



Issue Alert: Informal Adoptions in Central America and Their Implications for U.S. Immigration Cases

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December 2020

About Justice in Motion

Justice in Motion is a U.S.-based nonprofit that advocates for migrant rights across borders. Farmworker lawyer and human rights advocate Cathleen Caron founded Justice in Motion in 2005 to address a growing crisis in our globalizing economy: Abused migrant workers were shut out of the justice system after returning to their country of origin. These abuses ranged from unsafe working conditions to human trafficking and often left survivors with few options. To make justice across borders a reality, Justice in Motion connects advocates in the United States and Canada to the Justice in Motion Defender Network of on-the-ground human rights defenders in Mexico, Guatemala, El Salvador, Honduras, and Nicaragua. Together, we work on individual cases and advocate to stop abuses before they begin. Now, we work to defend the rights of thousands of migrants from across the region each year -- from parents separated from their children at the U.S. border to migrant workers exploited by U.S. employers.

This Issue Alert was made possible through Justice in Motion's Child Detention Crisis initiative, a pilot project dedicated to freeing migrant children from U.S. immigration detention centers and safely reuniting them with their families. Many children in detention centers are fleeing violence or other life-threatening situations in their countries of origin. Children often spend months, or even years, in facilities operated by the Office of Refugee Resettlement (ORR) as they wait for release options to be vetted and approved. By bringing together advocates from the United States, Central America, and Mexico, Justice in Motion ensures that justice for migrant children crosses borders too.

The Child Detention Crisis initiative is funded through a generous grant by [Together Rising](#).

About the Young Center for Immigrant Children's Rights

The Young Center for Immigrant Children's Rights protects and advances the rights and best interests of immigrant children according to the Convention on the Rights of the Child and state and federal law.

The Young Center is a champion for the best interests of children who arrive in the United States on their own, from all corners of the world. We serve as trusted allies for these children while they are facing deportation proceedings, advocating for their best interests, and standing for the creation of a dedicated children's immigrant justice system that ensures the safety and well-being of every child.

Young Center attorneys and social workers, along with bilingual volunteers, are appointed as Child Advocate (guardian ad litem) by the Department of Health and Human Services. Our role is to advocate for their best interests—from custody and release to the ultimate decision about whether the child will be allowed to remain in the United States. Our goal is to change both immigration policy and practice so that immigrant children are recognized first as children and their best interests are considered in every decision.

Acknowledgements

S. Ellie Norton and Glykeria Tsiokanou are the principal authors of this Issue Alert. Invaluable contributions in the form of review, edits, and guidance were provided by Noorjahan Akbar, Estrellita Alvarado, Beth Baltimore, Cathleen Caron, Isabella Cajiao Garces, Sarah Diaz, Jena Gutierrez, Kris Jackson, Gladis Molina Alt, Jennifer Nagda, Marcy Phillips, Monica Romo, Nan Schivone, Shaina Simenas, and Maria Woltjen.

Additionally, we are grateful to Amanda Flores for providing the illustrations for this Alert and Spencer Tilger and Natalia Vilela for their support with communications management.

Suggested citation:

NORTON, S.E. AND TSIOKANOU, G., ISSUE ALERT: INFORMAL ADOPTIONS IN CENTRAL AMERICA AND THEIR IMPLICATIONS FOR U.S. IMMIGRATION CASES (Dec. 2020).

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I. INTRODUCTION

Justice in Motion (JiM) and the Young Center for Immigrant Children's Rights (the Young Center) have partnered to advocate on behalf of unaccompanied children in the United States who face repatriation to their countries of origin. Through that partnership, JiM and the Young Center have identified an issue that impacts many Central American migrant children and their families, namely, U.S. immigration authorities' separation of children from their "informally adoptive" parents as they seek protection at the U.S. border.

Young Center Child Advocates¹ and practitioners in the field, who continue to see an array of cases where children are separated from informally adoptive parents, have begun to devise case-specific strategies to advocate for the children's best interests and their expressed wishes. The primary purpose of this Alert is to provide information about the circumstances that lead to informal adoptions and the rights of informally adoptive parents and the children in their care, as well as to encourage reflection on key questions that Child Advocates, immigration and child welfare attorneys, and other practitioners may face. Given the problem's continually evolving nature, this Alert cannot provide specific guidance on individual cases. But we hope that the information that follows will lead to greater information-sharing and strategy-building within the immigrant rights community.

Part I of the Alert provides factual background on "informal adoptions"² in Guatemala, Honduras, El Salvador, and Nicaragua and their relevance to the Department of Homeland Security's (DHS) family separation practices. It explains how, particularly in communities where families have limited access to resources and the formal adoption process, biological parents who find themselves unable to care for a child may rely on informal adoptions. These parents may ask or allow family members or other adults in the community to "informally adopt" their child, often even registering the name(s) of the informally adoptive parent(s) on the child's birth certificate. One reason biological parents do this is to avoid the child being taken into state custody (which is frequently the state's response in these situations). They also may not be familiar with or even be aware of the existence of a formal adoption process. Additionally, even when parents are aware of its existence, they may wish to avoid the costs associated with the process, which entails complicated judicial and administrative intervention and can take years. Cultural considerations—including concepts of family in many Central American communities that extend beyond biological parents and children—may also influence parents' decisions about who cares for their children. Family units in Guatemala, Honduras, El Salvador, and Nicaragua often extend beyond the nuclear family model dominant in the United States.³

¹ ORR appoints the Young Center to serve as the independent Child Advocate for vulnerable, unaccompanied immigrant children. Congress authorized ORR to appoint Child Advocates when it enacted the William Wilberforce Trafficking Victims Protection Reauthorization Act. 8 U.S.C. § 1232(c)(6) (authorizing the Secretary of Health and Human Services to "appoint independent child advocates for child trafficking victims and other vulnerable accompanied alien children"). The role of a Young Center Child Advocate is similar to a guardian ad litem in state court: Child Advocates identify and represent the best interests of unaccompanied migrant children and develop recommendations regarding custody, release, legal representation, permanency (relief from removal), and repatriation.

² See Definitions, *infra* (defining "informal adoptions").

³ See generally Heidi Ullmann et al., *Families in Latin America: Changes, Poverty and Access to Social Protection*, 40 INT'L J. SOC. FAM. 12 (2014), <http://www.jstor.org/stable/43488421>.

Part II of the Alert explains how, under the laws of these Central American countries, the registration of an informally adoptive parent’s name on a child’s birth certificate constitutes a “voluntary recognition of parenthood,” which creates a legal presumption of parenthood unless and until it is formally challenged in court. In these cases, if the adult and child later migrate to the United States, the adult may have been recognized as the child’s parent for most of the child’s life. Increasingly, U.S. immigration authorities have challenged the validity of these parent-child relationships when informally adoptive parents cross the border with their children.

In 2017, the U.S. government began separating families at the southern U.S. border to pursue criminal charges against adult immigrants, leading to public outcry, litigation, and eventually a federal court order to reunify separated families in the *Ms. L* case.⁴ The *Ms. L* court issued a preliminary injunction that ordered DHS to refrain from detaining parents apart from their children, “absent a determination that the parent is unfit or presents a danger to the child...”⁵ The administration then turned its attention to “verifying” family relationships at the border, increasing DNA testing of family units in the summer of 2018. Now, when DNA testing indicates that an adult is not a child’s biological parent—or when an adult acknowledges that they are not a child’s biological parent—DHS separates them, regardless of a Consulate’s validation of the child’s birth certificate, the law in the country of origin, or how long the adult has been the child’s primary caregiver. The adult is transferred to Immigration and Customs Enforcement (ICE) detention or, if the U.S. government charges them with making false statements and/or alien smuggling, to U.S. Marshals custody. The child is transferred to the custody of the Office of Refugee Resettlement (ORR) within the Department of Health and Human Services (HHS). In many cases, the child’s caregiver is returned to home country before the child can reunify and return with them. Even if the adult is later released from detention, ORR may cite trafficking or safety concerns as grounds for declining to release the child to the adult’s care. In either situation, reunification can be extremely challenging—but, as this Alert aims to show, not impossible.

Part III of the Alert therefore explores potential bases for, and consequences of, arguing that informally adoptive parents—particularly those whose names appear on a birth certificate validated by the Consulate of a child’s country of origin—should be considered a child’s legal parents in the U.S. immigration context. The analysis focuses on potential arguments in criminal proceedings against informally adoptive parents, ORR sponsorship and reunification decisions, Special Immigrant Juvenile Status (SIJS) petitions, and derivative applications for immigration relief. It addresses strategies for both practitioners and Child Advocates to consider within the unique circumstances presented by each case.

⁴ *Ms. L. vs. U.S. Immigration & Customs Enf’t*, 310 F. Supp. 3d 1133 (S.D. Cal. 2018).

⁵ *Id.* at 1149.

II. FACTUAL BACKGROUND

A. Informal Care and Adoptions in Guatemala, Honduras, El Salvador, and Nicaragua

Informal care and adoptions are relatively common in Guatemala, Honduras, El Salvador, and Nicaragua, and typically reflect a desire to serve the child's best interests. A 2016 study directed by the European Commission found that, in Central America, "the vast majority of children without parental care are in informal care" arrangements.⁶ This means that the "child is looked after on an ongoing or indefinite basis by relatives or friends ... at the initiative of the child, his/her parents or other person without this arrangement having been ordered by an administrative or judicial authority or a duly accredited body."⁷

In many Central American communities—particularly indigenous communities and those with limited access to resources—parents who cannot care for their children choose not to involve the state, which often institutionalizes children in these situations as a "first resort."⁸ Instead, parents in these communities often place their children "with other families, either their extended family or another in the community, where the child can form new ties and avoid entering the country's protection system."⁹ A report prepared by the Latin American Foster Care Network and SOS Children's Villages International deems this informal care "a viable alternative to institutionalization in cases where parental care is unavailable ..."¹⁰



Families in these situations rarely go through the formal adoption process, which (as explained in Part II) can be complex, costly, lengthy, and practically inaccessible to many communities with limited access to transportation and other resources. In some cases, biological parents might not even be aware that a formal adoption process exists, and thus opt for an informal arrangement,

⁶ DR. CHRISIE GALE, SOS CHILDREN'S VILLAGE INT'L, ALTERNATIVE CHILD CARE AND DEINSTITUTIONALISATION IN CENTRAL AND SOUTH AMERICA: FINDINGS OF A DESK REVIEW 25 (2016).

⁷ G.A. Res. 64/142, Guidelines for the Alternative Care of Children, ¶ 29(b)(i) (Dec. 18, 2009).

⁸ SOS CHILDREN'S VILLAGES INT'L & RELAF, CHILDREN AND ADOLESCENTS WITHOUT PARENTAL CARE IN LATIN AMERICA: CONTEXTS, CAUSES, AND CONSEQUENCES OF BEING DEPRIVED OF THE RIGHT TO FAMILY AND COMMUNITY LIFE 15, 19-20 (2010) [hereinafter "RELAF REPORT"].

⁹ *Id.* at 19. See also Kelley McCreery Bunkers et al., *International Adoption and Child Protection in Guatemala: A Case of the Tail Wagging the Dog*, 52 INT'L SOCIAL WORK 649, 652 (2009) (noting that "there is strong evidence that the indigenous Mayan communities care for abandoned, orphaned or at-risk children within the extended community").

¹⁰ RELAF Report, *supra* note 8, at 20.

which is culturally acceptable in many communities. Nonetheless, many families seek to establish a more formal legal relationship between “informally adoptive” parents and children by registering the name(s) of the informally adoptive parent(s) on the child’s birth certificate.

B. “Fraudulent Family Units” and Rapid DNA Testing

Informal care and adoptions are not a new phenomenon. But very recently, U.S. immigration officials have targeted them as a possible source of “fraud,” thus making this longstanding practice a significant issue of concern for both immigration attorneys and Child Advocates.

In the summer of 2017, the Trump Administration initiated an unprecedented pilot project to separate migrant families at the border. In early 2018, this policy was formalized, leading to widespread public outcry. The American Civil Liberties Union swiftly filed a class action lawsuit (“Ms. L”) in the U.S. District Court for the Southern District of California to enjoin family separations for violating the constitutional right to family integrity and association.¹¹

In June 2018, President Trump responded to the outcry and legal challenges by issuing an executive order “to maintain family unity, including by detaining alien families together where appropriate and consistent with law and available resources.”¹² The Ms. L court, however, recognized that this order neither addressed reunification of already-separated families nor set out specific standards for separating family units in the future. Thus, the court certified a class of “[a]ll adult parents who enter the United States who (1) have been, are, or will be detained in immigration custody by [DHS] and (2) have a minor child who is or will be separated from them ... absent a determination that the parent is unfit or presents a danger to the child.”¹³ The court then issued a preliminary injunction prohibiting DHS from separating these parents and children.¹⁴

Around the same time, DHS began to report an increase in “family unit fraud” at the U.S.-Mexico border, claiming that unrelated migrant adults and children were falsely presenting themselves as families to avoid separation.¹⁵ DHS suggested without evidence that this could “lead to, or stem from, other crimes, including ... identity and benefit fraud, alien smuggling, human trafficking, foreign government corruption, and child exploitation.”¹⁶ The agency thus began to separate adults from the children accompanying them wherever it found what it considered to be evidence of an “unverified familial relationship.”¹⁷ Such evidence could include alleged agency skepticism about the

¹¹ Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief, Ms. L. vs. U.S. Immigration & Customs Enf’t, No. 18-CV-0428 DMS (MDD) (S.D. Cal. Feb. 26, 2018) (ECF No. 1); see also Memorandum in Support of Classwide Preliminary Injunction, Ms. L. v. U.S. Immigration & Customs Enf’t, No. 18-CV-0428 DMS (MDD) (S.D. Cal. Mar. 19, 2018) (ECF No. 48-1).

¹² Exec. Order No. 13841, 83 C.F.R. 29435 (2018). The order defines an “alien child” to include any child who has a “legal parent-child relationship to an alien who entered the United States with the alien child” *Id.*

¹³ Ms. L. vs. U.S. Immigration & Customs Enf’t, 331 F.R.D. 529, 541 (S.D. Cal. 2018).

¹⁴ Ms. L. vs. U.S. Immigration & Customs Enf’t, 310 F. Supp. 3d 1133 (S.D. Cal. 2018).

¹⁵ See U.S. DEPT OF HOMELAND SEC., DHS/ICE/PIA-050, PRIVACY IMPACT ASSESSMENT FOR THE RAPID DNA OPERATIONAL USE 1 (2019), https://www.dhs.gov/sites/default/files/publications/privacy-pia-ice-rapiddna-june2019_1.pdf (“In the spring of 2018, ICE became aware of an increase in [family unit] fraud encountered at the United States border.”).

¹⁶ ICE HSI El Paso, USBP Identify More than 200 ‘Fraudulent Families’ in Last 6 Months, U.S. IMMIGRATION AND CUSTOMS ENF’T (Oct. 17, 2019), <https://www.ice.gov/news/releases/ice-hsi-el-paso-usbp-identify-more-200-fraudulent-families-last-6-months>.

¹⁷ See Ms. L. vs. U.S. Immigration & Customs Enf’t, 415 F. Supp. 3d 980, 987 n.4 (S.D. Cal. 2020).

family's identity documents, including birth certificates; but also a DNA test indicating the absence of a biological relationship or an adult's acknowledgment that they were not biologically related to the child.¹⁸ In the Young Center's and Justice in Motion's experiences with such cases, DHS often disregarded birth certificates that identified the adult as the child's parent (even when validated by a Consulate) and argued that these families were excluded from the *Ms. L* class and should be separated.

In January 2020, the *Ms. L* court determined that "lack of parentage" allows DHS to separate adults from children at the border.¹⁹ The court found that:

[DHS] must conduct DNA testing before separating an adult from a child based on parentage concerns. Such testing, in service to the fundamental right at issue, is clearly warranted. It is also an efficient and definitive way to resolve any concerns about fraudulent documentation.²⁰

In March 2020, ICE reportedly awarded a potential five-year contract to provide Rapid DNA testing of family units at the border.²¹ According to DHS, this testing can only be used to verify a biological parent-child relationship and can only be conducted with consent.²² If ICE determines that a family unit is "fraudulent" as a result of that test (or based on other information, such as an adult admitting that they are not the biological parent), the family is separated. The children are classified as "unaccompanied"²³ and transferred to ORR custody, while the adults "may face federal criminal charges related to identity and benefit fraud, alien smuggling, human trafficking, and child

¹⁸ See DEP'T OF HOMELAND SEC., *supra* note 15, at 3 (explaining that "ICE personnel review documents, observe the individuals, conduct interviews, and selected claimed [family units] for Rapid DNA testing").

¹⁹ *Ms. L.*, 415 F. Supp. at 990.

²⁰ *Id.*

²¹ Cal Biesecker, *ICE Awards Bode Contract for Rapid DNA Testing on Southwest Border*, DEFENSE DAILY (Mar. 31, 2020), <https://www.defensedaily.com/ice-awards-bode-contract-rapid-dna-testing-southwest-border/homeland-security/>.

²² DEP'T OF HOMELAND SEC., DHS/ICE/PIA-050, PRIVACY IMPACT ASSESSMENT FOR THE RAPID DNA OPERATIONAL USE 3, 4 (2019), https://www.dhs.gov/sites/default/files/publications/privacy-pia-ice-rapiddna-june2019_1.pdf. The validity of consent is one of several concerns with Rapid DNA testing. The content (and Spanish language availability) of consent forms have not been made public, and DHS has admitted that it uses individuals' refusal to grant consent as evidence to undermine their claimed parent-child relationship. *Id.* at 4. There may also be issues with the accuracy of the tests. In 2017, for example, the Swedish National Forensic Centre published a report indicating that its review of a similar test had revealed only a 77% success rate. SWEDISH NATIONAL FORENSIC CENTRE, EXPERIENCES FROM OPERATING THE RAPIDHIT® SYSTEM AND IDENTIFIED ISSUES PROCESSING CRIME SCENE SAMPLES 3 (2017), https://nfc.polisen.se/siteassets/dokument/informationsmaterial/rapporter/nfc-rapport-2017-02_experiences-from-operating-the-rapidhit-system.pdf. Of further concern is the fact that there does not appear to be any formal mechanism for an individual to appeal either (a) the result of a Rapid DNA test or (b) ICE's determination that a parent-child relationship does not exist. See Saira Hussain, *ICE's Rapid DNA Testing on Migrants at the Border Is Yet Another Iteration of Family Separation*, ELEC. FRONTIER FOUND. (Aug. 2, 2019), <https://www.eff.org/deeplinks/2019/08/ices-rapid-dna-testing-migrants-border-yet-another-iteration-family-separation>; Complaint for Injunctive Relief for Violation of the Freedom of Information Act, Electronic Frontier Found. v. Dep't Homeland Sec., Case No. 3:19-CV-07431 (N.D. Cal. Nov. 12, 2019) (ECF No. 1).

²³ Notably the definition of "unaccompanied alien child" also requires that the child have no "parent or legal guardian," but does not define those terms. 6 U.S.C. § 279(g) (defining an "unaccompanied alien child" as "a child who (A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom (i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody").

exploitation.”²⁴ These families can only be reunified if both the adult and child are later released from custody (within the United States or by repatriation) and their relationship is verified through other means. Ultimately, there appears to be no consideration of the realities of informal adoptions or the potential legal rights of informally adoptive parents (much less those of legal guardians) in these separation and prosecution decisions.

DHS’s problematic approach towards non-traditional family units can also be seen in its recent actions in the face of the COVID-19 pandemic. In March 2020, after the Centers for Disease Control and Prevention directed DHS to suspend entry of certain individuals into the United States to avoid their detention in DHS’s congregate settings,²⁵ DHS barred anyone from entering the United States via Mexico, with limited “essential travel” exceptions.²⁶ Nonetheless, by law, if an unaccompanied child arrives at the U.S.-Mexico border with a relative *other* than a parent or legal guardian, CBP must allow the child to enter and refer the child to ORR custody.²⁷ However, media reports have revealed that when children under 18 arrive with family members who are not their biological parents or legal guardians, CBP expels these “family units” together.²⁸

In other words, before the pandemic occurred, the U.S. government defined informally adoptive parents and their children as fraudulent in order to separate them. Now, it accepts them as family units in order to expel them. The determining factor seems to be which classification will allow the government to further its goal of deterring immigration. The rest of this Alert thus provides information that immigration attorneys and Child Advocates can consider when advocating for these families.²⁹

²⁴ ICE Awards New Contract for Rapid DNA Testing at Southwest Border, Expands Pilot Program, U.S. IMMIGRATION AND CUSTOMS ENFT (June 18, 2019), <https://www.ice.gov/news/releases/ice-awards-new-contract-rapid-dna-testing-southwest-border-expands-pilot-program>.

²⁵ Notice of Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, 85 FED. REG. 17060 (Mar. 26, 2020).

²⁶ Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Mexico, 85 FED. REG. 16547 (Mar. 24, 2020).

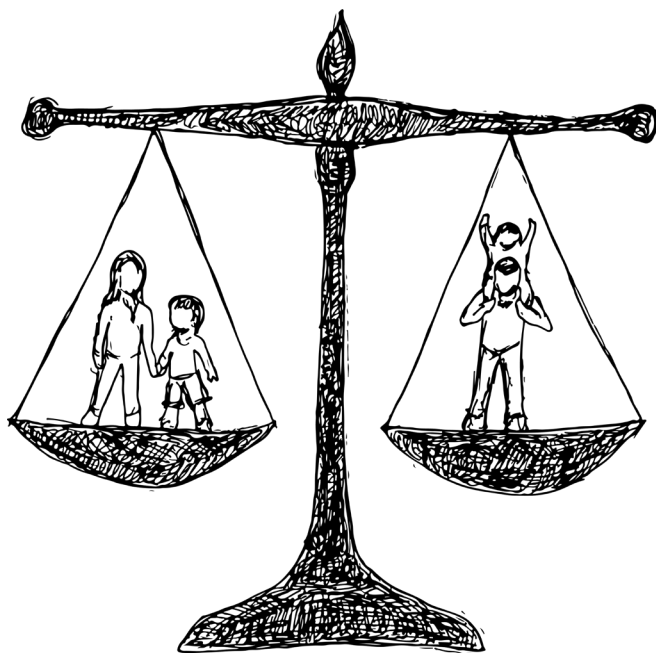
²⁷ See note 23, *supra*, for definition of “unaccompanied alien child.”

²⁸ See, e.g., Lucas Guttentag, *Coronavirus Border Expulsions: CDC’s Assault on Asylum Seekers and Unaccompanied Minors*, JUST SECURITY (April 15, 2020), <https://law.stanford.edu/2020/04/15/coronavirus-border-expulsions-cdcs-assault-on-asylum-seekers-and-unaccompanied-minors/>.

²⁹ Immigration attorneys retained by adults and children must zealously advocate for their clients’ expressed wishes. Child Advocates are appointed under federal law to advocate for the best interests of unaccompanied children, which includes consideration of their expressed interests, safety, well-being, family integrity, liberty, development, and identity. See SUBCOMM. ON BEST INTERESTS, INTERAGENCY WORKING GRP. ON UNACCOMPANIED AND SEPARATED CHILDREN, FRAMEWORK FOR CONSIDERING THE BEST INTERESTS OF UNACCOMPANIED CHILDREN 5, 22 (2016), <https://www.law.georgetown.edu/human-rights-institute/wp-content/uploads/sites/7/2017/07/Best-Interests-Framework.pdf>.

III. FAMILY LAW IN CENTRAL AMERICA

The following section reviews key legal concepts and statutory provisions on parenthood and parental rights in El Salvador, Honduras, Guatemala, and Nicaragua. This section aims to explain the context and consequences of informal adoptions in these countries and empower practitioners who work with migrant children and informally adoptive parents to advocate for the rights of these families when they are separated. More detailed summaries and links to the full texts of these laws can be found in Appendices A and B.



A. Informal Adoptions: Context and Consequences

As noted in Part I, informal adoptions occur for an array of reasons. Families often become involved in informal adoptive arrangements because formal adoption proceedings are commonly onerous, costly, and lengthy in nature. A family's geographical remoteness from courts and attorneys, lack of information about the required legal proceedings, as well as limited educational level and financial resources may be additional adverse factors—especially for indigenous families. In Honduras, for example, in order to adopt a child, a person must, among other requirements, be over the age of 25, at least 15 years older than the child, and married for at least three years.³⁰ Similarly, in Nicaragua, adoption can be only requested by married couples who are at least 24, no older than 55, and at least 15 years older than the child, and adoptive parents must prove that they exhibit the moral, social, psychological, and economic characteristics of suitable parents.³¹ In practice, the typical timeframe to complete both the administrative and judicial parts of the adoption process in Guatemala is between seven and ten years.³²

As a result, in lieu of going through formal adoption proceedings, families in these Central American countries may ask other adults (kin or others) to take on caregiving and parenting responsibilities for the child. Biological parents sometimes go one step further by allowing these informally adoptive parents to identify themselves as the birth parents on the child's birth certificate and thereby acquire parental rights with respect to the child. This is generally done in cases where the biological parents have not already registered the child's birth (which is not uncommon).³³

Under the laws of Honduras, Guatemala, El Salvador, and Nicaragua, the inscription of an individual's name on a child's birth certificate with the civil registry constitutes what is known as "voluntary recognition of parenthood," by evidencing the individual's intention to be recognized as the child's legal parent.³⁴ For example, in El Salvador, parents can voluntarily recognize paternity or maternity by

³⁰ See ADOPTION LAW, art. 15 (Hond.).

³¹ FAM. CODE, art. 237-40 (Nicar.).

³² Interview with Justice in Motion Guatemala Defender (Oct. 20, 2020).

³³ See UNICEF, A PASSPORT TO PROTECTION: A GUIDE TO BIRTH REGISTRATION PROGRAMMING 35, n. 102 (2013), <https://www.refworld.org/pdfid/52b2e2bd4.pdf>.

³⁴ See SPECIAL LAW FOR RESPONSIBLE MATERNITY AND PATERNITY, art. 6-8 (Hond.); CIVIL CODE, art. 210-12 (Guat.); FAM. CODE, art. 143 (El Sal.); FAM. CODE, art. 203, 223 (2014) (Nicar.), respectively.

registering their names and other identifying information on the child's birth certificate.³⁵ This, in turn, creates a legal presumption of parenthood and, by extension, the formation of a legally recognized parent-child relationship.³⁶ While "voluntary recognition of parenthood" is typically invoked in connection with children born to unmarried biological parents, as it allows biological fathers to recognize their paternity where the law does not otherwise automatically establish it, the principle nonetheless extends to any individual who inscribes their name on the child's birth certificate. It thereby enables the establishment of legal parenthood other than through a biological relationship or formal adoption.

Under relevant law of the Central American countries examined in this Alert, the legal presumption of parenthood created by voluntary recognition can only be overridden by a contradictory court ruling.³⁷ Generally, this can result only from a formal "challenge" to parenthood. The right to bring a formal challenge is typically limited to the child's biological parents, the child, and, sometimes, third parties with a cognizable interest. In some countries (El Salvador and Guatemala), this right may also be time-limited, based on when the challenger became aware of their right to bring a challenge. If a formal challenge is not brought, the adult(s) who voluntarily recognized parenthood, *i.e.* the person(s) listed on the birth certificate or registration, are considered the child's legal parent(s).

Although informal adoption via the voluntary recognition of parenthood on a child's birth certificate is a common practice in these Central American countries, immigration attorneys and Child Advocates should be aware that there can be civil and/or criminal penalties for subverting the formal adoption process.³⁸ Based on insight from legal practitioners in these countries, however, the Young Center and Justice in Motion understand that these penalties are typically reserved for cases that raise genuine trafficking concerns (*e.g.*, corrupt and often coerced international adoptions, which have been particularly problematic in countries like Guatemala in recent years).³⁹ In other words, the likelihood of consensual informal adoptions being targeted or penalized appears to be relatively small. Nonetheless, there is an undeniable tension between the formal law of these countries and this commonly accepted custom, which appears to be deeply rooted in the concept of extended family, among other sociopolitical factors.⁴⁰ As explored further below, practitioners and Child Advocates should keep this tension in mind, particularly when considering whether initiating a formal investigation of an informal adoption in a family's country of origin could trigger unintended consequences.

The sections below provide a summary of the specific laws on establishing parenthood through voluntary recognition, as well as challenging parenthood, in El Salvador, Honduras, Guatemala, and Nicaragua. Links to these laws can be found in Appendix A. Summaries of the laws on formal adoptions and the potential consequences for circumventing said laws can be found in Appendix B.

³⁵ FAM. CODE, art. 143, 159 (El Sal.).

³⁶ *Id.* See also *id.* art. 135 (El Sal.) (stating that paternity may be established by provision of the law, by voluntary recognition, or by judicial declaration).

³⁷ See, *e.g.*, *id.* art. 138 (El Sal.).

³⁸ Namely, under the laws of most of these countries, it is a criminal offense to inscribe false information related to a birth in the civil registry and/or to circumvent the formal processes of adoption. Being found guilty of such an offense can lead to the temporary suspension or permanent loss of parental rights of the biological parent and/or informally adoptive parent. See Appendix B for reference to the specific provisions of each country's laws.

³⁹ See, *e.g.*, *Adoption: Guatemala*, THE SCHUSTER INSTITUTE FOR INVESTIGATIVE JOURNALISM, <https://www.brandeis.edu/investigate/adoption/guatemala.html> (last visited Nov. 10, 2020).

⁴⁰ See RELAF Report, *supra* note 8.

B. El Salvador

Governing Authority: Parental rights in El Salvador are governed by Title II of the El Salvador Family Code, while adoption is governed by a Special Adoption Law.

Establishing Paternity: Paternity may be established by provision of the law, by voluntary recognition, or by judicial declaration.⁴¹ A father can voluntarily recognize paternity by providing his name and other identifying information when registering the child's birth certificate.⁴² Once paternity has been voluntarily recognized, it may not be revoked.⁴³

Establishing Maternity: Maternity may be voluntarily recognized in any of the ways in which paternity may be recognized.⁴⁴

Effect of Establishing Parenthood: Once parentage has been established in accordance with the Family Code, a later judicial finding that contradicts filiation is not valid unless the same or a different court also declares the initial filiation void.⁴⁵

Challenging Parenthood: Both maternity and paternity may be challenged.

Challenging Paternity: Voluntary recognition of paternity may be challenged by the child, by the father's relatives, and by anyone with a current interest (as defined by local law) in proving that the child could not belong to the father who recognized the child.⁴⁶ Any challenge must be brought within 300 days of having that interest and being able to assert these rights.⁴⁷

Challenging Maternity: Maternity may be challenged on the grounds of there being a fake birth or child impersonation. This may be done by the child; the "true" father or mother; the supposed mother if a child is claiming to be hers; the spouse of the supposed mother if a child is claiming to be hers; or any other person whose parental rights are currently prejudiced by the putative maternity.⁴⁸ A supposed mother, or her spouse, may only challenge maternity within one year of discovering that a child is claiming to be hers, though if new facts arise, a challenge may be brought within 90 days of the discovery of those new facts.

C. Honduras

Governing Authority: Parental rights in Honduras are governed by Titles III and V of the Honduras Family Code, respectively. Also relevant are the Special Law for Responsible Maternity and Paternity and the Reformed Rules of the Law of the National Registry of Persons (RNP Rules). Adoption is governed by a Special Adoption Law.⁴⁹

⁴¹ See FAM. CODE, art. 135 (El Sal.).

⁴² See *id.* art. 143 (El Sal.).

⁴³ *Id.* art. 147.

⁴⁴ *Id.* art. 143.

⁴⁵ *Id.* art. 138.

⁴⁶ *Id.* art. 156.

⁴⁷ *Id.* art. 157.

⁴⁸ *Id.* art. 162.

⁴⁹ *Id.* art. 163.

Establishing Parenthood: A child's parentage is recorded in the birth registration book of the Civil Registry. It can also be recognized or declared in an authentic document, public deed, or judicial sentence, in which case an annotation will also be made in the Civil Registry.⁵⁰

As a general matter, paternity and maternity are recognized from the moment of registration with the Civil Registry.⁵¹ In certain cases, a mother can register the birth of a child with the name of the man to whom she attributes paternity.⁵² This will be noted by the Civil Registrar, but will be provisional.⁵³ The putative father will then be notified of the attribution and will have one year from that notification to formally challenge paternity. If the putative father does not challenge paternity within one year, he will be formally recognized as the child's father.

Challenging Parental Rights: A person who believes they are the true parent of a child can bring an action challenging paternity at any time.⁵⁴

D. Guatemala

Governing Authority: Parental rights in Guatemala are governed by Chapters IV, V, and VII of the Guatemala Civil Code, while adoption is governed by the Guatemala Adoption Law. Methods for establishing and challenging parenthood depend on the marital status of the child's parents. Chapter IV of the Guatemala Civil Code governs the parenthood of children born in wedlock, while Chapter V governs the parenthood of children born out of wedlock.

Establishing Parenthood:

Children Born in Wedlock: Pursuant to Article 199 of the Civil Code, a husband is the legal parent of any child born during the marriage, even if the marriage is later declared void. It is presumed that any child born within 180 days of the marriage is the husband's, and any child born within 300 days of the end of a marriage is the former husband's, absent DNA evidence indicating otherwise.⁵⁵

Children Born out of Wedlock: When a child is born out of wedlock, maternity is established and proven solely by the fact of birth, while paternity can be established by voluntary recognition or by court order.⁵⁶ Voluntary recognition of paternity can be done via the birth certificate, which requires appearing before the Civil Registry, or by making a specific request before the Civil Registry. It can also be done by public deed, will, or judicial confession - which must also be submitted to the Civil Registry and noted on the child's birth certificate.⁵⁷ Once recognition has been made, it cannot be revoked by the person who acknowledged paternity.⁵⁸

⁵⁰ See FAM. CODE, art. 104 (Hond.).

⁵¹ See SPECIAL LAW FOR RESPONSIBLE MATERNITY AND PATERNITY, art. 6 (Hond.).

⁵² *Id.* art. 7-8.

⁵³ See REFORMED RULES OF THE LAW OF THE NATIONAL REGISTRY OF PERSONS (RNP), art. 130 (Hond.).

⁵⁴ See FAM. CODE, art. 117 (Hond.). By contrast, if the child's birth was registered by only one married spouse, the other spouse can challenge paternity if it is impossible that both spouses conceived the child. *Id.* art. 114. This must be done within the first year of the child's birth or within one year of the date on which the challenger received notice of the fact. *Id.* art. 115.

⁵⁵ See CIVIL CODE, art. 200 (1963) (Guat.)

⁵⁶ *Id.* art. 210.

⁵⁷ *Id.* art. 211.

⁵⁸ *Id.* art. 212.

Article 227 of the Civil Code makes clear that “voluntary and judicial recognition are declaratory acts of paternity and, consequently, they take effect from the date of the child’s birth,” stressing that pecuniary rights can be deduced from such recognition, if nothing more.⁵⁹ Parents can recognize a child together or separately, in which case one parent’s recognition is valid only as to that individual.⁶⁰

Challenging Parenthood:

Children Born in Wedlock: A husband cannot challenge his paternity if he knew of the pregnancy before the marriage took place, if he was present at the registration of the birth certificate with the Civil Registry, or if he agreed the birth certificate would be signed in his name.⁶¹ Husbands wishing to challenge paternity must do so within 60 days of the child’s birth.⁶²

Children Born out of Wedlock: The biological father or mother, the child, or an interested third party can challenge the recognition within six months of the day they became aware of the relevant facts.⁶³

E. Nicaragua

Governing Authority: Parenthood, parental rights, and adoption are governed by Titles I, IV, and V of the 2014 Nicaragua Family Code (which repealed the previously existing Adoption Law, various laws regulating family relationships, and various provisions of the Nicaragua Civil Code).⁶⁴

Establishing Parenthood: Maternity can be established without express recognition by the mother if there is proof of the child’s birth and identity.⁶⁵ Otherwise, maternity and paternity can both be established voluntarily, administratively, or judicially.⁶⁶

Voluntary recognition of maternity or paternity can be made before an official from the Registry of the Civil Status of Persons, in a public deed, or in a will.⁶⁷ Upon voluntary recognition, a person legally achieves the status of parenthood over the child.⁶⁸ If they are married or in a de facto union as defined by the Nicaragua Family Code of 2014,⁶⁹ the registration of the birth of a child in the Registry of the Civil Status of Persons by one spouse will have legal effect as to both spouses.⁷⁰ Unmarried parents, on the other hand, must register their child jointly for both to be recognized as parents.⁷¹ If the father wishes to register himself voluntarily and the mother objects, he must affirmatively prove his paternity through a DNA test.⁷²

⁵⁹ *Id.* art. 227 (“Sobre la calidad de hijo no puede celebrarse transacción ni compromiso alguno; pero sí sobre los derechos pecuniarios, que puedan deducirse de la filiación.”).

⁶⁰ *Id.* art. 214.

⁶¹ *Id.* art. 201.

⁶² *Id.* art. 204.

⁶³ *Id.* art. 214.

⁶⁴ See FAM. CODE, art. 671 (2014) (Nicar.).

⁶⁵ *Id.* art. 201.

⁶⁶ *Id.* art. 202.

⁶⁷ *Id.* art. 223.

⁶⁸ *Id.* art. 223.

⁶⁹ “The de facto union rests on the voluntary agreement between a man and a woman who, without legal impediment to marry, live together freely in a stable, notorious and singular way for at least two consecutive years. For all purposes, the members of this union will be called cohabitants.” FAM. CODE, art. 83 (2014) (Nicar.).

⁷⁰ *Id.* art. 206.

⁷¹ *Id.* art. 207.

⁷² *Id.* art. 208.

Challenging Parenthood: Paternity can be challenged by a person's spouse⁷³ or by their putative child.⁷⁴ Maternity can be challenged on the grounds of there being a fake birth or child impersonation. This can be done by the child; the biological father or mother; the supposed mother if a child is claiming to be hers; the spouse of the supposed mother if a child is claiming to be hers; or any other person whose probate rights are currently prejudiced by the putative maternity.⁷⁵ The supposed mother, or her spouse, can only challenge maternity within one year of discovering that a child is claiming to be hers, though if new facts arise, a challenge may be brought within 90 days of the discovery of those new facts.⁷⁶

IV. IMPACT OF INFORMAL ADOPTION ON U.S. IMMIGRATION CASES

There are several ways in which informal adoptions may become significant in U.S. immigration proceedings, including: criminal charges against informally adoptive parents, parent-child reunification, and the availability of substantive immigration relief. In each of these contexts, immigration attorneys and Child Advocates may be able to argue that decisionmakers should look to the law of the child's country of origin to determine the legal relationship between the child and their putative parent. However, they should also keep in mind how making this argument in one context might impact the child's legal case and best interests in other contexts.



A. General Considerations

When deciding whether to advocate that U.S. immigration authorities should respect a parent-child relationship recognized under the law of a Central American country, practitioners and Child Advocates should consider the following issues.

1. The Likelihood and Consequences of an Investigation

Though it may be unlikely, there is nonetheless a possibility that any investigation (by a practitioner, Child Advocate, or the U.S. government) into the factual situation surrounding the child's informal adoption in their country of origin could lead to (1) a formal challenge to the informally adoptive parent's presumed parenthood and/or (2) potential criminal charges against the informally adoptive and/or biological parent(s) for false inscription of the child's birth certificate. In the United States, these actions could undermine the ability of the informally adoptive parent to be reunified with the child, as well as negatively impact the adult's criminal or immigration case. If the family is returned to their home country, an existing investigation could increase the likelihood that the child is placed into state protective care. It could also increase the likelihood of incarceration of the informally adoptive or biological parent(s), or suspension or termination of the informally adoptive or biological parent(s)' parental rights. Before launching any investigation, therefore, it is critical to consider the level of risk in the case at hand, as well as how this might affect the child's best interests while they are in the United States and if they are returned to their home country.

⁷³ *Id.* art. 224.

⁷⁴ *Id.* art. 226.

⁷⁵ *Id.* art. 227.

⁷⁶ *Id.* art. 228.

In some instances, by the time an immigration attorney or Child Advocate encounters the case, the U.S. government will have already initiated an investigation. In these cases, it is important determine the extent of any such investigation, whether it has triggered any relevant legal proceedings in the family's home country, and how this might impact the child in the United States and upon return.

2. The Potential Impact on the Child's and Adult's Immigration Case

Arguing that an informally adoptive parent is a child's legal parent could undermine the child's ability to apply for SIJS, or at the very least could significantly complicate the case. This issue is explored in greater detail in Part IV.D. below.

In addition, once an argument that an informally adoptive parent is a child's legal parent has been made in one context (e.g., to mitigate an informally adoptive parent's criminal sentence), it will likely be difficult to backtrack from this argument in other contexts (e.g., if it could undermine a child's SIJS case). Doing so could lead to credibility concerns, which could further undercut both the child and adult's ability to obtain immigration relief. It is therefore important that practitioners and Child Advocates consider the consequences of making this argument in every context and to take an approach that can be maintained consistently throughout a child and adult's immigration proceedings.

3. The Necessity of Addressing Legal Parenthood in the Context of a Client's Individual Case

Given the considerations above, it is critical to consider whether making an argument about legal parenthood is necessary in the context of each client's individual case. If the informally adoptive parent has not been criminally charged, for example, explaining the factual context of the informal adoption and the legitimately psychological and caregiving relationship between the adult and child (without raising issues of foreign law) could still be enough to persuade ORR to release the child to the adult as a non-parent sponsor (see below), and might ultimately better serve the child's best interests. This decision should always be made on a case-by-case basis and may be aided by the more detailed guidance set forth below.

B. Criminal Proceedings Against Birth Certificate Parents

If the U.S. government criminally charges an informally adoptive parent with making false statements or with alien smuggling (which has occurred with unusual frequency under the Trump Administration),⁷⁷ practitioners may be able to combat these charges or reduce sentencing by showing that the adult is in fact the child's legal parent under the law of their country of origin. This can be done through reference to the laws described in Part II and detailed in Appendices A and B, ideally via an affidavit from a foreign family law attorney.⁷⁸

⁷⁷ We are aware of adults being charged under 18 U.S.C. § 1001(a)(2) for making a "materially false, fictitious, or fraudulent statement or representation," as well as under 8 U.S.C. §§ 1324(a)(1)(A)(ii), 1324(a)(1)(A)(v)(II), and 1324((a)(1)(B)(ii) for knowingly transporting, moving, attempting to transport, and attempting to move an alien.

⁷⁸ The Justice in Motion Defender Network is comprised of trained attorneys and other professionals in Central America and Mexico who support advocates in the United States and Canada in their litigation or provision of other types of support. Practitioners can seek their services by emailing legalaction@justiceinmotion.org. Moreover, practitioners may access resources related to legal issues in Central America and Mexico, including expert declarations on family law, by visiting: <https://www.justiceinmotion.org/child-detention-crisis>.

When determining whether to make this argument, however, it is important to consider the consequences it may have on a child's potential case for SIJS (see below). Even if an immigration attorney or Child Advocate ultimately chooses not to raise the issue of legal parenthood to advocate for clients or a child, they may still be able to mitigate the adult's sentence by explaining, for example: the circumstances of the informal adoption, the adult's longstanding caregiving relationship with the child, and the child's consideration or treatment (for pre-verbal children) of the adult as a parent.⁷⁹

Where a child has two informally adoptive parents, it is also important to be mindful of how the disclosure of certain facts and use of certain arguments can impact families when one informal adoptive parent has been charged in a criminal proceeding, but the other has not. Certain disclosures (e.g., that the other parent is also not a biological parent, even if their name appears on the child's birth certificate) could lead to criminal charges being brought against the other parent in the United States (or home country, depending on the circumstances), as well as affect that parent's ability to be approved by ORR as the child's sponsor.

C. Family Reunification and Sponsorship from ORR Custody

In cases where children have already been separated from their informally adoptive parents, the most pressing concern quickly becomes determining whether it is in the child's best interests to be reunified with those parents. If the parents and children seek reunification, or reunification serves the child's best interests, practitioners can argue for the adult to be classified as a parent (Category 1), close relative (Category 2), or other sponsor (Category 3) under ORR's sponsorship system.

Because Category 3 sponsors (often relatives or unrelated adults) are typically considered to be more distant from the child, ORR requires more information to prove the relationship and proceed with the sponsorship. These added burdens of proof can cause further delay in reunification and may lead to an extended length of stay for children in ORR care, which may exacerbate the trauma of the initial separation. Children who have been traumatically separated from their caregiver may experience changes in behavior, mood, and development.⁸⁰

⁷⁹ There are several ways in which the fact that an adult is a child's legal parent might reduce sentencing in the event of a guilty plea or conviction for making false statements or alien smuggling. The process for determining an individual's sentence under the Federal Sentencing Guidelines (U.S.S.G.) primarily involves calculating the "offense level" for each particular offense based on the nature of the offense and the circumstances under which it was committed. The sentencing range for any term of imprisonment depends on the final offense level identified at the end of that process, along with the offender's criminal history. For violations of 8 U.S.C. § 1324(a) (alien smuggling), the Guidelines specifically require a decrease in the offense level if "the offense was committed other than for profit, or the offense involved the smuggling, transporting, or harboring only of the defendant's spouse or child." U.S.S.G. § 2L1.1. For violations of 18 U.S.C. § 1001 (false statements), the Guidelines do not specify reductions likely to be applicable in informal adoption cases. See U.S.S.G. § 2B1.1. However, the Guidelines do permit upward or downward "departures" from final sentencing ranges on any grounds that a court finds the Guidelines have not taken into account (or have not taken into account to the extent appropriate). U.S.S.G. § 5K2.0(b), (c). A departure in false statement or alien smuggling cases involving informally adoptive parents may arguably be warranted based on "lesser harm," given that "society's interest in punishment is diminished" under the circumstances. U.S.S.G. § 5K2.11. We are aware of one case in which an adult who pled guilty to making a false statement was sentenced only to time served after submitting an affidavit from a Honduras family lawyer explaining the informal adoption and existence of a legal parent-child relationship.

⁸⁰ See NATIONAL CHILD TRAUMATIC STRESS NETWORK, CHILDREN WITH TRAUMATIC SEPARATION: INFORMATION FOR PROFESSIONALS (2016), https://www.nctsn.org/sites/default/files/resources//children_with_traumatic_separation_professionals.pdf. For additional resources on the trauma caused by parent-child separation, see NATIONAL CHILD

ORR may also limit the amount of communication, or more closely monitor the communication, between children and Category 3 sponsors. Moreover, where these adults are held in ICE custody or U.S. Marshals custody (because federal charges are pending),⁸¹ it may be difficult to convince the ICE or U.S. Marshals officials that they should permit the parent to have calls or video communication with their child without proof of a parent-child relationship. Finally, while Category 1 sponsors have a formal process to appeal a decision by ORR denying the release of a child to their care, Category 3 sponsors do not.⁸² For all of these reasons, it could be beneficial to argue that informally adoptive parents should be considered Category 1 sponsors, including by citing to the law of the family's country of origin.

Nonetheless, making this argument could still lead to ORR requiring additional proof of the parent-child relationship, which could equally extend the child's length of stay in ORR care. If ORR questions children in detail about the nature of their relationship with their parent(s), this might further exacerbate children's trauma. It is also possible that ORR would view the informally adoptive parent's inscription of the child's birth certificate—often viewed by government officials as a fraudulent act—as a factor negatively impacting their suitability as a sponsor. These potential consequences should not be overlooked.

Arguments about parentage to seek Category 1 sponsorship, so as to facilitate contact and faster reunification, may also impact the child's legal case and long-term best interests, particularly where the child has a potential SIJS claim. Where there are significant concerns about these issues, consider whether focusing on the legitimate psychological, caregiving relationship between the child and adult (as a Category 3 sponsor) might be able to achieve the immediate goals of regular communication and reunification while minimizing overall harm to the child. For example, advocates could evaluate and address [focus and expand on] the length of the caregiving relationship between the adult and child, the caregiver's prior responsibilities for the child, the names the adult and child use for each other ("mama," "papa," e.g.), the amount of the child's life that the adult has been their caregiver, relevant cultural practices and understandings of family units/extended family responsibilities, and any concrete, future plans that exist for the caregiver to continue caring for the child.

TRAUMATIC STRESS NETWORK, SELECT NCTSN RESOURCES RELATED TO REFUGEE & IMMIGRANT TRAUMA (2019), https://www.nctsn.org/sites/default/files/resources/fact-sheet/nctsn_resources_traumatic_separation_and_refugee_and_immigrant_trauma.pdf; Carmen Rosa Noroña et al., *Historical, Sociopolitical, and Mental Health Implications of Forcible Separations in Young Migrant Latin American Children and Their Families*, 39 ZERO TO THREE 8 (2018); Michael J. MacKenzie et al., *Separating Families at the Border—Consequences for Children's Health and Well-Being*, 376 N. ENGL J. MED. 2314 (2017).

⁸¹ If a parent is in U.S. Marshals custody, practitioners should contact the parent's federal public defender. Sometimes the defender can recommend contacts in the U.S. Marshals office who are amenable to connecting calls between detainees and children. However, as discussed above, sometimes ORR will not allow children to communicate with adults who are not family members. This would therefore require additional advocacy.

⁸² See OFFICE OF REFUGEE RESETTLEMENT, ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERV., ORR GUIDE: CHILDREN ENTERING THE UNITED STATES UNACCOMPANIED § 2.7.7 (Notification of Denial), § 2.7.8 (Appeal of Release Denial) (2015).

D. Special Immigrant Juvenile Status

Special Immigrant Juvenile Status is an immigration classification available to certain children seeking permanency in the United States. SIJS is based on the fact that a child’s reunification with one or both parents “is not viable due to abuse, neglect, abandonment, or a similar basis found under State law.”⁸³ SIJS is a unique immigration remedy in that the application process requires the involvement of a state “juvenile court” (including but not limited to family courts). Before the child can formally petition for SIJS, a state court must establish jurisdiction over the child and appoint an individual to be the child’s legal custodian or guardian.⁸⁴ The state court must also make specific findings that reunification is not viable and that it is not in the child’s best interests to be returned to their country of origin.⁸⁵ These findings are contained in a state court order commonly referred to in SIJS cases as a “predicate order,” which must accompany the child’s subsequent SIJS petition (Form I-360) with USCIS—along with proof of the child’s age, although not necessarily a birth certificate.⁸⁶ SIJS eligibility may allow the child to file an application for adjustment of status (Form I-485) to become a lawful permanent resident (green card holder) of the United States once a visa becomes available.

In cases where a child has been informally adopted and their birth certificate lists a non-biological parent, it will be critical for practitioners who believe a child may be eligible for SIJS to consider: (1) whom to identify as the child’s “parents” for the purpose of arguing that the child has been abused, abandoned, or neglected by one or both parents; (2) whether to proceed with the case via guardianship proceedings (with the informally adoptive parent being appointed as a non-relative guardian) or custody proceedings (with the informally adoptive parent positioned as the parent); and (3) whether to disclose the birth certificate and its back story to the state court and whether to file the birth certificate with USCIS. It is also generally worth keeping in mind that children petitioning for SIJS cannot petition for their parents as derivatives.

As these cases depend heavily on widely varying state laws, the guidance presented here is general, meant to encourage further research and consultation on these issues; it does not constitute specific advice. Practitioners should always consider the specific state law that governs their case as well as evolving practices of USCIS officials.

1. Deciding Whom to Name as Respondent Parent(s)

When a child has been informally adopted, determining whom to name as the respondent parent(s) in a custody or guardianship proceeding—if necessary—can be complicated. Three key issues to consider are: (1) whether there is a factual argument that one or both of the child’s biological parents abandoned, neglected, or abused the child; (2) who is listed on the child’s birth certificate as their

⁸³ 8 U.S.C. § 1101(a)(27)(J).

⁸⁴ Other juvenile or family court circumstances can also lead to SIJS predicate orders, but custody/guardianship actions are the most common (and likely in these cases).

⁸⁵ 8 U.S.C. § 1101(a)(27)(J).

⁸⁶ 8 C.F.R. § 204.11(d).

mother and father; and (3) whether the state will issue a predicate order when only one parent has been named as a respondent in a custody, dependency, or guardianship proceeding.⁸⁷

In cases of informal adoptions, there is likely to be a strong argument that by allowing someone else to care permanently for their child and be registered on the child's birth certificate, one or both biological parents effectively abandoned the child (though the definition of abandonment will depend on state law). However, practitioners who maintain that the informally adoptive parent, not the biological parent, is the child's legal parent for other purposes (such as reunification or criminal proceedings), could complicate or preclude naming the biological parent as the respondent parent in certain circumstances described below. Nonetheless, particularly in a state that permits one-parent SIJS, it may still be possible to maintain that the informally adoptive parent is the child's legal parent and obtain SIJS based on the abandonment by a biological parent; it may also not be necessary to make arguments about the informally adoptive parent (aside from their need for an order of custody) while seeking findings against the biological parent.

The simplest scenario might be where the informally adoptive mother's name is listed alongside the biological father's name on the birth certificate (or vice versa) and the state permits just one parent to be named as the respondent in a custody, dependency, or guardianship petition. In these cases, depending on the factual circumstances (*i.e.*, whether there is an argument that the biological father abandoned, neglected, or abused the child), the biological father may become the respondent parent and the informally adoptive mother may seek to be named as the custodian or guardian.⁸⁸

If *only* the informally adoptive mother's name is listed on the birth certificate, practitioners may still be able to name the biological father as the respondent parent if the state permits just one parent to be named as the respondent in a custody, dependency, or guardianship petition. Nonetheless, the court may require a separate "parentage" proceeding to establish the paternity of the biological father before allowing him to be served as a respondent. But the informally adoptive parent could still be designated as the custodian or guardian.

⁸⁷ Despite the clear language of 8 U.S.C. § 1101(a)(27)(J) that SIJS can be based on abuse, abandonment, or neglect by "one or both parents," a few state courts have interpreted the statute to require failed reunification with both parents. *See, e.g.*, *Interest of Erick M.*, 284 Neb. 340 (2012) (holding that "when ruling on a petitioner's motion for an eligibility order under Section 1101(a)(27)(J), a court should generally consider whether reunification with either parent is feasible"). The majority, however, do permit SIJS based on abuse, abandonment, or neglect by one parent alone. For further information, *see*, IMMIGRANT LEGAL RESOURCE CTR, SPECIAL IMMIGRANT JUVENILE STATUS: A PRIMER FOR ONE-PARENT CASES (2015), https://www.ilrc.org/sites/default/files/resources/one-parent_sijs_primer_final.pdf.

⁸⁸ Whether an informally adoptive parent can be appointed as a child's custodian will depend on state law. In New York, for example, typically only a "parent" may be appointed as a custodian. But "parent" is not statutorily defined. The New York Court of Appeals has indicated that, at least in certain circumstances, a non-biological parent may be considered a "parent." *See Matter of Brooke S.B. v. Elizabeth A.C.C.*, 28 N.Y.3d 1 (NY Ct. App. 2016). The fact that the non-biological parent is listed on the child's birth certificate has even been considered positive evidence of an intention to act as the child's parent. *See Christopher YY v. Jessica ZZ*, 69 N.Y.S.3d 887, 896 (3d Dep't 2018). Existing case law focuses on the non-biological parents in same-sex couples, rather than informal adoptions, but the New York Court of Appeals has expressly declined to find that any single test for "parenthood" would cover all potential circumstances, leaving the issue open for a case-by-case determination. *Matter of Brooke S.B.*, 28 N.Y.3d at 11. In any event, New York does allow non-parents to be appointed custodians in "extraordinary circumstances." *See Matter of Bennett vs. Jeffreys*, 40 N.Y.2d 543 (Ct. App. 1976). As these circumstances include "surrender, abandonment, persisting neglect, [or] unfitness" by a child's biological parent(s), it is possible that an informally adoptive parent could be appointed custodian under this standard. Otherwise, they could still be appointed guardian.

If practitioners are in one of the few states in which custody, dependency, or guardianship petitions must name both parents, they might not be able to pursue the SIJS predicate order with respect to both biological parents unless they concede that the informally adoptive parent is not the legal parent. The same problem could arise if the birth certificate lists two informally adoptive parents, regardless of whether practitioners are in a one-parent state: If they have argued that both these parents are legal parents, there would be no respondent parent against which to bring a case (unless one or both of the informally adoptive parents had abandoned, abused, or neglected the child).

The chart below summarizes these potential scenarios and outcomes:

Birth Certificate	Scenario 1	Scenario 2	Scenario 3
Parent 1	Informally adoptive	Informally adoptive	Informally adoptive
Parent 2	Biological	None listed	Informally adoptive
Outcome	Scenario 1	Scenario 2	Scenario 3
State Permits Only One Parent to Be Named as Respondent	Parent 1 = Custodian or Guardian Parent 2 = Respondent	Parent 1 = Custodian or Guardian Parent 2 = Respondent (with possible parentage proceeding)	Practitioners may not want/be able to argue that either informally adoptive parent is legal parent
State Requires Both Parents to Be Named as Respondents	Practitioners may not want/be able to argue that Parent 1 is legal parent (and may necessitate parentage proceeding)	Practitioners may not want/be able to argue that Parent 1 is legal parent (and may necessitate parentage proceeding)	Practitioners may not want/be able to argue that either informally adoptive parent is legal parent (and may necessitate parentage proceeding)

2. Potential Issues with the Birth Certificate

Practitioners should also consider the weight that the family court will give to the birth certificate in light of the circumstances of its inscription. The approach and risk will likely vary depending on the individual factual circumstances of the case, the court/judge, and the state law at play, but if an informally adoptive parent admits that they are not the biological parent and that the birth certificate was falsely inscribed, a court could choose to order a parentage proceeding regardless of a Consulate’s validation of the birth certificate.

In general, the family court may be more concerned with the factual circumstances and the reality of the relationship between the biological parents, child, and informally adoptive parents, than with the rights conferred under foreign law by the birth certificate itself, but practitioners should be prepared for questions.

It is also possible that family courts could view the false inscription of the birth certificate as undermining the suitability of the informally adoptive parent as custodian or guardian. Evidence that this was done with the consent of the biological parent, and that it aligned with customs in the relevant countries or community, however, may mitigate this concern.

Similar risks should be considered with respect to submitting the child's birth certificate to USCIS with the I-360 as proof of the child's age, as other evidence is also accepted.

E. Derivative Status

If the informally adoptive parent applies for immigration relief that allows them to include derivatives (e.g., asylum), it may also be possible to invoke foreign law to argue that the child meets the applicable INA definition of "child" and thus merits derivative status.⁸⁹

As noted above, INA Section 101(b)(1)(C) provides that a "child" includes "a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation."⁹⁰ Under the heading, "Primary evidence for a legitimated child or son or daughter," the statute's accompanying regulations further provide:

If the legitimation is based on the laws of the country or state of the child's residence or domicile, the law must have taken effect before the child's eighteenth birthday. If the legitimation is based on the laws of the country or state of the father's residence or domicile, the father must have resided—while the child was under eighteen years of age—in the country or state under whose laws the child has been legitimated. Primary evidence of the relationship should consist of the beneficiary's birth certificate and the parent's marriage certificate or other evidence of legitimation issued by civil authorities.⁹¹

Thus, if voluntary recognition of parenthood via inscription on the child's birth certificate creates a legal presumption of parenthood in the child's country of origin, that presumption has not been overturned by legal challenge or annulment, and the child's birth certificate has been validated, then arguably the child technically should be able to be included as a "legitimated child" derivative on the informally adoptive parent's application. Nonetheless, particularly given USCIS's general refusal to recognize informal adoptions with respect to the definition of an "adopted child" under the INA,⁹² there is an undeniable risk that it would refuse to accept an argument regarding a "legitimated child" if there were DNA evidence or an admission in the record indicating that the informally adoptive parent was not the child's biological parent.

⁸⁹ For detailed guidance on petitioning for derivative status and preparing evidence regarding a child's eligibility, see CATHOLIC LEGAL IMMIGRATION NETWORK, INC., I-730 REFUGEE/ASYLEE FAMILY REUNIFICATION PRACTICE MANUAL (2019).

⁹⁰ 8 U.S.C. § 1101(b)(1).

⁹¹ 8 C.F.R. § 204.2(d)(2)(ii).

⁹² See 8 U.S.C. § 1101(b)(1)(E); U.S. CITIZENSHIP & IMMIGRATION SERV., ADJUDICATOR'S FIELD MANUAL, Ch. 21.16; Matter of Lee, 16 I&N Dec. 511 (BIA 1978).

V. CONCLUSION

In the current immigration climate, immigration advocates—immigration attorneys of record, Child Advocates, organizations providing generalized legal services such as “Know Your Rights” and case consultations—are faced with many challenges when involved in the representation of and advocacy for migrant families. This Issue Alert has focused on the potential implications of “informal adoptions” in Central America, identifying issues for consideration and legal authorities for review when strategizing in these complex cases. As the

Alert explains, under the laws in El Salvador, Honduras, Guatemala, and Nicaragua, the registration of an adult’s name on a child’s birth certificate—often done in the context of informal adoptions—constitutes a “voluntary recognition of parenthood.” This, in turn, creates a legal presumption of parenthood—unless and until it is formally challenged in court. Therefore, practitioners and Child Advocates are urged to consider the implications of arguing in the U.S. immigration context that the adoptive parent is the child’s legal parent, which may be done in (federal or state) criminal proceedings, ORR sponsorship, and applications/petitions before USCIS. Practitioners should consider the potential consequences of this argument within the unique circumstances of each case while taking into account both U.S. and foreign law. Furthermore, immigration attorneys and Child Advocates are encouraged to consider the legal rights of families subjected to DNA testing and separated at the border. Though this Issue Alert cannot address all issues that may arise out of the unique circumstances of each case, we hope that it has provided relevant content and legal tools for meaningful analysis.



DEFINITIONS

AGENCY DEFINITIONS

Department of Homeland Security (DHS): A U.S. federal executive agency responsible for public security and the department overseeing CBP and ICE. Successor to the Immigration and Naturalization Service (INS), which was dissolved by the Homeland Security Act of 2002 and replaced by DHS and its three components: USCIS, ICE, and CBP.

Immigration and Customs Enforcement (ICE): A federal law enforcement agency under DHS that enforces federal laws governing border control, customs, trade, and immigration.

Customs and Border Protection (CBP): A federal law enforcement agency under DHS that acts as the primary border control agency of the United States.

U.S. Citizenship and Immigration Services (USCIS): A federal agency under DHS that administers the U.S. immigration and naturalization system. Responsible for processing applications for several immigration benefits, including asylum, U and T non-immigrant status, and Special Immigrant Juvenile Status.

Department of Health and Human Services (HHS): A federal executive agency that has custody and must provide care for “unaccompanied alien children,” that is, children without lawful immigration status in the United States, who have not attained 18 years of age and, with respect to whom, there is no parent or legal guardian in the United States, or no parent or legal guardian in the United States available to provide care and physical custody.

Office of Refugee Resettlement (ORR): A federal agency under HHS that is responsible, among other things, for the care and placement of “unaccompanied alien children” apprehended by DHS.

TERMS RELEVANT TO THIS PRACTICE ADVISORY

False Childbirth: Conduct in which a birth that has not actually taken place is feigned. This could manifest as presenting a child as the product of a birth that did not occur, presenting a live newborn as the child of a mother who delivered a stillborn child, or otherwise presenting another child as one’s own.

Informal Adoptions: Adoptions arising out of an unofficial arrangement/agreement between a child’s biological parent(s) and informally adoptive parent(s), not occurring under the formal doctrines and procedures dictated by legal authorities in the country where the child was born.

Special Immigrant Juvenile Status (SIJS): An immigration classification available to certain undocumented migrant children. SIJS is based on a child's reunification with one or both parents not being viable due to abuse, neglect, abandonment, or a similar basis under state law.

Voluntary Recognition of Parenthood: The process by which a legal relationship of parentage between an adult and child is established. Under laws in many Central American countries, voluntary recognition of parenthood creates a legal presumption of parenthood, which affords parental rights. This presumption can only be overridden by a contradictory court ruling.

APPENDIX A: RELATED LEGAL AUTHORITIES

- A. El Salvador Family Code (Titles I and II), https://www.oas.org/dil/esp/Codigo_de_Familia_El_Salvador.pdf
- B. El Salvador Special Adoption Law, <https://www.asamblea.gob.sv/sites/default/files/documents/decretos/C22AF553-30E4-4418-A5B1-909B8F7BD4AD.pdf>
- C. El Salvador Penal Code, <https://www.asamblea.gob.sv/decretos/details/380>
- D. Honduras Family Code (Titles III and V), <http://www.bvs.hn/Honduras/Leyes/CodigodelaFamilia.pdf>
- E. Honduras Special Law for Responsible Maternity and Paternity, <https://tzibalnaah.unah.edu.hn/bitstream/handle/123456789/863/2013118.pdf?sequence=2&isAllowed=y>
- F. Honduras National Registry of Persons (RNP Rules), Reformed Rules of the Law, <https://www.tsc.gob.hn/biblioteca/index.php/reglamentos/140-reglamento-de-la-ley-del-registro-nacional-de-las-personas>
- G. Honduras Special Adoption Law, <https://www.tsc.gob.hn/biblioteca/index.php/leyes/803-ley-especial-de-adopciones-de-honduras>
- H. Honduras Penal Code, http://www.oas.org/dil/esp/codigo_penal_honduras.pdf
- I. Guatemala Civil Code (Chapters IV, V, VII), https://www.oas.org/dil/esp/Codigo_Civil_Guatemala.pdf
- J. Guatemala Adoption Law, http://www.cna.gob.gt/Documentos/Ley_de_Adopciones.pdf
- K. Guatemala Penal Code, https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/GTM_codigo_penal.pdf
- L. Nicaragua Family Code (Titles I, IV, and V) (2014), http://www.sipi.siteal.iipe.unesco.org/sites/default/files/sipi_normativa/ley_870-14_codigo_de_familia-nicaragua.pdf
- M. Nicaragua Penal Code, http://www.oas.org/dil/esp/Codigo_Penal_Nicaragua.pdf

APPENDIX B: FORMAL ADOPTION PROCEEDINGS, POTENTIAL PENALTIES FOR FALSE CLAIMS OF PARENTAGE & TERMINATION/ SUSPENSION OF PARENTAL RIGHTS

EL SALVADOR

1. Adoption

General: Decree 282, which established a Special Law of Adoptions in El Salvador in 2017, provides that no adoption may take place without a judicial procedure declaring the child to be adoptable and the adoptive parent(s) to be suitable as adopters.¹

Children’s Eligibility for Adoption: Children may be adopted if: they have been declared adoptable by a judge specializing in childhood and adolescence; they are of unknown origin; they are under the personal care of relatives, provided there are justified reasons for adoption, and this is approved by a judge specializing in childhood and adolescence; they are the sons or daughters of a person’s spouse; or their father or mother has been declared legally incapacitated by a chronic and incurable mental illness.²

Adults’ Eligibility to Adopt: People are eligible to adopt a child if they: (1) are legally capable; (2) are over 25 years old (or have been married to another person over 25 for at least 3 years); (3) possess family, moral, psychological, social, economic and health conditions that demonstrate aptitude and willingness to assume the exercise of parental authority; (4) have not lost or been suspended from exercising parental authority; (5) are not subject to administrative or judicial proceedings involving, and have not been convicted of, crimes against children, domestic violence or gender violence; and (6) have no criminal record for serious crimes.³

Registration of Adoptions: Once the process of adoption is complete, the adoption is then registered in the adopted child’s birth certificate and in the Registry of Family Status.⁴ The child is issued a new birth certificate, in which the fact of their adoption and the identity of their biological parents are absent. The old birth certificate is kept by the Registry of Family Status, but no certified copies of the old birth certificate can be issued absent a court order.⁵

2. Potential Penalties for False Claims of Parentage

Civil Penalties: Under the El Salvador Family Code, anyone who has taken part in a “false birth,” including by falsely presenting a child as one’s own, is subsequently prohibited from exercising parental rights over the child. Additionally, such person loses the right to demand maintenance or succeed in the child’s property rights.⁶

¹ See SPECIAL ADOPTION LAW, art. 26 (El Sal.).

² *Id.* art. 23.

³ *Id.* art. 38.

⁴ *Id.* art. 114.

⁵ *Id.* art. 119.

⁶ “False childbirth” more broadly refers to the conduct in which a delivery that has not actually taken place is feigned. Related conduct could include professing the existence of the birth of a live child or presenting another child as one’s own. See generally, CHÁVEZ, J. M. P., EL NIÑO EN PRISIÓN: UNA MIRADA MULTIDISCIPLINARIA, 5(4), 323-54 (2020). See also FAM. CODE, art. 164 (El Sal.).

Criminal Penalties: The El Salvador Penal Code further provides that anyone who “supplants the family status of another” by changing personal data or affiliation in the civil registry is subject to two to four years in prison. The penalty is raised to three to five years if the alteration “is made for purposes of adoption.”⁷ Article 198 of the Penal Code further provides that anyone who gives up their child to another person in exchange for economic compensation, in breach of the requirements for legal guardianship or adoption, is subject to one to three years in prison, as well as disqualification of the ability to exercise parental rights for the same period. The person who received the child and any intermediaries may be punished by two to four years in prison.

3. Termination/Suspension of Parental Rights

Termination of Parental Rights: Parents may lose their parental rights if the child is adopted⁸ or if the parent corrupts the child or promotes or facilitates their corruption; abandons the child without just cause; participates in a fake birth or impersonation;⁹ or is convicted of committing or abetting a malicious crime against their child.¹⁰

Suspension of Parental Rights: This may occur for routinely mistreating the child or allowing any other person to do so; alcoholism, drug addiction or notorious immorality that endangers the health, security, or morality of the child; suffering from mental illness; or unexcused absence or prolonged illness.¹¹

The loss and suspension of parental rights must be judicially decreed, which can be done at the request of any child, the Attorney General, or by the judge *ex officio*. Parental rights may be restored when the causes giving rise to it cease, or when the parent can prove their rehabilitation.¹²

Guardianship: If the loss or suspension of parental rights is decreed against one of the parents, it may continue to be fully exercised by the other parent, but if both parents’ rights are terminated or suspended, a guardian will be appointed pursuant to Article 299 of the Family Code.¹³

A guardian will be appointed based on their personal conditions and relationship with the child. Generally, the guardian and child must be of the same sex.¹⁴ Guardianship by family members is preferred, in the following order: grandparents, siblings, uncles/aunts, first cousins. However, the judge can vary or ignore this order when there are justified reasons.¹⁵ When there is more than one suitable guardian, or if there is no family member available or suitable to be a guardian, the judge will consider suitability in accordance with Article 277.¹⁶ Children 12 and over will be heard prior to the appointment of a guardian. If the child states that the person selected to exercise guardianship is not suitable, the judge may make an investigation and hear from the Attorney General, if appropriate.¹⁷

⁷ See PENAL CODE, art. 196 (El Sal.).

⁸ See FAM. CODE, art. 239 (El Sal.).

⁹ *Id.* art. 164.

¹⁰ *Id.* art. 240.

¹¹ *Id.* art. 241.

¹² *Id.* art. 244.

¹³ *Id.* art. 242.

¹⁴ *Id.* art. 277.

¹⁵ *Id.* art. 287.

¹⁶ *Id.* art. 288, 299.

¹⁷ *Id.* art. 280.

HONDURAS

1. Adoption

General: Decree 102-2018, which established a Special Law of Adoptions for Honduras in 2019, makes clear that any adoption of a minor requires a declaration of adoptability from the Dirección de Niñez, Adolescencia y Familia (DINAF) in accordance with the Code of Childhood and Adolescence, which must be recorded by the National Authority in the Register of Adoptable Children.¹⁸

If parents wish to voluntarily give their children up for adoption, it may be done in a formal judicial proceeding in which the parents are informed of the consequences of their decision and deemed legally capable of consenting to adoption.¹⁹ In all cases, any payment or compensation for adoption by legal representatives, intermediaries, or third parties is prohibited.²⁰

Adults' Eligibility to Adopt: In order to adopt a child, a person must, among other requirements, be over the age of 25 and at least 15 years older than the child and have been married or in a de facto marriage for at least three years.²¹ The spouse of a child's biological father or mother can adopt the child if the biological parent gives consent.²²

Registration of Adoptions: When a person is adopted, their original birth inscription is canceled by the National Registry²³ and a new inscription is retroactively recorded.²⁴ Certifications of adoptions will only be issued upon court order, upon formal request of the Public Ministry or the Directorate of the National Registry.²⁵ No proof or certification of the original birth registration, its cancellation, or of the adoption will be issued unless there is a petition from the director of the governmental institution in charge of children and the family; a competent court; the Public Ministry; the Directorate of the National Registry; or the adopter, only one time, immediately following adoption, for the registration of adoption.²⁶

2. Potential Penalties for False Claims of Parentage

Under the Honduras Penal Code, the following are crimes punishable by three to six years in prison: "false childbirth;"²⁷ falsely reporting or registering the birth, death or any other event that alters the civil status of another person in the National Registry; and knowingly taking advantage of false registration.²⁸

¹⁸ See ADOPTION LAW, art. 9 (Hond.).

¹⁹ *Id.* art. 10.

²⁰ *Id.* art. 13.

²¹ *Id.* art. 15.

²² *Id.* art. 22.

²³ See REFORMED RULES OF THE LAW OF THE NATIONAL REGISTRY OF PERSONS (RNP), art. 191 (Hond.).

²⁴ See ADOPTION LAW, art. 173 (Hond.).

²⁵ *Id.* art. 110.

²⁶ *Id.* art. 174.

²⁷ *Id.*

²⁸ See PENAL CODE, art. 170 (Hond.).

3. Termination/Suspension of Parental Rights

Termination of Parental Rights: This can occur as a result of “depraved or scandalous customs,” excessively harsh treatment of a child, or abandonment; an offense committed against the other parent or against a child, where there is a judicial conviction; mental illness, if this is judicially declared; being convicted of a crime two or more times, if the penalty exceeds three years in prison for each crime; or a final judgement of divorce or annulment of marriage.²⁹

Suspension of Parental Rights: This can occur due to a serious breach of parental duties (pursuant to Article 186, to protect, care for, feed, help, and educate the child); absence for more than two years that causes harm to the child; civil interdiction; habitual drunkenness or misuse of narcotics; simple adoption; or illegal negligence or negligence in the administration of the child’s assets.³⁰

Only the child’s ascendants, relatives within the fourth degree, or the Public Ministry may seek the termination or suspension of parental rights.³¹ A judge can re-establish the exercise of paternal rights at the request of the interested party, if they can prove good behavior for three years prior to the request.³²

Guardianship: If a child’s parents have been stripped of parental rights (or one parent is otherwise absent), the child is subject to guardianship, the conditions of which are to be determined by the judge who terminated or suspended parental rights.³³ The Honduras Family Code provides a set order of preferred guardians; however, regardless of this preferred order, the judge may appoint a guardian who best meets the conditions of knowledge and familiarity with the child, solvency, suitability and preparation.³⁴

GUATEMALA

1. Adoption

General: The Guatemala Adoption Law makes clear that any adoption requires a judicial declaration that results from a process that considers the child’s social, psychological, and medical needs and establishes the impossibility of reunifying the child with its family.³⁵ The National Adoption Council is responsible for ensuring the protection of all children in the adoption process, including through gathering critical information about children eligible for adoption, obtaining the valid consent of biological parents, and generally verifying that every step of the adoption process is properly followed.³⁶

Children’s Eligibility for Adoption: Those eligible for adoption include children whose biological parents have lost their parental rights in a final court order,³⁷ as well as children who wish to be

²⁹ See FAM. CODE, art. 200 (Hond.).

³⁰ *Id.* art. 201.

³¹ *Id.* art. 204.

³² *Id.* art. 205.

³³ *Id.* art. 203, 263.

³⁴ *Id.* art. 269.

³⁵ See ADOPTION LAW, art. 2.d. (Guat.).

³⁶ *Id.* art. 23

³⁷ *Id.* art. 12.c.

adopted by the spouse or partner of one of their parents, as long as both biological parents give their consent (unless one has died or lost parental rights).³⁸

Registration of Adoptions: After the completion of adoption process, the adoption is recorded in the Civil Registry; any related certification requested will omit the fact of adoption unless requested by the adoptee or a competent judge.³⁹

2. Potential Penalties for False Claims of Parentage

Under the Guatemala Penal Code, any woman who fakes a childbirth in order to obtain for herself or a third person rights that do not correspond to her is subject to one to three years in prison and a monetary fine.⁴⁰ Moreover, anyone⁴¹ who registers in the Civil Registry any fact that creates or alters the civil status of another person, knowingly takes advantage of a false registration, registers a non-existent birth, or provides false information about a child's parents is subject to one to eight years in prison.⁴²

3. Termination/Suspension of Parental Rights

Suspension and Termination of Parental Rights: Parental rights can be suspended as the result of judicial declaration, customary drunkenness, or a drug or gambling addiction.⁴³ They can be terminated for a number of other behaviors, including: “depraved or scandalous customs,” excessively harsh treatment of a child, or abandonment of family duties; forcing children to beg; an offense committed against the other parent or against a child; abandonment; or being convicted of a crime two or more times for a crime, if the penalty exceeds three years in prison for each crime. Parental rights are also lost when the child is adopted by another person.⁴⁴

An action to suspend or terminate parental rights can only be brought by the minor's relatives or the Public Ministry, and the other parent and Public Ministry must take part in all cases.⁴⁵ Parental rights can later be reinstated, but only if the underlying cause(s) are no longer present; there has been no recidivism (in the event a crime was committed); or, in some cases, when reinstatement is requested by a child over 14 or by their guardian.

Guardianship: Children who are not under parental authority are subject to guardianship.⁴⁶ The Guatemala Civil Code provides a set order of preferred guardians. Regardless of this preferred order, however, the judge may appoint a guardian who best meets the conditions of knowledge and familiarity with the child, solvency, suitability and preparation.⁴⁷

³⁸ *Id.* art. 12.e.

³⁹ *Id.* art. 53.

⁴⁰ See PENAL CODE, art. 138 (Guat.).

⁴¹ The public official who knowingly authorizes or inscribes a false fact in the corresponding registry of persons, may also be sanctioned with imprisonment from six to ten years and disqualification for employment or public office for twice the length of the penalty imposed. See PENAL CODE, art. 240 (Guat.).

⁴² *Id.*

⁴³ See CIVIL CODE, art. 273 (Guat.).

⁴⁴ *Id.* art. 274.

⁴⁵ *Id.* art. 276.

⁴⁶ *Id.* art. 293.

⁴⁷ *Id.* art. 299.

NICARAGUA

1. Adoption

General: There is an administrative and judicial stage in the adoption process. Adoption can be challenged for six months after the judicial resolution, 18 months by a child's grandparents, or at any time by a child who has been subjected to physical or sexual abuse.⁴⁸ Otherwise, adoption is irrevocable and cannot be terminated by agreement.⁴⁹

Adults' Eligibility to Adopt: In Nicaragua, adoption can be requested by married or de facto married couples who are at least 24, no older than 55, and at least 15 years older than the child; a child's relatives, up to the fourth degree; or the spouse or partner of a child's parent (with the consent of the parent). The adoptive parent(s) must exhibit the moral, social, psychological, and economic characteristics of a suitable parent.⁵⁰

Registration of Adoptions: After the completion of the adoption process, the Registry of Civil Status records the adoption, and any certificates issued by the Registry thereafter must not refer to the fact of adoption.⁵¹

2. Potential Penalties for False Claims of Parentage

The Nicaragua Penal Code makes it a crime punishable by six months to two years in prison to simulate a childbirth or give a child to another person for the purpose of avoiding procedures for legal guardianship or adoption (separate from the crime of trafficking in persons).⁵² Moreover, if such a crime is committed for money, a reward, or the promise of some benefit, the penalty is increased to two to three years in prison. If it was committed by the child's parents, they will be disqualified from exercising parental rights over the child for three to six years.⁵³

3. Termination/Suspension of Parental Rights

Suspension of Parental Rights: This can occur under the Nicaragua Family Code based on repeated and malicious breaches of parental obligations to the child; a judicial decision declaring the father or mother absent; incapacitation by physical or psychological illness that impedes the normal exercise of parental authority; habitual drunkenness or drug abuse; displaying habits or customs that could traumatize or "deform" the personality of the child (subject to professional verification); subjecting the child to physical, psychological or moral abuse.⁵⁴

Termination of Parental Rights: This can occur if the parent denied paternity or maternity and was forced to recognize it by administrative resolution or judicial decision; abandoned the child, putting

⁴⁸ See FAM. CODE, art. 234 (Nicar.).

⁴⁹ *Id.* art. 236.

⁵⁰ *Id.* art. 237, 238, 239, 240.

⁵¹ *Id.* art. 259.

⁵² See PENAL CODE, art. 214 (Nicar.).

⁵³ *Id.* art. 216.

⁵⁴ See FAM. CODE, art. 294 (Nicar.).

its life in danger or causing it serious harm; subjected the child to physical, psychological, or moral abuse that damaged its integrity; exploited or allowed the exploitation of the child through trafficking, pornography, paid sexual acts, or child sex tourism; was convicted of an offense against the other parent or against the child that endangered their lives or physical and mental integrity; was convicted of an offense punishable by loss of parental authority; or, promoted the exploitation of the child for their own benefit or for the benefit of a third party.⁵⁵

Suspension and termination can ensue by the competent judicial authority at the request of the child, any relative of the child, the National Family Prosecutor, or ex officio.⁵⁶ In terminating or suspending parental rights, a judge's decision should be supported by psychological and/or medical experts. If necessary, the judge can require the parent to undergo psychological or other treatment.⁵⁷ Parental rights that have been suspended or terminated may be regained at any time, via judicial resolution, if the reasons for suspension/termination cease.

Guardianship: Children who are not subject to parental authority, because parental rights were terminated or suspended, are subject to guardianship.⁵⁸ The National Family Attorney's Office, the Ministry of Family, Adolescence and Childhood, joint or interchangeably, whenever they deem necessary, will urge the appointment of a guardianship when it receives information related to the relatives who are in the child's life and might be deemed suitable guardians, or when there has been any judgement terminating parental rights or revoking an adoption.⁵⁹

The Nicaragua Family Code contains a special provision for children deemed to be in a situation of "total helplessness" (*total desamparo*), which may occur in the event of the death, serious illness, or neglect of the child's father or mother, or any other circumstance that violates the fundamental rights of the child. In these instances, the judge, ex officio or at the request of an administrative authority or National Prosecutor, must temporarily entrust care and guardianship of the child to any of their grandparents, or if none are able to provide care, to the closest other available family member, keeping in mind the best interests of the child.⁶⁰

There is a preferred order for guardianship appointment by law, but the judge can vary this order where they deem appropriate. Similarly, the judge can appoint a different person as guardian, even where relatives exist.⁶¹ The child's preference must also be considered, and where the child is over 16 years old, they have the right to propose the guardian.⁶² In the territories of indigenous peoples, indigenous judges and communal and territorial authorities have jurisdiction to determine custody, guardianship, and other situations related to children and adolescents originating in those communities.⁶³

⁵⁵ *Id.* art. 295.

⁵⁶ *Id.* art. 294, 295.

⁵⁷ *Id.* art. 298.

⁵⁸ *Id.* art. 337, 343.

⁵⁹ *Id.* art. 347.

⁶⁰ *Id.* art. 341; *see also* CODE OF CHILDREN AND ADOLESCENCE, art. 31 (Nicar.).

⁶¹ *See* FAM. CODE, art. 376 (Nicar.).

⁶² *Id.* art. 378.

⁶³ *Id.* art. 341.



Issue Alert: Informal Adoptions in Central America and Their Implications for U.S. Immigration Cases

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