

STUDY NOTE
My Nephew's Sanctuary: Hurdles to Guardianship of Collateral
Refugee Minors in Utah

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I. INTRODUCTION

Unshirey carried her three-year-old nephew, Malik, seventeen miles across the border of Somalia and into Kenya in 1991.¹ Members of the Somali Bantu, Unshirey and Malik were not indigenous Somalis and were fleeing the ethnic violence raging in their village and the surrounding lands in Somalia.²

Unshirey's great-great-grandfather was the first of their Tanzanian tribe to be captured in Tanzania and sold into slavery in Somalia, where his descendants labored for over a century as either slaves or, after being granted freedom, as laborers persecuted by the dominant Somali clans.³ Unshirey's husband, her two sons, and her brother-in-law were conscripted to fight and were killed in the Ogaden War between Somalia and Ethiopia in the late 1970s.⁴ In 1990, a dominant Somali clan raided Unshirey's village for food, and her sister, Malik's mother, was killed. Unshirey alone remained to care for Malik.⁵

Upon arrival at a refugee camp, refugee families like Unshirey's often hope for resettlement in the United States.⁶ The United States identifies these refugees as individuals unable or unwilling to return to their native country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."⁷ The United States and the United Nations High Commissioner for Refugees has designated all Somali Bantus as refugees under this definition.⁸ The Department of Homeland Security and the international organizations charged with screening

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¹ This is a hypothetical scenario combining the common experiences of many Somali Bantu refugee families.

² See Christina Bruce-Bennion, *Out of Africa: A Model for Immigration Concerns*, IDAHO ISSUES ONLINE, Fall 2005, available at http://www.boisestate.edu/history/issuesonline/fall2005_issues/2f_somali_bantu.html.

³ See *id.*; DON BARNETT, CTR. FOR IMMIGRATION STUDIES, OUT OF AFRICA: SOMALI BANTU AND THE PARADIGM SHIFT IN REFUGEE RESETTLEMENT 4 (2003), available at <http://www.cis.org/articles/2003/back1303.pdf>.

⁴ See Bruce-Bennion, *supra* note 2; Tom Cooper & Gianfranco Lanini, Air Combat Info. Group, Ogaden War, 1977-1978 (Sept. 2, 2003), available at http://www.acig.org/artman/publish/article_188.shtml; PINDIE STEPHEN, INT'L ORG. FOR MIGRATION, SOMALI BANTU REPORT 8 (2002), available at http://www.brycs.org/documents/ft_BRYCS0392.pdf.

⁵ See Bruce-Bennion, *supra* note 2.

⁶ See BARNETT, *supra* note 3, at 3.

⁷ 8 U.S.C. § 1101(a)(42) (2006).

⁸ See BARNETT, *supra* note 3, at 4.

refugees for resettlement would likely allow Unshirey to be resettled with her nephew, and they may ultimately be placed in Salt Lake City, Utah.

Although Unshirey and Malik would be resettled in Utah as a family, Unshirey may have difficulty providing for Malik unless she is appointed as his legal guardian. Without guardianship, she is not legally permitted to make medical decisions for Malik.⁹ She would also have difficulty registering her nephew for school.¹⁰ Moreover, unless she had the paperwork necessary to prove her relationship with Malik, Unshirey may not qualify for cash assistance payments on his behalf and may struggle to financially support him.¹¹ Until she seeks a Utah court order appointing her as Malik's legal guardian, Unshirey's relationship with Malik has no legal status and her ability to care for him is limited.¹²

If Unshirey petitions the court for guardianship of Malik, she will encounter several difficulties. For example, without Malik's birth certificate and his parents' death certificates, Unshirey's petition may be denied due to insufficient proof of her relationship to Malik and the status of Malik's parents.¹³ Additionally, despite the fact that her sole source of financial support is public assistance, Unshirey may be denied a court fee waiver at her guardianship hearing.¹⁴

Unshirey's hypothetical dilemma reflects the real experiences of some refugee families resettled in Utah.¹⁵ Following traumatic and violent persecution in a war-torn homeland, refugees seek a new start in Utah. When these refugees arrive in the United States, they are recognized by the Department of Homeland Security (DHS), which has adopted the informal definition of "family" used by the non-governmental agencies charged with operating refugee camps.¹⁶ This definition includes more than just direct lineal family members, and, while in conflict with the definition DHS uses to reunite immigrant families,¹⁷ it helps ensure that orphaned children are cared for and resettled with their extended relatives rather than resettled separately as unaccompanied minors.¹⁸

These non-lineal family relationships are called "collateral relations," which are relatives not in the direct line of descent.¹⁹ For example, parents, grandparents,

⁹ UTAH CODE ANN. § 75-5-209(3)(G)(ii) (1993 & Supp. 2007).

¹⁰ *Id.* at § 75-5-209(3)(G)(i).

¹¹ See discussion *infra* Part III.

¹² Interview with Alyssa Williams, Immigration Attorney, Catholic Community Services of Utah, in Salt Lake City, Utah (Aug. 21, 2007).

¹³ Utah State Courts, Online Court Assistance Program, How Is Guardianship of a Minor Requested?, <https://www.utcourts.gov/ocap/utah/guardianship/> [hereinafter "OCAP"] (last visited Dec. 12, 2007).

¹⁴ Utah State Courts, General Public Motion and Affidavit for Waiver of Court Fees, http://www.utcourts.gov/resources/forms/waiver/General_Public_Motion_General_Use_03_06.pdf (last visited Dec. 12, 2007).

¹⁵ Williams, *supra* note 12.

¹⁶ *Id.*

¹⁷ See 8 U.S.C. § 1153(a) (2006) (discussing only spouses, sons, daughters, brothers, and sisters as eligible to sponsor such immigrant relatives for entry into the United States).

¹⁸ Williams, *supra* note 12.

¹⁹ Family Tree Magazine, Kith and Kin, <http://www.familytreemagazine.com/articles/dec00/relatives.html> (last visited Dec. 12, 2007).

great-grandparents and children are ancestors or descendants; cousins, nephews, aunts, uncles, are collateral relatives.²⁰ As discussed below, ancestors and descendants generally have little trouble being defined as members of the family for medical, educational, and public assistance purposes, but the legal status of collateral relatives in this regard is unclear.

Guardianship is the mechanism through which an adult may obtain legal authority to make decisions regarding a collateral minor relative's physical custody, education, health, activities, personal relationships, and general welfare.²¹ For instance, if parents become unable or unwilling to provide guardianship for their children, the state courts may appoint another adult to act as guardian.²² In Utah the Legislature has given courts the power to appoint as a guardian "any person whose appointment would be in the best interests of the minor."²³ Despite these protections, there are gaps that the Legislature has yet to address that create difficulties for refugee families.

While native Utahns traverse the guardianship appointment system with relative ease, the same is not always true for refugee adults seeking to care for their minor family members. State statutes and judicial decisions regarding guardianship have failed to provide adequate mechanisms for the exceptional case where the petitioner for guardianship cannot furnish birth and death certificates.²⁴ Additionally, a lack of clarity in the impecuniosity standard for receiving a court fee waiver, as well as an unnecessary military background investigation, can sometimes make the guardianship petition process unnecessarily complicated and unpredictable.²⁵ It is up to the Utah Legislature to amend the current guardianship system to provide Utah's refugee children the same protection afforded Utah citizens and ensure that refugee minors are placed in the care of a person whose appointment as guardian is truly in their best interest.

This Note will first discuss the background of the current guardianship system in Utah, Utah's role in the federal refugee relocation system, and the importance of legal guardianship to refugee families. This Note will then introduce three difficulties refugee families face in the guardianship petition process and suggest possible remedies to these difficulties.

II. THE GUARDIANSHIP SYSTEM IN UTAH

The manner in which guardians are appointed in Utah reflects the State's interest in ensuring both that minors are protected and cared for and that all adult parties legitimately interested in the minor's well-being are informed of the

²⁰ *Id.*

²¹ BLACK'S LAW DICTIONARY 725 (8th ed. 2004).

²² UTAH CODE ANN. § 75-5-204 (1993 & Supp. 2007).

²³ *Id.* § 75-5-206(1)(a).

²⁴ See *infra* Part V. A.

²⁵ See *infra* Part V. B-C.

process and given an opportunity to make their thoughts, concerns, and claims heard.²⁶

The Utah guardianship process consists of a petition, a hearing, an appointment, and an acceptance of the appointment.²⁷ An adult seeking to be appointed as the guardian of a child must petition the court in the county in which the minor resides.²⁸ Utah courts have the power to "appoint as guardian any person whose appointment would be in the best interests of the minor."²⁹ In determining the minor's best interests, the court may consider "the minor's physical, mental, moral, and emotional health needs."³⁰ The court's determination is based largely upon the prospective guardian's petition, which includes information about the petitioner, the minor, the petitioner's relationship to the minor, and information about other parties interested in the minor's well-being, such as parents or other relatives.³¹

Upon submitting the petition, a hearing is scheduled at which the court will hear all objections to the appointment and determine whether the minor's interests will be adequately represented by the petitioner.³² After the hearing, the court will appoint a guardian, who must accept the appointment in writing within thirty days of the appointment.³³

The State judiciary provides resources to assist petitioners in filing their guardianship petition with the court. Notable among these resources is the Online Court Assistance Program (OCAP), an online system that takes the petitioner step-by-step through the petition and provides a printable, personalized court petition that may be filed.³⁴ This option helps pro se applicants initiate the guardianship petition process without enlisting the assistance of a lawyer.³⁵

A legal guardianship appointment qualifies the guardian for certain benefits, including the ability to make medical decisions for the minor, to register the minor in school, and to obtain sufficient federal assistance to support the minor.³⁶ Refugee families, as described below, come to the State courts with a unique set of circumstances that warrant special consideration when such families seek to gain these benefits and rights that come only through legal guardianship.

²⁶ Editorial Board Comment to UTAH CODE ANN. § 75-5-206 (1993 & Supp. 2007).

²⁷ UTAH CODE ANN. § 75-5-207 (1993 & Supp. 2007).

²⁸ *Id.* at § 75-5-205; *see also* OCAP, *supra* note 13.

²⁹ UTAH CODE ANN. § 75-5-206(1)(a) (1993 & Supp. 2007).

³⁰ *Id.* at § 75-5-206(1)(b).

³¹ OCAP, *supra* note 13.

³² *Id.*

³³ *Id.*

³⁴ Online Court Assistance Program, <http://www.utcourts.gov/ocap/> (last visited Dec. 12, 2007).

³⁵ *Id.*

³⁶ UTAH CODE ANN. § 75-5-209(3)(g)(i-ii) (1993 & Supp. 2007); *id.* at § 75-5-209 (3)(c)(i).

III. THE FEDERAL REFUGEE RELOCATION SYSTEM

Each year the United States welcomes thousands of refugees, and nearly two million refugees have resettled in the United States in the last twenty-five years.³⁷ Six hundred seventy-one refugees were resettled in Utah in 2006.³⁸

The United States Department of Homeland Security (DHS) grants refugee status to individuals overseas who, like the Somali Bantu, are unable or unwilling to return to their country of origin "because of persecution or a well-founded fear of persecution."³⁹ DHS accepts the informal and practicality-based definition of "family" used by the non-governmental agencies charged with operating refugee camps and conducting pre-screening interviews.⁴⁰ These agencies understandably elect to keep orphaned children with their extended family members rather than separate them from the only family they know and resettle them as unaccompanied minors.⁴¹ Hence, while these families are not families within the existing legal framework, DHS nevertheless aims to resettle such families together.

The State Department brings families to the United States for resettlement, and they are assisted by the Office of Refugee Resettlement of the Department of Health and Human Services and other volunteer agencies.⁴² Specially designated federal funding is used to reimburse states for providing cash and medical assistance to refugee families for their first eight months in the United States.⁴³ The task of administering these resources and services, however, is delegated to the individual states.⁴⁴

IV. WHY REFUGEES NEED LEGAL GUARDIANSHIP OF THEIR COLLATERAL RELATIVES

The inability of a refugee adult to gain legal guardianship of a collateral minor relative creates many problems for the family. Adult relatives may not make medical decisions for the minor or register the minor for school.⁴⁵ Another significant reason to obtain guardianship is the need to collect enough federal public assistance (cash assistance, food stamps and Medicaid) to support a

³⁷ Office of Refugee Resettlement, U.S. Dep't of Health & Human Servs., Fact Sheet, http://www.acf.hhs.gov/programs/orr/press/office_refugee_factsheet.htm.

³⁸ Office of Refugee Resettlement, U.S. Dep't of Health & Human Servs., ORR, Fiscal Year 2006 Refugee Arrivals, <http://www.acf.hhs.gov/programs/orr/data/fy2006RA.htm>.

³⁹ Office of Refugee Resettlement, U.S. Dep't of Health & Human Servs., Who We Serve, <http://www.acf.hhs.gov/programs/orr/about/whoweserve.htm> (definition of "refugee").

⁴⁰ Williams, *supra* note 12.

⁴¹ *Id.*

⁴² *Id.*

⁴³ Office of Refugee Resettlement, U.S. Dep't of Health & Human Servs., Cash & Medical Assistance, <http://www.acf.hhs.gov/programs/orr/benefits/cma.htm> [hereinafter ORR, Assistance] (last visited Dec. 7, 2007).

⁴⁴ See Office of Refugee Resettlement, U.S. Dep't of Health & Human Servs., Divisions, <http://www.acf.hhs.gov/programs/orr/about/divisions.htm> (last visited Dec. 7, 2007).

⁴⁵ See UTAH CODE ANN. § 75-5-209(3)(g)(i-ii) (1993 & Supp. 2007) (defining the powers and responsibilities granted to a minor's legal guardian).

household that includes a collateral relative. While refugees receive special federal funds for their first eight months in the country,⁴⁶ refugee families are often obliged to rely on federal public assistance in the first few years after their arrival because they have difficulty adjusting to a new culture, learning English, and finding employment that will allow them to support what is often a large family.⁴⁷ Federal public assistance and refugee assistance payments are granted based on the size of the family household; therefore, the definition of “household” becomes significant.

Congress has delegated the power to administer general federal public assistance payments, such as cash, food, and medical assistance, to the states.⁴⁸ State agencies, like the Utah Department of Workforce Services (DWS), enact regulatory policies that implement federal laws and regulations setting eligibility criteria for public assistance benefits.⁴⁹ Because each state drafts eligibility guidelines based on the federal regulations, an examination of the eligibility system used in Utah provides a helpful illustration. Utah’s eligibility system interpreting the federal eligibility guidelines defines household in several different ways. For example, eligibility for federal public assistance is determined by measuring the household’s income and asset level.⁵⁰ However, while the applicant for assistance must include the income of every individual living within a household, the amount of the applicant’s monthly payments will be based only on whether the household members are in fact eligible for assistance.⁵¹ Even where no member of the household earns income, the level of assistance may be limited to an amount that considers only eligible household members.⁵² Therefore, an eligible head of household like Ushirey may not receive payments which factor in all of her household members unless she can prove that they are also eligible for assistance.⁵³

⁴⁶ ORR, Assistance, *supra* note 43.

⁴⁷ Williams, *supra* note 12.

⁴⁸ 42 U.S.C. § 603 (2006); 8 U.S.C. § 1522 (2006).

⁴⁹ See, e.g., Utah Refugee Resettlement Program Home Page, <http://jobs.utah.gov/services/financial/refuge.asp> (last visited Mar. 21, 2008).

⁵⁰ 42 U.S.C. §§ 602–603 (2006).

⁵¹ See Utah Dep’t of Workforce Servs., Eligibility Manual: Whose Income to Count, http://jobs.utah.gov/Infosource/eligibilitymanual/400_Income_Standards/401_Whose_Income_to_Count_-_Financial.htm (requiring an eligible worker to count the income of all household members in the “assistance unit,” which is then defined as all individuals attributed to a household even if they are determined to be ineligible for assistance).

⁵² See generally Utah Dep’t of Workforce Servs., Family Employment Program, <http://jobs.utah.gov/services/financial/fep.asp> [hereinafter Family Employment Program]. For example, an indigent nuclear family may be eligible for the Family Employment Plan, which provides cash assistance to heads of household who pledge to make progress towards self-sufficiency through employment. *Id.* The FEP “household” must include at least one “child” (minor under eighteen) of at least one “parent” (a biological or legal parent of the eligible child), and a household containing neither cannot be enrolled in the FEP plan. See Utah Dep’t of Workforce Servs., Eligibility Manual: Household Composition - FEP-TP, http://jobs.utah.gov/Infosource/eligibilitymanual/200_Program_Eligibility_Requirements/222_Household_Composition_-_FEP-TP.htm.

⁵³ See generally Family Employment Program, *supra* note 52 (listing the different levels of cash paid to households based on size).

Utah DWS defines a household to include minors who are not the eligible children of a parent under a designation called “specified relative.”⁵⁴ A specified relative is a relative with “a specific relationship to a child. . . living with the specified relative” and whose “parents are absent from the home.”⁵⁵ This specified relative designation is favorable for collateral refugee families because the collateral minor in the family is guaranteed to receive cash and medical assistance until he is eighteen years old, even if the rest of the family earns sufficient income to make them ineligible for federal assistance.⁵⁶ In such a household, the specified relative (Unshirey) of an eligible child (Malik) must prove her relationship to the child in order to receive assistance under this designation.⁵⁷ Unshirey could be designated a specified relative of Malik as long as the relationship can be verified.⁵⁸

Unfortunately, many refugee families lack necessary relationship verification documents, such as birth and death certificates.⁵⁹ Refugees resettled in Utah, like Unshirey and Malik, are fortunate because the Utah DWS has created a special refugee team to review all refugee public assistance applications.⁶⁰ The team has determined that a refugee family’s overseas file, which contains biographic statements specifying the relationships between the family members, may be used to satisfy the verification requirement in the place of birth and death certificates.⁶¹ However, this exception to the verification documentation requirement is not standard across the nation⁶²—the only way a refugee family could insure against the loss of critical financial assistance in the instance where they moved to another state would be to obtain legal proof of the relationship by applying for guardianship.

In this situation, it is easy to understand why it is important for the refugee adult to gain legal guardianship over the collateral minor relative. As the guardian’s legal ward, the collateral minor relative would be considered a family member for purposes of medical decisions, education, and federal assistance benefits, and the family would be able to meet their financial and other needs, just as wards of guardians that are native Utahns could.⁶³

⁵⁴ Utah Dep’t of Workforce Servs., Eligibility Manual: Specified Relative, http://jobs.utah.gov/Infosource/eligibilitymanual/200_Program_Eligibility_Requirements/205-3_Specified_Relative_-_General_Information.htm. [hereinafter DWS Eligibility Manual, Specified Relative].

⁵⁵ See Utah Dep’t of Workforce Servs., Eligibility Manual: Household Composition – Specified Relative, http://jobs.utah.gov/Infosource/eligibilitymanual/200_Program_Eligibility_Requirements/223_Household_Composition_-_Specified_Relative.htm [hereinafter DWS Eligibility Manual, Household Composition].

⁵⁶ Williams, *supra* note 12; see also DWS Eligibility Manual, Specified Relative, *supra* note 54 at § 205-3.

⁵⁷ See DWS Eligibility Manual, Household Composition, *supra* note 55, at § 223.

⁵⁸ *Id.*

⁵⁹ Williams, *supra* note 12.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ See UTAH CODE ANN. § 75-5-209 (1993 & Supp. 2007) (defining the powers and responsibilities granted to a minor’s legal guardian).

V. GAPS IN THE SYSTEM THAT COMPROMISE REFUGEE FAMILIES' ABILITY TO OBTAIN GUARDIANSHIP

While the Utah guardianship system provides an effective method for addressing guardianship petitions by and for American citizens, it fails to provide such a method for refugee families. At several stages of the guardianship appointment system, refugee families pass through a markedly different experience as compared to United States citizens petitioning for guardianship of a minor United States citizen. The gaps in the guardianship system, including the absence of necessary definitions and the need for certain exceptions to the petition requirements, create difficulties that could keep collateral refugee children from the benefit of the guardian whose care "would be in the best interests of the minor."⁶⁴

A. *Difficulty 1: Proving Parentage—The Demand for Absent Documents*

The guardianship petitioner is required to complete thorough checks to ensure that all parties interested in the minor's welfare are properly informed and considered in the proceedings.⁶⁵ Importantly, the system seeks to protect the guardianship rights of living parents and other persons of priority from being taken away without their consent.⁶⁶

The Utah system requires the petitioner to establish the minor's parentage and the parents' current guardianship status.⁶⁷ The petitioner is required to present the minor's birth certificate to prove parentage.⁶⁸ Additionally, if the petition declares the minor's biological parents deceased, the parents' death certificates must also be provided.⁶⁹

Americans are accustomed to relying upon birth and death certificates to prove relationships, but such documents are often unavailable or nonexistent in foreign countries, especially where the country has undergone a period of extreme civil unrest.⁷⁰ While the Utah courts have recognized affidavits of birth, there is no clear legal standard for admission of such an affidavit.⁷¹ Hence, if the judge in the petitioner's case is unwilling to accept an affidavit, the law provides no alternative to reliance on the unavailable documents. The absence of documents cannot be

⁶⁴ *Id.* at § 75-5-206(1)(a).

⁶⁵ See Utah State Courts, Online Court Assistance Program: Forms, <http://www.utcourts.gov/ocap/> (then select "Guardianship of a Minor" and continue through the steps of filling out a petition) [hereinafter OCAP, Guardianship Petition].

⁶⁶ Williams, *supra* note 12.

⁶⁷ OCAP, Guardianship Petition, *supra* note 65 (requiring users of the online guardianship forms to show the relationship between the guardian and the minor).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See, e.g., Charles Gesheker, *The Plague That Isn't: Poverty is Killing Africans, Not an Alleged AIDS Pandemic*, THE GLOBE & MAIL (March 14, 2000), available at http://heal_portland.tripod.com/geshek2.htm (noting that death certificates are rarely created in many African countries).

⁷¹ Williams, *supra* note 12.

remedied by the petitioner and could make it difficult for him to meet the guardianship requirements, or it could even forfeit his petition for guardianship of a collateral minor relative.

To illustrate, consider the following hypothetical example. A twelve-year-old Somali boy we will call Labaan resettled in Utah with his uncle Abu after living with him in a Kenyan refugee camp for several years. The nephew was born in his grandmother's home;⁷² hence, a birth certificate was not created. Labaan's parents were killed in Somalia when he was two years old, leaving him to the care of his only living adult relative, Uncle Abu.⁷³ Because of the high number of casualties and the absence of a unified government with documentation standards, death certificates were never produced for Labaan's parents.⁷⁴

At the earliest stage of the guardianship petition process, Abu would be unable to provide documents showing that Labaan was born to Abu's brother, or that Labaan's parents were deceased. Under Utah's current system, Abu's guardianship petition could be hampered or even jeopardized by a documentation requirement out of his control. The Utah statute lacks any provision outlining a substitute or exception that would fulfill these identification requirements in the absence of documents. The determination of whether the rights of refugee children's parents are being compromised in the guardianship petition process is left to the judge's discretion.⁷⁵

1. Remedy 1: Amend the Filing Petition to Include Standards that Provide for Unavailable Documents

Proving the minor's parentage and establishing the parents' death is important in guardianship proceedings. However, as it is often impossible for refugees to provide the required documentation, Utah could amend the filing petition requirement to provide a clear alternative method to establish parentage and parental death.

One possible alternative method could be adopted from the United States Citizenship and Naturalization Service (USCIS) standards for existence of certificates. If documents are unavailable, a petitioner is permitted to submit a copy of the Foreign Affairs Manual's Reciprocity Guideline published by the Department of State, which helps to verify that official documents from a

⁷² See, e.g., M de Onis, et al., *Levels and Patterns of Intrauterine Retardation in Developing Countries*, in CAUSES AND CONSEQUENCES OF INTRAUTERINE GROWTH RETARDATION Discussion (Nevin S. Scrimshaw & Beat Schürch, eds., November 11–15, 1996), available at <http://www.unu.edu/Unupress/food2/UID03E/uid03e08.htm#discussion> (noting that most births in Africa occur at home).

⁷³ See generally IRIN UN Office for the Coordination of Humanitarian Affairs, *SOMALIA: Orphans Facing Street Life After Saudi NGO Pulls Out*, May 21, 2003, available at <http://www.irinnews.org/report.aspx?reportid=43860> (noting the many orphans following the civil war).

⁷⁴ AFR. WATCH PHYSICIANS FOR HUM. RTS., HUM. RTS. WATCH, *SOMALIA NO MERCY IN MOGADISHU THE HUMAN COST OF THE CONFLICT & THE STRUGGLE FOR RELIEF* (1992), available at <http://www.hrw.org/reports/1992/somalia/>.

⁷⁵ Cf. OCAP, *Guardianship Petition*, *supra* note 65.

particular country are generally unavailable.⁷⁶ The applicant is then advised to obtain affidavits from individuals who can attest to personal knowledge of the birth or death.⁷⁷

Incorporation of this type of system into the Utah guardianship petition process would allow refugee family members to establish both the parentage of collateral minor relatives and the death of the parents of the minor for purposes of the guardianship petition without compromising the guardianship system's mechanisms for protecting parental rights. A clearly defined alternative to required documentation would not eliminate the requirement to prove the minor's parentage, but would strengthen it by affording refugee petitioners a clearly marked path guaranteed to fulfill the requirement in the absence of the primary documentation. Such provisions would allow refugee guardianship petitioners to go forward in the petition process with confidence rather than with uncertainty and fear that their petitions will not be granted.

B. Difficulty 2: Food or Filing?—The Fee Waiver

As has been discussed, obtaining guardianship has a direct impact on refugee families' ability to obtain sufficient federal cash assistance to support themselves during their first few months in the country.⁷⁸ Upon arriving in the United States, most refugee families have little or no money, making them among Utah's most indigent residents. Because of these inherent financial difficulties, refugee guardianship petitioners are clearly among the most qualified applicants for a waiver of the \$155 court filing fee. Unlike Massachusetts and Colorado, Utah law does not draw a clear line delineating the point at which a guardianship petitioner is considered indigent.⁷⁹ Massachusetts defines as indigent for purposes of obtaining a filing fee waiver those:

⁷⁶ U.S. Dep't of State, Visa Reciprocity by Country, <http://travel.state.gov/visa/reciprocity/index.htm> (last visited Jan. 28, 2008).

⁷⁷ 8 C.F.R. § 103.2(b)(2)(i) (2007).

The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document, such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the facts at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

Id.

⁷⁸ See *supra* Part IV.

⁷⁹ Interview with Linda Smith, Professor, S.J. Quinney College of Law, University of Utah, in Salt Lake City, Utah (Aug. 30, 2007).

(A) [Who] receive public assistance under Transitional Aid to Families with Dependent Children (TAFDC), Emergency Aid to Elderly, Disabled or Children (EAEDC), Supplemental Security Income (SSI), Medicaid (MassHealth) or Massachusetts Veterans Benefits Programs; or

(B) [Whose] income, less taxes deducted from my pay, is \$_____ per week/month/year (*circle period that applies*), for a household of _____ persons, consisting of myself and _____ dependents; which income is at or below the court system's poverty level [which is posted at the court house]; or

(C) [Who are] unable to pay the fees and costs of this proceeding, or [are] unable to do so without depriving [themselves] or [their] dependents of the necessities of life, including food, shelter and clothing.⁸⁰

Similarly, Colorado clearly defines as indigent any petitioner (a) whose income is at or below income eligibility guidelines (which are clearly enumerated on the petition form) and has liquid assets of \$1,500 or less; or (b) whose income is up to twenty-five percent above the income eligibility guidelines, who has assets of \$1,500 or less, and whose monthly expenses equal or exceed monthly income.⁸¹

Standards like those established in Colorado and Massachusetts are clear and unambiguous. Petitioners are able to approach the filing fee waiver petition process with confidence because they know the indigency standard and can determine for themselves whether they qualify.

By contrast, filing fee waivers in Utah are granted based on a judge's determination rather than on a clear legal standard.⁸² While many judges grant fee waivers, the lack of a clear statutory indigency standard permits the possibility that such a waiver would not be granted automatically, or that the applicant would receive a partial rather than full fee waiver, creating a significant worry for a refugee petitioner already in a difficult financial position.⁸³ The present waiver motion form includes questions about the petitioner's financial sources and assets.⁸⁴ These items are considered as a whole by a judge, and the ultimate determination of whether a fee waiver is warranted in any given case is left to the

⁸⁰ The Massachusetts Court System, Affidavit of Indigency, *available at* http://www.mass.gov/courts/formsandguidelines/aff_indigency.pdf [hereinafter Massachusetts Affidavit of Indigency]; *see also* MASS. GEN LAWS ANN. ch. 261, § 27A–G (West 2007).

⁸¹ Colorado Judicial Branch, Guide for Determination of Indigency, *available at* <http://www.courts.state.co.us/supct/directives/98-01.pdf> [hereinafter Colorado Determination of Indigency].

⁸² *See* Utah State Courts, General Public Motion and Affidavit for Waiver of Court Fees 2, http://www.utcourts.gov/resources/forms/waiver/Poverty_Clients_Motion_In_The_Matter_Of_03_06.pdf.

⁸³ Williams, *supra* note 12.

⁸⁴ Utah State Courts, Waiver of Court Fees, http://www.utcourts.gov/resources/forms/#Waiver_of_Court_Fees (last visited Mar. 21, 2008).

judge's discretion.⁸⁵ For indigent refugee families, this judicial determination may mean that the family is ordered to pay to one governmental agency (the court) the payments which they receive from another government agency, such as the Office of Refugee Resettlement (ORR). Indeed, it is the refugee's qualification for federal public assistance payments that should absolve him of any debt to a court that processes a civil action.⁸⁶

It is significant in regard to the filing fee that guardianship petitions are really petitions for the benefit of the entire family, particularly the minor. Refugee children are, unsurprisingly, not wealthy, and when considering that the petition is primarily filed for the protection and well-being of the child, it logically makes little sense to impose a fee on the child's de facto protector (or, it would be hoped, newly-appointed guardian) that will ultimately take precious resources away from those available to support the child.⁸⁷ While it may be argued that a competent guardian is one that demonstrates the financial ability to support the minor, this argument ignores the reality of refugee family's financial situation. Furthermore, it makes little sense to find a related refugee guardian unfit to care for the minor when the only alternative is appointment of a wealthier guardian who does not share the child's ethnic, linguistic, and cultural background.⁸⁸ Would such an appointment really be in the best interests of the child?

The United States Supreme Court has found that some rights, such as the right to a divorce, can only be obtained in a court of law and should, therefore, be provided to indigent people with a fee waiver.⁸⁹ A child's right to a guardian is also only available in a court of law, and, unlike bankruptcy or other "non-essential" rights,⁹⁰ should be provided to the indigent family without the imposition of a court filing fee.

It is interesting that there exists a clearly delineated statutory indigence standard for criminal proceedings in Utah.⁹¹ Criminal defendants can approach their case with confidence in their ability to be considered indigent and thus qualified for a court-appointed lawyer.⁹² If the State feels comfortable providing clear guidelines for poverty benefits of parties to criminal proceedings, surely the State could find a way to determine a poverty standard for fee waiver petitions in refugee guardianship proceedings. Clarification of the Utah poverty standard for filing a court fee waiver is needed in order to afford the petitioner confidence in his qualification to obtain a waiver, as well as to protect indigent refugee petitioners from the onerous burden of a court fee they simply cannot afford.

⁸⁵ *Id.*

⁸⁶ Williams, *supra* note 12.

⁸⁷ Smith, *supra* note 79.

⁸⁸ Williams, *supra* note 12.

⁸⁹ See, e.g., *Boddie v. Connecticut*, 401 U.S. 371, 380-81 (1971).

⁹⁰ See, e.g., *U.S. v. Kras*, 409 U.S. 434, 442-43 (1973).

⁹¹ UTAH CODE ANN. § 77-32-302 (2003 & Supp. 2007) (appointment of counsel).

⁹² *Id.*

1. Remedy 2: Clarify the Poverty Definition for Purposes of Petitioning for Guardianship.

The current definition of indigence in the Utah guardianship fee waiver petition is no definition at all, but rather consists of a list of various federal public assistance benefits to be considered as a whole by a judge, who then determines whether to grant the fee waiver.⁹³ Simply enacting a clear statute dictating a clear poverty standard, such as those in Colorado⁹⁴ and Massachusetts,⁹⁵ would allow the fee waiver system to effectively embrace Utah's most financially needy residents. This would eliminate the uncertainty and guesswork implicit in the current system. It would also allow refugee petitioners to approach the petition filing process without fear of losing precious resources necessary to support their family as they begin their new life as Americans.

C. Difficulty 3: The Unnecessary Search for Parents in the Military

Refugee guardianship petitioners are subjected to a burdensome and usually unnecessary investigation to prove that the minor's parents are not serving abroad in the United States military and have not refused to give their consent to the guardianship proceedings.⁹⁶ The petitioner is required to answer an extensive series of questions and to complete an investigation into a United States military records database.⁹⁷ While it would be possible for Uncle Abu to complete the process to prove Labaan's parents were not in the United States military, it is a complex and completely unnecessary step. As refugees, neither Labaan nor his parents had ever been to the United States before, much less served in the United States military.

It is important to establish parenthood and to ensure that living parents are not unknowingly stripped of their guardianship rights, but exceptions to this step of the procedure for protecting parents' rights should be made for guardianship petitioners of refugee children whose parents could not possibly have served in the United States military.

1. Remedy 3: Exception to the Parental Military Status Check

A simple remedy to this absurdly unnecessary step would be to insert a question before the military status section of the guardianship petition asking whether the parents had ever been American citizens or had ever been to the United States. If the answer to these questions is no, an investigation into whether the parents are in the United States military effectively becomes unnecessary.

⁹³ Utah State Courts, *supra* note 84.

⁹⁴ Colorado Determination of Indigency, *supra* note 81.

⁹⁵ Massachusetts Affidavit of Indigency, *supra* note 80.

⁹⁶ OCAP, Guardianship Petition, *supra* note 67 (select Affidavit of Military Service).

⁹⁷ *Id.*

VI. CONCLUSION

Refugee families are invited to enter Utah and are provided resources to become integrated members of the community. The guardianship system should mirror the ideals that the refugee resettlement system represents by providing a structure that allows relocated refugee families to maintain their family ties and receive necessary assistance.

The guardianship system must be a more feasible journey for refugee families—families invited to enter this country together to escape oppression and war and experience the American Dream—and who hope to stay together. Improvements are needed, and Utah can look to other states and agencies for guidance in framing the guardianship petition system in such a way that protects the minor and all concerned adults.