaining a relationship with, your children is your ultimate goal.

Steps Parents Can Take If Detained

If you are detained, you likely will want to

- (1) ensure that your children are taken care of, and
- (2) limit their time in detention.

This section focuses on what parents can do for their children, and does not address how parents can fight their own immigration cases. For that question, you should review a resource specific to that topic and consult with an immigration attorney.

Prepare for a Potential Stop by ICE

In preparation for a potential stop by ICE, regardless of whether your children are with you at the time, you should keep copies or photos of important documentation with them or on your phone that shows you have children, especially if the children are U.S. citizens. Examples of this documentation include:

- The child’s birth certificate on a phone;
- Evidence that the child is a DACA recipient, if applicable; and
- The child’s medical or education records.

Currently, ICE is more likely to release people they have detained if there is evidence that the person is not a flight risk and not a danger to their community. Having kids may show this.

If you are stopped by ICE, regardless of whether your children are with you at the time, it is very important that you inform ICE that:

- You have children who need your care;
- Request not to be detained by ICE, and advise that you will comply with ICE's requests; and
- You need to make a phone call to a caretaker or other emergency contact to arrange care for your children.

If parents have their children with them when they are detained

If you have your children with you when ICE detains you, you should tell the ICE officers that you need to make a phone call immediately so that a caretaker can come take care of your children before a child welfare agency takes them into custody.

ICE should allow you to make such a call to your designated caretaker or emergency contact so that you can tell that person that (1) you are in ICE custody, and (2) alert that person to follow any emergency plans you have prepared in advance, or follow instructions that you give to them at that time.

If ICE refuses to allow you to make a phone call, you should tell the officer(s) over and over again that you must place a call to arrange plans for your children so that the children are not taken into custody by a child welfare agency. Even if ICE still detains you, you should continue to communicate these things to every ICE officer encountered during your detention.

If children are NOT with their parents when their parents are detained

If children are not with you at the time you are detained by ICE, you should tell the ICE officer(s) immediately that you have children, and that you need to make a phone call to ensure your children are safe and taken care of.

It is likely that you may spend at least a day or maybe a few days in an ICE facility while ICE decides what to do about your case. You may have very limited access to a phone, and ICE may not tell you anything about what will happen to you. If you are not released,

you may be taken to an immigration detention center. If this happens, it is still possible but less likely that ICE may release you. At the very least, you may spend anywhere between a few days or multiple weeks in detention.

What Happens if No One Picks Up Children When Their Parents Are Detained?

If you are unable to reach a designated caretaker or some other trusted friend or relative who is able to take care of your children right away, in most states, a state or local child welfare agency will take custody of your children. Each state and many localities (e.g., city or county) have child welfare agencies. These agencies have names like “Child Protective Services,” or the “Department of Children and Families.” You can consult a telephone directory or search on Google to determine which agency may have taken or is seeking to take custody of your children if you are not contacted by the agency directly.

If you are facing detention and have already chosen a caretaker, it is important that the caretaker contact the local agency immediately in order to seek to have the agency place the children in their care. The more time that passes after a parent’s detention, the harder it may be for someone other than the parent to be granted access to care for their children, and the less likely it is that the care of the children will remain a private matter between the parent and a designated caregiver. Therefore, it is important to keep trying to contact a caregiver or other friend/relative until you are able to reach someone.

You should keep in mind that any caretaker, as well as adults living in the same household of the caretaker, may be subject to a criminal background check as well as a check of child abuse registries. Having a past criminal offense could disqualify someone from taking custody of children, even if you have expressly chosen a specific person as a caretaker.

If no caregiver comes forward or is identified, the agency may begin a child welfare proceeding to determine where a child will live.

Child welfare proceedings

Once an agency takes custody of a child, the agency may try to identify a relative or friend willing to take care of the child. However, if an agency has taken a child into custody and cannot locate someone to care for the child, the agency will likely try to place the child in foster care. A foster parent is someone who has been trained and is licensed to care for children whose parents are unavailable or unable to care for them. Sometimes older children may be placed in a group home, which is a home where several older children live together with one or more trained adults who supervise and care for them.

If a child welfare agency takes custody of a child and is unable to find a known caregiver immediately, it will typically file a petition shortly after taking custody of the child. This begins what is called a “neglect proceeding,” or “child welfare proceeding,” although the name can be different depending on what state the child is in.

- The purpose of a neglect proceeding is to determine where a child will live, and it is held before the court (usually a family court or juvenile court), although the process will differ depending on the state it is in.
- As the parent, you may have the right to have an attorney appointed by the court to represent you during the neglect proceeding.
- It is also possible that the child will get an attorney or other form of guardian to represent his or her interests.
- The agency will likely also assign a caseworker, who will report to the judge handling a child’s case about the parent and the child. A caseworker generally has the power to make recommendations about what should happen to a child, so it is important to maintain good relationships with your caseworkers, and frequently communicate, so that the caseworker knows your wishes for the children they represent.

Under different circumstances, the court handling a child’s case would notify the child’s parent of all the hearings, and the parent could participate in the court process. If a parent is detained, courts may issue a “writ” to bring that parent to the court or if there are concerns of security or public safety, make provisions for the parent to participate in the hearing remotely. However, if the court does not know that the parent has been detained, it may not send notice of a court hearing to the correct address. Additionally, it

may be difficult to participate in the hearing if a parent is detained in a different state from where the court is located.¹

Note that the hearing will still take place even if a parent does not receive a notice about the hearing, or if the parent cannot attend the hearing. If a parent misses a hearing, even if the reasons are beyond their control, the court will make a decision about a child without the parent being there to tell the court their wishes. That is why it is important for parents to do everything possible to communicate with the court, caseworker and their attorney, as well as their children, while child welfare proceedings are going on.

Seeing Children While Parents Are Detained

ICE must accommodate regular visits between a parent who is detained and the parent's minor children. It should not matter if the child does not have a Social Security Number or is not a U.S. Citizen, although adults may have to provide their date of birth and Social Security number, and be approved by ICE prior to the visit. If the parent is detained in a facility where there is not a provision for contact visits by minor children, ICE must arrange for a contact visit between a detained parent and their minor child within the first 30 days of the parent's detention and if the detained parent requests it. After the first 30 days of a parent's detention in a facility without a provision for contact visits by minor children, ICE must consider a detained parent's request for a transfer to a facility that allows contact visits with minor children. If the transfer is not approved, ICE must allow monthly visits between the detained parent and their minor children. If in-person visits between a detained parent and their children are not practicable, ICE may allow virtual or teleconference visits.

However, if there is an ongoing child welfare proceeding, whether or not a child can visit a parent in a detention facility will likely be up to a judge handling the case. The decision may be based on what the judge believes is in the child's best interests. For instance, for some children, seeing a parent in a detention facility could be difficult. If parents want their children to visit them, they should tell their attorney and/or caseworker, if they have one. Keep in mind that visitation by phone is another option that a court could order. Even if parents cannot visit, they can write letters to their children to keep in touch.

¹ According to U.S. Immigration and Customs Enforcement Fact Sheet for Child Welfare & Guardianship Stakeholders: The Parental Interests Directive (PID) allows Covered Individuals to make in-person appearances in family court or child welfare proceedings when required to maintain or regain custody of minor child(ren) or incapacitated adult(s) (dependents). If transport presents security and/or public safety concerns, or negatively impacts mission needs, facility staff will identify alternative means of participation, such as telephonic or video or standard teleconferencing, when technologically feasible. In addition to court participation, ICE will facilitate remote participation in court or child welfare mandated services, programs, or trainings.

How Parents Who Have Been Detained Can Take Steps to Protect Their Parental Rights

You must play an active role in protecting your rights as a parent, even while you are detained and possibly face deportation. Here are some specific steps that you can take:

Stay involved with your children

It is very important to do everything you can to stay as involved as possible in your children's lives, including making decisions about any medical or educational issues. It should be clear to everyone involved in your case that you are actively involved in caring for your children, even from detention. You should call your children regularly, as well as write letters to them. Communication with caseworkers is also important, along with making a strong effort to see your children even while detained.

You should let people know where you are

If you are detained, you need to make sure that as many people as possible know where you are and how to contact you. You should make every effort to contact a designated caretaker, relatives, and friends, and be sure to tell such persons to provide your location to any court or agency that may have a role in deciding who gets custody of your children. If a caseworker is assigned to you on behalf of the court, you should make sure the caseworker understands your situation and that you are detained.

Useful information that you can communicate includes:

- Your alien number ("A Number") that will be assigned to you;
- The name of your deportation officer; and
- The name and location of the facility where you are being detained, along with a phone number to make sure you receive notices about court hearings.

The [ICE Online Detainee Locator System](#) may also be used to locate a person currently detained in ICE custody, or who was released from ICE custody for any reason within the last 60 days.

Contact your state or local child welfare agency and verify the location of your children

If you think your children are not with a friend or family member and the children might be in the custody of a state or local agency, you should talk to your deportation officer and ask to contact the agency right away. It can be hard for agencies to locate a parent who is detained, so contacting the agency directly is very important. Many agencies have a hotline that parents can call.

When calling, you should:

- Give your full name and identify yourself as the parent;
- Give all children's full names and dates of birth;
- Explain that you are in immigration detention and believe that your children may be in the agency's custody;
- Be clear that this is an emergency situation, and that you need to know if the agency has an open case so they can contact your children right away;
- Give the name and contact information for the children's designated caretaker, if you have one or, if you do not have a one, then the name and contact information for another trusted friend or relative who you think will be willing and able to take care of your children;
- Give your alien number and the name and address of the detention center where you are located; and
- Find out if a case number is available for your child's case.

If you cannot call the agency yourself, the designated caretaker or a relative or friend should call on your behalf and provide all the same information described above.

Request a lawyer

You should consider having a lawyer to represent you at hearings during their detention. If you cannot afford a lawyer, you may be able to request that a lawyer be provided for you. The court may ask for information about income and any property you may own. You should be prepared to provide such information. In addition to lawyers provided by the court, you may be able to talk to non-profit legal aid providers who provide legal services for free.

Once you have a lawyer, you should stay in contact with them. If your lawyer does not answer when you call, you should always leave a message. You should always write down the date and time that you called your lawyer, and note whether you left a message.

You should make sure the officials handling your deportation case know about your custody concerns

You should also tell your deportation officer and the immigration judge overseeing your case that your child is in or may be placed in foster care, and your wishes for how your child should be cared for if you are deported. You should do your best to make sure that the officials handling your deportation case are aware of the situation and that it is documented in the court's record.

Request an interpreter

If your native language is not English, you can request to be provided with an interpreter at any hearings regarding your children.

You should contact their consulate

Your consulate may be able to provide you with information or possibly advocate on your behalf.

Options for Parents Facing Deportation

You may have to decide whether to bring your children to your home country or to leave the children in the United States. This is a difficult decision, and the outcome may depend on several factors, including who has custody of the children and, if more than one person has custody, whether they agree on where the child should live.

Bringing a Child with You Upon Deportation

Many factors affect whether a parent can bring a child with them upon deportation. First and foremost, if a parent is in detention and wishes to bring a child with them after deportation, they should make sure the deportation officer and immigration judge know this. The parent's next steps depend on whether the child is in foster care or under the custody of another person and whether the child has appropriate documentation to travel.

Foster care

If your child is in foster care, read the section above on "Child Welfare Proceedings." You should make sure that the family court judge, case worker, child's case worker and any other official or attorney involved in the child welfare case or any immigration case knows that you wish to bring your child with you upon deportation. You should also ask to be reunited with your child at the airport before leaving the country.

Shared custody or visitation rights

If you share legal custody of the child, your ability to bring the child out of the United States may depend on whether you can obtain either the other parent's or a court's permission. If the other parent agrees that the child can go with you, both parents should consider writing this agreement down and notarizing your signatures. You should keep a copy of this written document in a safe place and take the letter with you while traveling.

If the other parent does not want the child to leave the United States, you may need to get a court order allowing the child to be taken out of the country. Since the likely outcome of the case will depend on many factors, you should contact a family law attorney for help.

Children traveling on airlines

Some airlines require special documentation for a minor child traveling with only one custodial parent. You should contact the airline for details on what may be needed to travel alone with the child. You may need to show one of the following:

- (a) a notarized letter of permission from the child's other parent;
- (b) a court order showing that you are the sole custodian; or
- (c) the child's birth certificate showing that you are the sole custodian.

In addition, if you are travelling internationally, you will need to show the child's passport. *(For information on how to obtain a child's passport, please read the "Child's Passport" section above.)* If the child was born in the U.S., you should make sure that the child has important documents like a birth certificate, social security card and passport before leaving the country with your child. The destination country may impose additional requirements. A list of embassies and entry requirements can be obtained through the Department of State website or by calling the embassy in question. Contact information for U.S. Embassies is available here: <https://www.usembassy.gov/>.

Note: An airline's documentation requirements for minor children also apply if the child is travelling with a guardian. In addition to the child's identification documents, the guardian will likely need to show either: (a) a court order granting that person legal guardianship; or (b) a notarized letter signed by the parents that give the guardian permission to travel with the child, often referred to as a "parental consent letter." The U.S. Customs and Border Protection Agency recommends that a parental consent letter is in English and notarized, is less than one-year old, and includes the following information:

- *Who*
- *When*
- *What*
- *Why*
- *Where*
- *Contact information for the absent parent(s)*

Whether a child is allowed to travel alone depends on the child's age and the airline. Under no circumstance can a child under the age of five travel alone. For children between the ages of five and eighteen, contact the airline for details on the airline's rules regarding child passengers. The child may be able to fly alone only on certain flights, under certain circumstances, if they have a notarized letter from the child's legal custodian.

Reuniting child with deported parent after deportation

If you obtained a temporary guardian for your child before deportation, the guardian may be able to assist the child with obtaining the necessary paperwork to travel out of the country and meet you. For more information on temporary guardians and their ability to act as a legal custodian, please read the “What is a Temporary Guardian?” section above. However, the temporary guardian may have no obligation to do so if they choose not to assist the child in relocating.

Keeping the Child in the U.S. when a Parent is Deported

Minor children need a legal custodian to make decisions on matters such as medical care, education and travel decisions. For this reason, a parent facing deportation that wants his or her child to stay in the U.S. should seek to have a guardian or other legal custodian appointed for the child.

Changing custody of a child after a custodial parent is deported

If a parent wants to change a custody order after deportation, they may need to go through the U.S. court system. If both parents are outside of the United States, someone inside the country could petition to be appointed as guardian, and the absent parent(s) could consent. If only one parent is outside of the United States, they can agree to give custody to the other parent in the United States. To do so, the parent in the United States can file a modification action with the court, and the absent parent can then consent to the modification action from outside of the United States.

Emancipation of an older child

Some states also permit older children (generally over the age of 16) to become emancipated. An emancipated child has the right to make their own decisions about education, medical treatment, travel, and legal matters—i.e., the decisions that a parent or guardian would otherwise make until the child becomes an adult. Thus, emancipation may provide a way for an older child to live on their own, rather than in state custody, upon the detention or deportation of the child’s parents. To become emancipated, a child may need to file a petition in family court that explains why emancipation is in their best interest and shows they are financially independent. Because emancipation will generally terminate parental rights, the parents and child should consider this option carefully. They should also consider talking to an attorney, as the law and process for emancipation varies from state to state.

Barriers an Immigrant Family May Face in Court

Immigrant families dealing with family issues in court may face several difficulties. Some of these potential obstacles are discussed below.

Finding an Interpreter and/or a Translator

In some cases, one of the greatest challenges in ensuring the proper care of a child is effective communication with authorities like case workers or a judge. If you do not speak English, it is important to find someone to interpret and/or translate documents.

Some states will provide interpretation and translation services for parents that are dealing with child services or the court system. For example, some California courts will provide interpreters for hearings involving Child Support Services in family law cases. Whether the state provides interpretation and translation services or not, you should consider finding your own interpreter or translator now, so the information is readily available in case an emergency arises. If you are having difficulty finding someone to interpret and/or translate, it may be possible to find an interpreter/translator through a community or religious organization that provides outreach to immigrants.

Finding Legal Service Providers or Other Family Law Advocates

In every state there are organizations that provide free legal services to low-income individuals, but their eligibility guidelines vary. In addition, immigrants may face barriers in obtaining access to legal and other assistance in some areas of the country. For example, some legal service providers clearly state on their websites and in their promotional materials that they will not help undocumented immigrants due to federal regulatory requirements. However, in some cases, there are exceptions for immigrants who are victims of domestic violence. Accordingly, in approaching a legal service provider, you should ask whether they require proof of legal residence.

In some cities there are organizations that focus specifically on legal issues for immigrants. If you are unable to pay for a lawyer it may be possible to find an attorney or representative through these organizations. Typically, it is not a legal requirement for a parent to have a lawyer during a family court proceeding, but it is strongly recommended to work with a lawyer if possible, especially when weighing your options to protect your children if you are detained or deported.

Unfavorable Immigrant Policies in Custody Hearings

Immigration status may be taken into account when a court is considering the best interests of a child. It is possible that a court will consider a potential guardian's undocumented immigration status as a factor against the child's best interests and may refuse to grant custody to that individual. You should be mindful of this problem when determining whom to name as the child's guardian or who may be seeking custody of the child.