

*Appleseed is pleased to present an update to our 2012*

## **“PROTECTING ASSETS AND CHILD CUSTODY IN THE FACE OF DEPORTATION.”**



March 2017

As millions of immigrant families face fear and uncertainty, Appleseed is updating its 2012 manual, “Protecting Assets and Child Custody in the Face of Deportation.”

This one-of-a-kind resource is designed for immigrants and those who work with them: the host of attorneys, nurses, social workers, religious workers who are stepping up in challenging times. Appleseed’s Manual will help families develop plans *in advance* to deal with critical financial and family issues in the event of deportation, arrest and other emergencies.

Because the times are so uncertain, and the demand for these updates is growing, we are publishing each chapter as we draft it.

We are grateful for your interest, and for everything you can do to help immigrants and refugees. Please let us know of other topics you’d like to see covered.

To explore new chapters, further updates and additional resources, please visit us at [www.appleseednetwork.org/deportationmanual](http://www.appleseednetwork.org/deportationmanual).

A handwritten signature in black ink that reads "Bert Brandenburg". The signature is fluid and cursive, with a long horizontal stroke extending from the end.

Bert Brandenburg  
President, Appleseed



**APPLESEED**

*Appleseed wishes to express our gratitude to Ballard Spahr and its individual attorneys for their expertise: pro bono counsel, Mary Gay Scanlon, and attorneys Jessica M. Anthony, Katie Leesman and Heike Sullivan.*

## CHAPTER 2:

### ASSETS & BENEFITS OF MINOR CHILDREN

*Immigrants often hold, in a capacity as a “custodian” or “trustee,” assets for a child who is a U.S. citizen (“citizen child”) in the hopes that the citizen child will have a greater ability to protect the assets under U.S. law. Immigrants may also hold significant assets in their own name that they desire to leave to their citizen child upon deportation. This section highlights certain issues related to the protection of assets for the benefit of a citizen child (or children) and provides general guidance, including:*

◎◎ **The Effect of Deportation on a Child’s Assets and Considerations for Protecting Those Assets**

◎◎ **Specific Considerations for the Protection of Certain Common Assets, including:**

- Personal Property
- Bank Accounts
- Credit Cards
- Motor Vehicles
- Real Property (Land, House, or Condo)
- Settlements, Investments, and Inheritance
- Child Support
- Education Savings Plans
- Government Benefits

◎◎ **Unclaimed Property Laws**

Generally, the disposition of assets is a matter of state law and the requirements and process for protecting assets will vary from state to state. Immigrants should consult an attorney for advice regarding the best means to protect assets, including consideration of specific state requirements, transfer restrictions, tax implications, and personal liability.

### **The Effect of Deportation on a Child's Assets and General Considerations for Protecting Those Assets:**

Generally, minor children (those under 18 or 21 years of age, depending on the state) cannot own property because they are not old enough to enter into legal contracts. Therefore, property in a minor’s possession is typically owned by a parent. Deportation of a parent can thus disrupt the child’s possession or use of the property, including access to a bank account, vehicle, home, and other personal property. While an immigrant parent should consider granting power of attorney to a trusted individual who will remain in the U.S. to handle financial matters in case of deportation, an immigrant might also consider transferring assets for the benefit of the citizen child. Similarly, when an immigrant parent currently holds property for the benefit of a minor child, the parent should consider transferring custodianship or trusteeship to an individual who will remain in the U.S. in case the immigrant parent may be deported. When assets are currently

held in trust for the citizen child and the trustee is not subject to deportation, action may not be needed.

### *The Uniform Transfer to Minors Act*

Almost every state has adopted some form of the Uniform Transfer to Minors Act (UTMA). The sole exception, South Carolina, has adopted a similar but less generous law, the Uniform Gifts to Minors Act (UGMA). The UTMA permits the transfer of a wide variety of property—including real or personal and tangible or intangible property—to a custodian for the benefit of a minor.

Transfers under the UTMA are irrevocable and leave the donor with no legal or equitable rights in the property. The owner transfers “legal title” of the property to an adult (custodian) while the minor retains “equitable title.” Equitable title means that the child gets the benefits of the property but cannot sell or mortgage the property until becoming a legal adult.

The custodian has broad powers regarding the use of the assets for the minor. For example, the custodian may use the funds toward the minor's rent, utilities, car payments and repair bills, activities, and spending money, in addition to expenses such as education and medical care. However, the custodian has a fiduciary duty to the beneficiary to manage the funds as “would be observed by a prudent person dealing with property of another.” Accordingly, the custodian can be personally responsible for losses of the minor’s property. The beneficiary generally has a right of accounting, which requires the custodian to document what has happened to the minor’s property. Most state laws hold that an account under UTMA must be turned over to the minor when the minor reaches the age of 21. In some states, this can be extended to age 25.

UTMA agreements are popular because they can be made with a simple writing, can appoint additional adults as substitute custodians, and generally do not require an attorney. However, in order for the state TMA to apply to a transfer, the agreement must explicitly state that the agreement is made pursuant to the state TMA. Assets may be identified by general description, but property not included in the document or inadequately identified will not be transferred.

As a general rule, custodial accounts under the TMA should not be used for significant gifts or for a series of gifts that will grow over time. UTMA accounts do not guarantee that funds will be used for a specific purpose and the entire amount of the account will be transferred to the minor for uninhibited use at the age of maturity. Also, when a significant amount of assets—more than a few thousand dollars—are transferred in a TMA agreement, courts may intervene to create a trust for management of the assets. Courts may require investment of assets for return at a later time, or create a “blocked” account that permits withdrawals only by a court order.

### *Trusts, Guardianships, and Conservatorships*

State law also provides for the creation of more formal arrangements for the management of assets, including: trusts; co-signed accounts or title documents; guardianships; or conservatorships. These arrangements are generally more appropriate for assets of significant value or when more complex schemes are desired to protect property from transferring to the citizen child immediately upon their reaching the age of maturity (generally, 21), or by creating special restrictions that assets be used for a specific purpose (*e.g.*, education).

### *When the Departing Parent is the Custodian or Trustee*

If the parent facing deportation is the custodian or trustee of the minor's property, and the minor is remaining behind in the U.S., the parent should have an alternate custodian named to control and protect the assets. If an alternate custodian was named in the original document, the alternate may simply step into the role of custodian. In California, if the minor has reached the age of 14, the minor may appoint a new custodian whom is a member of the minor's family. Other states may have similar or additional rules. For other situations, the court may need to approve the new custodian or trustee, depending on the assets and the nature of the trust or custodial property.

If the minor is leaving with the departing parent and the parent is the trustee of the minor's property, the parent should confer with an attorney experienced in this area before cashing-out the assets and taking them out of the country. The trustee or custodian is obligated to protect the assets for the minor, and the specific requirements for protection will vary depending on the specifics of the original arrangement. In California, the sale of a minor's property under the California TMA must be approved by a court if the value of the property is over \$10,000. The specific rules of other states may vary.

### *Restrictions on Transfer*

Other laws, such as those governing the transfer of securities or investments, may require additional action for a transfer to be effective and enforceable. In an effort to protect the greatest amount of property, an immigrant parent should aim to include all potential property in a transfer, knowing that some transfers may be affected by other laws.

### *Taxes*

Generally, special tax rules apply to assets held by minors. In some circumstances a minor will be taxed at the parent's or guardian's tax rate, and in other circumstances, special exclusions and tax rates may apply. If the minor's assets produce an income or a capital gain over a certain amount, taxes must be paid. Moreover, tax rates change regularly.

### *Personal Liability*

The transfer of some property (e.g., real estate and motor vehicles) may create personal liability. For example, personal injury claims may be made against the owner of a motor vehicle or property even when the owner is a minor.

### *Emancipation*

Emancipation is the legal process through which a minor, typically not less than the age of 16, can petition a court to be legally recognized as an adult. An emancipated minor may fully own property and enter into legally binding contracts. Because of the gravity of the order, the minor child must demonstrate that he or she is sufficiently mature to manage his or her own financial and health-related affairs. When a citizen child is supported by family and friends who will remain in the U.S., emancipation may not be needed. However, in some cases, emancipation avoids the use of a custodian to transfer of property, or the creation of a trust.

## **Specific Considerations for Protecting Certain Common Assets**

The following provides specific considerations for protecting certain common assets. This is not an exhaustive list, and immigrant parents should make an inventory of all possible assets, not just those listed below, and attempt to determine how each asset will be handled if the parent or parents is deported. If possible, the parent should consult an attorney for guidance.

### *Personal Property*

A minor may acquire other valuable personal property, such as jewelry, computers, electronics, and other consumer products. Legally, this type of property is owned by the minor's parent or guardian. The UTMA allows transfer of most all personal property to the child. When considering what property to include in a transfer under the UTMA or the creation of a trust, parents should think broadly about all assets and personal property. This property may include cell phones and gift, payroll, or other prepaid cards. Property not described will not be transferred.

### *Bank Accounts*

Banks and other financial institutions (such as credit unions) may be chartered under state or federal law. Accordingly, laws regarding account ownership vary among financial institutions. Generally speaking, however, if an immigrant parent is a joint account holder with a citizen child and faces deportation, he or she should consider modifying the account or transferring the funds to an account that allows another trusted adult to serve as a custodian. The institution will likely have a special form used to adjust ownership.

In many instances, bank accounts for minors reflect the UTMA. Accounts are held by "(the adult) as custodian for (the minor)," immediately become the property of the minor, cannot be

undone, are automatically transferred to the minor upon reaching adulthood, and a custodian may only use the proceeds of the account only for the benefit of the minor.

### *Credit Cards*

Generally, U.S. credit card companies do not issue credit cards to minors as primary account holders. However, credit card companies may issue credit cards to minors as authorized users on an adult's account, when the adult is responsible for paying all debts incurred on the account. Transfer of the account is likely prohibited by the adult's cardmember agreement. If the immigrant parent is deported, the minor's continued use of the account can have negative consequences if arrangements are not made to satisfy any incurred debts. If credit is needed, the minor should seek to become an authorized user on the account of another adult.

### *Motor Vehicles*

State laws vary on the age at which a person can legally own a motor vehicle. Generally, a minor cannot be the sole owner. Some states allow minors to register a car at the age of 16, while others require a parent or guardian to sign (e.g., the registration or car loan) on behalf of a minor. Insurance companies may also restrict when a minor may qualify for insurance coverage. If a parent facing deportation is a co-signer on a minor's car registration, car loan, or insurance policy, he or she should have a different adult serve as the adult co-signer.

### *Real Property (Land, House, or Condo)*

Ownership of land, a house, or a condominium is governed by state law. In many states, a minor may own this property but cannot directly purchase, sell or make contracts relating to the property—this must be done indirectly through a trust, guardianship or conservatorship. If a parent facing deportation is the trustee, guardian, or conservator of a minor's property, he or she should consider transferring title to another adult for the benefit of the minor.

### *Lawsuit Settlements, Investment, and Inheritance*

If a minor is the recipient of property or money from a legal judgment, a guardian or conservator is usually appointed to receive and manage those assets on behalf of the minor. Similarly, minors cannot own stocks, bonds, mutual funds, annuities, life insurance policies, patents, or royalties. If a minor receives property or money due to inheritance, the assets will either be placed in trust (for the benefit of the minor) or a court may supervise the administration of the assets. If a parent facing deportation is the guardian or conservator for any of these assets, a new guardian or conservator should be appointed to assume that role.

### *Child Support and Custody Orders*

Family courts—which deal with issues such as divorce, custody, and child support—operate separately from immigration courts. In most cases, there is no communication between family and immigration courts. Therefore, a family court order will not automatically be modified

upon a parent’s deportation. If a family court order will be affected by deportation—including custody or child support—an individual must petition the court that created the order for modification.

Maintenance of child support payments can be a complicated problem depending on whether the obligee (person receiving money) or obligor (person owing money) is deported, whether the citizen child accompanies the deported parent, and whether the destination country recognizes a foreign child support order.

If the immigrant parent receiving child support faces deportation and the citizen child will remain in the U.S., the immigrant parent should immediately petition the family court for modification of the order to ensure that the citizen child will continue to receive support through a new guardian. If the immigrant parent has full custody of the citizen child and wants the child to accompany him or her outside of the U.S., the parent must typically receive permission from the court.

Numerous countries have reciprocal child support agreements with the United States, including: Australia, Canada, Czech Republic, El Salvador, Finland, Hungary, Ireland, Israel, Netherlands, Norway, Poland, Portugal, Slovak Republic, Switzerland, and The United Kingdom of Great Britain and Northern Ireland. If an obligor is deported to one of these countries, a U.S. child support order can be enforced in the foreign court. Also, when the child lives in one of these countries, the foreign court may issue an order enforceable against an obligor remaining in the U.S.

### *Education Savings Plans*

Education savings plans are different than a bank account that has been created for the purpose of saving for school. Depending on the type of plan, special transfer rules may apply.

### **Education Savings Accounts (ESAs)**

An Education Savings Account, also called a Coverdell Education Savings Account, is considered an asset of the minor’s parent or guardian. For a minor leaving the country with the deported parent, the account may generally be “liquidated” – that is, turned to cash – if this is not specifically prohibited by the account creation conditions. The funds may be used for non-educational purposes, but there may be an associated penalty. For a minor child remaining in the country, care should be taken to insure that a remaining parent or guardian is aware of the account. A financial consultant from the firm hosting the account should be able to ensure a smooth transition of account control.

### **529 Savings Plans**

In contrast to the Coverdell ESA, a 529 plan remains in the control of the party creating the account. Because of this, the funds may not be considered an asset of either the

minor or the minor’s guardian, and the funds may become unavailable to the minor unexpectedly if the controlling party decides to remove them or change the beneficiary of the 529 plan. If a 529 plan designating the minor exists, a parent facing deportation or another parent or guardian may wish to discuss the minor’s future educational plans with the party who created the 529 savings plan. If it is the parent being deported who created the 529 plan, such parent may wish to name a successor owner of the plan, recognizing that the successor owner has the ability to redirect the funds away from the minor. This may allow the minor to know if they may rely on the funds in the future despite any changed circumstances.

### **Government Benefits**

A citizen child may be receiving benefits, grants, or financial aid from federal, state, county, and/or local governmental programs. Eligibility for these programs might be adversely affected by the deportation of a parent or guardian. Immigrant parents should investigate whether eligibility for the programs is conditional and whether action is necessary to maintain eligibility upon the parent’s deportation. The immigrant parent should also investigate whether a citizen child may qualify for assistance through other programs, including those that provide benefits to “unaccompanied” youths or minors. Where possible, a description for obtaining or maintaining these benefits should be provided to the citizen child and/or a guardian or custodian.

### **Unclaimed Property Laws**

Unclaimed property laws, also known as “escheat” laws, require financial institutions to report when personal property has been abandoned or unclaimed after a period of time under state law—often five years. Before assets can be considered abandoned, the institution must make a diligent effort to try to locate the owner. After the property is abandoned, the state keeps record of the asset and the owner may make a claim to retrieve the property. The National Association of Unclaimed Property Administrators maintains databases to search for unclaimed property and state law may have special restrictions. Diligently drafted agreements may prevent the loss of these assets, though citizen children, custodians, and those with power of attorney should be aware that escheated property may be retrieved if later discovered.

## CHECKLIST FOR ASSETS & BENEFITS OF MINOR CHILDREN

---

- Property held by a minor is generally governed by state law. Where possible, consult a lawyer for advice on state-specific property laws and your individual best course of action.
- If you currently hold assets as custodian in the name of your minor citizen child, consider transfer of the custodianship to a trusted individual who will remain in the U.S. should you be deported.
- Create a list of all available assets not currently protected that may be transferred or otherwise protected for the benefit of your minor child (including real and personal, tangible and intangible property). Where practicable, consider consolidating assets for easier management and transfer.
- Draft an agreement for the transfer of the identified assets to a custodian for the minor under the Uniform Transfer to Minors Act (UTMA) to be executed immediately or, at a minimum, before deportation (including during detention, if needed).
- If in possession of significant or unique assets (including real estate), consult a lawyer to consider the formation of a trust, guardianship, or conservatorship for the benefit of your minor child with a trustee who will remain in the U.S.
- Investigate whether any government benefits your minor child receives may be affected by your deportation, whether your child may qualify for additional benefits upon your deportation, and leave instructions for your minor child and/or your child's guardian for maintaining and/or obtaining these benefits.
- If possible, ensure all bank accounts are jointly-held by your minor child and a custodian who you trust and who will remain in the U.S. to ensure your citizen child has continued access.
- Consider granting power of attorney to someone who will remain in the U.S. to handle the disposition of any other assets in your absence.
- If your minor child is leaving the country with you during deportation, a professional with expertise should be consulted to determine if and how your child's assets may be sold and taken out of the country with him or her.
- You and your child may request an accounting from any custodian or trustee managing your child's assets in order to ensure that the assets are safe and are being managed appropriately.

[WWW.APPLESEEDNETWORK.ORG](http://WWW.APPLESEEDNETWORK.ORG)