Border Crossings: Understanding the Civil, Criminal, and Immigration Implications for Battered Immigrants Fleeing Across State Lines With Their Children

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I. Introduction

A. The Need to Relocate

The period immediately following an individual's decision to leave her abusive partner is often accompanied by a significant escalation in danger to the safety and welfare of the survivor and her children.[1] While some

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1. *See* Sarah M. Buel, *Fifty Obstacles to Leaving, A.K.A., Why Abuse Victims Stay*, 28 COLO. LAW 19 (1999).

survivors are able to navigate legal and social services systems to access basic legal protection, shelter and other emergency benefits, survivors fleeing their abusers generally face numerous systemic obstacles to attaining the physical, emotional, and economic security they need during this critical period. For immigrant survivors of violence leaving their abusers, additional barriers of linguistic and cultural differences, limited access to public benefits, and a fear of deportation can significantly magnify the difficulty of accessing critical protective services.[2]

For survivors who attempt to establish a safe, new life for themselves and their children in the community or geographic area to which they are accustomed, the threat of an abuser's violent retaliation is never far away. Civil or criminal protection orders may deter some abusers from retaliating against their former partners. However, for many survivors, physical violence, stalking, harassment, threats of violence, and threats to take away the children frequently occur in violation of such orders, long after a survivor's decision to leave her abusive partner.[3] The abuser's disregard of prohibitions on such behavior, coupled with the difficulties in enforcing protection orders, only serve to empower the batterer to continue his abusive tactics.[4] Many survivors, determined to put an end to their ex-partner's continuous attempts to maintain control over their lives, decide to flee with their children to a confidential out-of-state location to truly regain safety and autonomy.

The decision to flee the state may mean an opportunity to live with extended family members who will offer a survivor and her children a safe, caring, supportive, and familiar environment while she is healing from the physical and psychological injuries resulting from the abuse. Moving to find shelter with friends or relatives offers many immigrant victims safety in a culturally and linguistically comfortable environment.[5]

While the decision to flee a pattern of abuse and regain physical, emotional, and economic autonomy in a location unknown to the abuser may

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2. *See* Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 1020 (1993); *See generally* LEGAL MOMENTUM, BREAKING BARRIERS: A COMPLETE GUIDE TO LEGAL RIGHTS AND RESOURCES FOR BATTERED IMMIGRANTS (Leslye E. Orloff & Kathleen Sullivan eds., 2004) [hereinafter BREAKING BARRIERS].

3. BUEL, *supra* note 1, at 19.

4. SARAH COLSON & PETER FINN, NAT'L INST. OF JUSTICE, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT 2, 7 (1990).

5. Presentation of paper by Angela Brown on "Domestic Violence in Context: A Forum on Race, Immigration, and Poverty," University of New Hampshire, 6th International Family Violence Research Conference (1999) (noting that immigrant women and women of color who flee their abusers most often choose to move to houses of friends or family members rather than use domestic violence shelters).

appear to be in the best interest of the survivor and her children, many survivors and their advocates may be surprised to learn of the severe legal consequences that may arise. Individuals who, without the consent of the other parent, leave with their children to confidential locations in or out of their home state may face serious criminal penalties under state parental kidnapping statutes.[6] Further, survivors may also face restrictive state civil statutes on child custody as well as related case law that encourage adverse custody decisions to penalize parents who deprive the other parent of access to or contact with their children.[7]

Legislative reform of numerous state criminal and civil statutes that affect survivors who flee the state with their children has been possible. Currently, many states have special statutory provisions that require consideration of domestic violence perpetrated against the fleeing parent as a mitigating factor or defense in criminal parental kidnapping proceedings and/or against adverse custody decisions.

This article will provide an overview of the impact of state criminal parental kidnapping or custodial interference statutes on immigrant survivors of domestic violence who already have left or wish to leave their state with their children.[8] Specifically, it will discuss the jurisdictional laws that relate to interstate custody; criminal implications of intrastate versus interstate custodial interference; the varying applicability of custodial interference statutes for parents who do and do not have court-ordered custody of their children; statutory exceptions or defenses available to survivors of domestic violence facing prosecution on charges of criminal parental kidnapping; and immigration consequences related to a conviction under such statutes. This article will also provide an overview of the implications of interstate parental relocation on civil family court custody

6. Parental kidnapping statutes may also be referred to as custodial interference, child snatching, or child abduction statutes. Most state criminal statutes distinguish parental kidnapping from general child abduction and address these crimes in separate statutes. While many general state kidnapping statutes are designed to be inapplicable to parental kidnapping cases, it is always advisable to check your state's relevant kidnapping and custodial interference statutes for the most current and accurate information on the statutory applicability to your client's case. For a compilation of parental kidnapping statutes current through November 2004, *see* chart in Appendix A.

7. *See, e.g.*, Joan Zorza, *"Friendly Parent" Provisions in Custody Determinations*, 26 CLEARINGHOUSE REV. 921, 923 (1992); Clare Dalton, *When Paradigms Collide: Protecting Battered Parents and their Children in the Family Court System*, 37 FAM. & CONCILIATION COURTS REV. 273 (1999).

8. Battered immigrants who flee to another country with their children to escape abuse will face complex international custody law and jurisdiction provisions. For an extensive discussion on the implications of fleeing the country with one's children, *see* LEGAL MOMENTUM, *The Implications of the Hague International Child Abduction Convention: Cases and Practice*, in BREAKING BARRIERS, *supra* note 3, at § 6.3.

determinations. The article will conclude with a discussion of ethical issues that may arise for lawyers representing survivors who flee from violence with their children.

B. A Brief Overview of the UCCJA, UCCJEA, and the PKPA

Fleeing abuse with a child across state lines for reasons of safety may not automatically justify the removal of the child in the eyes of the court.[9] Survivors who are contemplating flight from domestic violence should have a basic understanding of the laws that govern interstate custody matters before they leave.[10] Lawyers working with clients who have fled or are contemplating flight from abuse should have a working knowledge of legal issues and protections that arise under the following provisions related to interstate custody:

- The applicable state jurisdictional law—Uniform Child Custody Jurisdiction Act (UCCJA)[11] or Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)[12]
- The federal Parental Kidnapping Prevention Act (PKPA)[13]
- State criminal custodial interference/parental kidnapping statutes, and
- State civil custody/visitation statutes and case law addressing the impact of relocation on custody/visitation determinations when domestic violence has occurred.[14]

This article begins with a basic overview of three types of statutes governing custodial jurisdiction that commonly arise in interstate custody proceedings: the UCCJA, the UCCJEA, and the PKPA.[15] Generally, these statutes help courts to determine which state has the authority to make or enforce a custody decision when the children and their parents do not all reside in the same state. They *do not* provide guidelines to assist courts in

9. Similarly a battered woman whose child is abducted by the batterer must be well informed of the legal basis for securing the expedient return of the child.

10. NOW LEGAL DEFENSE AND EDUCATION FUND, INTERSTATE CUSTODY: UNDERSTANDING THE UCCJA, THE UCCJEA, AND THE PKPA (1999).

11. Uniform Child Custody Jurisdiction Act (1968), 9 U.L.A. Part I pp. 115-331 (1988) [herein after UCCJA].

12. Uniform Child Custody Jurisdiction and Enforcement Act (1997), 9 U.L.A. Part I pp. 257-94 (1999 Supp.) [hereinafter UCCJEA].

13. 28 U.S.C. § 1738A (2004) [hereinafter PKPA].

14. *See generally* The National Council of Juvenile and Family Court Judges—Family Violence Department *at* http://www.ncjfcj.org/dept/fvd.

15. For an extensive discussion of the impact of jurisdictional statutes on survivors of violence, *see generally* Deborah M. Goelman, *Shelter From the Storm: Using Jurisdictional Statutes to Protect Victims of Domestic Violence After the Violence Against Women Act of 2000*, 13 COLUM. J. GENDER & L. 101 (2004).

determining who gets custody or what kind of visitation arrangements should be made. State custody provisions and the UCCJA, UCCJEA and PKPA jurisdictional statutes apply equally to both immigrant and nonimmigrant women.

1. Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)

The UCCJEA, created in 1997 to help reconcile discrepancies between the previous UCCJA and federal laws such as the PKPA and the Violence Against Women Act (VAWA), has replaced the UCCJA in thirty-nine states and the District of Columbia.[16] The UCCJEA is limited to jurisdictional questions and does not address resolution of the merits of a custody case.[17] The UCCJEA uses the following four categories to determine which state has the authority to hear or enforce a custody issue: home state jurisdiction, significant connection jurisdiction, more appropriate forum jurisdiction, and default jurisdiction. *Home state,* § 102(7), is the state in which a child lived with a parent for at least six consecutive months immediately before the initiation of a child custody proceeding, regardless of where the parent and child currently live. Section 201(a)(1) provides that a state has jurisdiction to make an initial child custody determination if it is the home state of the child when the action is filed. The home state jurisdiction takes priority, except in the case of emergencies.

Section 201(a)(2) provides for *significant connection* jurisdiction where a court of another state does not have home state jurisdiction or a court of the home state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum. A court may decline jurisdiction if it determines that the child and at least one parent have a significant connection with another state. A significant connection is more than mere physical presence and can be demonstrated by substantial evidence concerning the child's care, protection, training, and personal relationships in this state.

Section 201(a)(3) provides for jurisdiction when all courts having jurisdiction under the home state and significant connection jurisdictional provisions have declined to exercise jurisdiction on the ground that a court of this state is the *more appropriate forum* to determine custody. Section 201(a)(4) provides for *default jurisdiction* where none of the states in which the parents and child had lived could properly exercise jurisdiction under any of the first three jurisdictional requisites.

16. *See* National Conference of Commissioners on Uniform State Laws, UCCJEA, *at* http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-uccjea.asp.

17. The UCCJA was designed to promote the "best interests" of the child whose custody was at issue by discouraging parental abduction and providing that the State with the closest connections to the child should decide custody. The language was not intended to address the merits of the custody case itself. To eliminate confusion, this language was removed from the UCCJEA.

The UCCJEA positively impacts survivors of domestic violence in several ways. Under the UCCJEA, a court may exercise emergency jurisdiction in cases where the child is present in the state and the child, *or a parent or sibling of the child*, has been abused by the other parent.[18] This expands the basis for emergency jurisdiction provided for by the older UCCJA by acknowledging abuse against a parent and offering some protection to a battered parent who decides to escape from her abuser with her children. While a temporary emergency jurisdiction order is still subject to the actual "home" state's issuance of a final custody order, the UCCJEA encourages states to decline jurisdiction when invoking jurisdiction may compromise the safety of a parent or her children.[19] A court can decline jurisdiction on the basis that the state is an inconvenient forum to hear the matter, and that another, more appropriate, forum exists.[20] When making inconvenient forum decisions, the first factor a court must consider is "whether domestic violence has occurred and is likely to continue . . . and which state could best protect the parties and the child."[21] If a court of the home state declines jurisdiction, the UCCJEA allows a temporary emergency jurisdiction order to become permanent, once the issuing state becomes the home state.[22]

Further, under both the UCCJA and UCCJEA, a court may decline to hear a case if the party making the request appears to have "unclean hands," or has acted wrongfully with respect to the custody matter at hand. The UCCJEA, however, clarifies that "[d]omestic violence victims should not be charged with unjustifiable conduct for conduct that occurred in the process of fleeing domestic violence, even if their conduct is technically illegal."[23]

2. Uniform Child Custody Jurisdiction Act (UCCJA)

Created in 1968, the UCCJA was designed to foster uniformity among the state laws governing jurisdiction over, and modification and enforcement of, child custody determinations through provisions aimed at minimizing or preventing parental kidnapping, forum shopping, jurisdictional conflicts, and re-litigation of custody decisions issued by courts in other

18. "Emergency jurisdiction" is the temporary power of a court to make decisions in a case to protect a child from harm. *See* UCCJA § 3(a)(3)(ii); UCCJEA § 204; 28 U.S.C. § 1738A(c)(2)(C)(ii). This type of jurisdiction is temporary and is invoked for the sole purpose of protecting the child, as well as the child's parent or siblings, under the PKPA and UCCJEA, until the state that has jurisdiction enters an order. Thus, an order issued by a court exercising "emergency jurisdiction" is not a permanent order regarding custody or visitation.

19. *See* Goelman, *supra* note 15 at 114.

20. UCCJEA § 207(a) (1997).

21. UCCJEA § 207(b)(1).

22. UCCJEA § 204.

23. UCCJEA § 208, Comment *at* http://www.law.upenn.edu/bll/ulc/fnact99/1990s/uccjea97.htm.

states. States that have not yet adopted the UCCJEA retain the UCCJA.[24]

The UCCJA specifies *which court* may decide a custody case, and does not govern the substance of how such a case should be decided. The primary feature of the UCCJA was the codification of the four bases by which a court may assume jurisdiction over a custody matter: home state, significant connection, emergency, and default jurisdiction.[25] While the statutes are similar, under the UCCJA, a court may only exercise *emergency* jurisdiction if the child is physically present in the state, and the child has been abandoned, or it is necessary in an emergency to protect the child because the child has been subjected to or threatened with mistreatment or abuse, or is otherwise neglected.[26]

When a battered client flees to a UCCJA state to escape abuse, the best initial move may be to attempt to secure temporary emergency jurisdiction in their new state.[27] Under the UCCJA, emergency jurisdiction is not explicitly applicable if the other parent abused the fleeing parent, but not the child. In such a situation, strong advocacy is necessary to secure emergency jurisdiction and convince the other court, the court of the home state, to decline jurisdiction. In some states, the state version of the UCCJA or case law extends emergency jurisdiction to cases involving domestic violence where a parent was abused or threatened, even if the child was not physically abused. Further, while domestic violence is not explicitly included as a factor for declining jurisdiction in the home state, case law in many states has held that courts may consider domestic violence in making inconvenient forum decisions.

Additionally, the "clean hands doctrine" permits courts to decline to exercise jurisdiction where a party has wrongfully taken the child from another state or engaged in similar misconduct. While cases in many states have held that the "clean hands doctrine" should not be used to penalize victims of domestic violence who flee across state lines with their children to escape abuse, a survivor runs the risk that a court may find that she has acted with "unclean hands" under such circumstances.[28]

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24. *See* Legal Information Institute, *Uniform Matrimonial and Family Laws Locator—UCCJA, at* http://www.law.cornell.edu/uniform/vol9.html for links to state UCCJA statutes.

25. Jurisdiction in custody cases in all states is based on the grounds specified in the state UCCJEA or UCCJA. Immigration status of any party or any child is not relevant to jurisdiction in custody or other family law cases. *See Immigration Status and Family Court Jurisdiction*, in BREAKING BARRIERS, *supra* note 2, at § 6.5.

26. *Id.*

27. *See* UCCJA § 3(a)(3)(ii).

28. *See generally* Goelman, *supra* note 15. *See, e.g.*, Alexander v. Ferguson, 648 F. Supp. 282, 287 (D. Md. 1986) (failing to consider domestic violence in making a jurisdictional decision after a survivor fled the jurisdiction and commenced custody proceedings in another state); Dymitro v. Dymitro, 927 P.2d 917 (Idaho Ct. App. 1996) (finding that mother had overstated

3. PARENTAL KIDNAPPING PREVENTION ACT (PKPA)

The PKPA is a federal law enacted in 1980, largely motivated by the same principles as state UCCJA and UCCJEA statutes,[29] to discourage interstate conflicts over custody, deter interstate abductions, and promote cooperation between states about interstate custody matters. As part of the Violence Against Women Act of 2000 (VAWA II), the PKPA's definition of "emergency jurisdiction" was broadened to cover domestic violence cases in a manner consistent with the UCCJEA. The PKPA is a "full faith and credit" statute. It tells courts when to honor and enforce custody determinations issued by courts in other states or Native American tribal jurisdictions. Unlike the UCCJA or UCCJEA, the PKPA does not instruct courts as to when they should exercise jurisdiction over a new custody matter. Rather, courts must follow the PKPA (1) when they are deciding whether to enforce a custody determination made by a court in another state or tribe; (2) when they are deciding whether to exercise jurisdiction even though there is a custody proceeding already pending in another jurisdiction; or (3) when they are asked to modify an existing custody or visitation order from another jurisdiction.[30]

The PKPA recognizes continuing jurisdiction in the state that issued the initial custody determination. A court may modify a custody or visitation order from another state if it has jurisdiction to do so, and the court of the initial state no longer has, or has declined to exercise, jurisdiction over the custody matter.[31]

While the PKPA does not explicitly carry criminal consequences, the Federal Fugitive Felon Act does operate in conjunction with the PKPA to

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father's violent temper and that the court was entitled to consider mother's removal of son from Idaho contrary to UCCJA); Malik v. Malik, 638 A.2d 1184 (Md. Ct. Spec. App. 1994) (finding that mother's conduct in fleeing Pakistan with children was reprehensible despite her allegations of abuse and the existence of a civil protection order protecting the victim and her children). *But see In re* Thorensen, 730 P.2d 1380, 1387 (Wash. Ct. App. 1987) (finding mother's flight from violence to counterbalance the "clean hands doctrine"); Vachon v. Pugliese, 931 P.2d 371 (Alaska 1996) (holding that mother's flight with child to a safe state was not custodial interference or wrongful conduct); Fox v. Fox, 225 Cal. Rptr. 823 (Ct. App. 1986) (holding that where mother fled out of fear of father, her flight to California was not reprehensible or objectionable conduct under the statute); O'Neill v. Stone, 721 So. 2d 393 (Fla. Dist. Ct. App. 1998) (holding that victim's departure was in the context of domestic violence and that she did not leave the state to circumvent the court-ordered visitation schedule); Swain v. Vogt, 206 A.D.2d 703 (N.Y. 1994) (holding that victim was permitted to remove child because of he

29. *See* 28 U.S.C. § 1738A (2004).

30. *Id.* at § 1738A(c), (g); *See generally Immigration Status and Family Court Jurisdiction, supra* note 25.

31. *Id.* The PKPA does not define "jurisdiction under the law of such State." It is likely that when the PKPA was enacted, this provision referred to the UCCJA, and that it now also includes the UCCJEA. Some advocates have argued, however, that this could refer to a state's protection order statute. Courts have not ruled on such an argument.

locate parents who have crossed state lines with their children without the knowledge or consent of the other parent.[32] The implications of the applicability of the Federal Fugitive Felon Act on survivors of domestic violence fleeing across state lines with their children to escape from abuse are discussed below.

II. Criminal Parental Kidnapping Statutes

Parental kidnapping or custodial interference statutes are generally designed to ensure parents equal access to their children by criminally sanctioning a parent who hides the child from the other parent.[33] Currently, almost every state criminally forbids custodial interference by parents or relatives of the child.[34] While these statutes may share similarities in name, purpose and structure, the statutory provisions concerning definitions of lawful custodian, the availability of statutory exceptions or defenses, and the severity of the criminal penalty for conviction vary greatly between states. A lawyer for a survivor who has already left or wishes to leave the state with her children should carefully consult the relevant statutes and case law in the client's home state to best inform the client of the potential legal ramifications of her decision to flee. The following section will generally address the legal implications of some common approaches taken by state statutes. Appendix A contains a summary of the language, applicability, and penalties of state custodial interference statutes.

A. The Definition of "Custody" or "Lawful Custodian"

States vary with respect to how they define "parental kidnapping." While some states assume that all parents inherently share joint custodial rights to their children, others only recognize legally established custodial relationships. Therefore, to begin assessing the potential criminal implications of a client fleeing domestic violence with her children across state

32. *See* 28 U.S.C. § 1738A (2004); 42 U.S.C. § 653-655, 663 (2004); 18 U.S.C. § 1073 (2004) (Parental kidnapping and interstate or international flight to avoid prosecution—"(a) In view of the findings of the Congress and the purposes of sections 6 to 10 of this Act . . . the Congress hereby expressly declares its intent that section 1073 of title 18, United States Code, apply to cases involving parental kidnapping and interstate or international flight to avoid prosecution under applicable State felony statutes").

33. THE NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, FAMILY ABDUCTION: PREVENTION AND RESPONSE ix (2002), *at* http://www.missingkids.com. NCMEC defines parental kidnapping, also called family abduction, child abduction, or child snatching, as:

> "the taking, keeping, or concealing of a child or children by a parent, other family member, or person acting on behalf of the parent or family member that deprives another individual of his or her custody or visitation rights. Family abductions can occur before or after a court issues a custody determination. The term custodial interference is frequently used in criminal statutes, and the definition of the offense varies from state-to-state."

34. *See* Criminal Custodial Interference Statute Chart in Appendix A.

lines, it is important to determine the legal relationships that exist between the battered client, the other parent, and the child. Depending on the state in which she resides, factors such as whether your client is married to the father of her children, has established paternity of the children if she is unmarried, or has entered into a court ordered custody or visitation agreement, may affect the applicability of custodial interference statutes to the client's particular case. The lawyer must first examine the state custodial interference statute to see how it defines custodial relationships. Then determine whether the relationship between the client and her abuser fits within the statutory definition. Even if the client's relationship does not fall under the criminal statute, other serious civil consequences may still apply. Once it has been established that their relationship falls under the statute, the lawyer must determine whether a custody or visitation order will be violated if the client flees. The following provides an overview of the potential criminal consequences and legal options for survivors who leave in violation of a court order of custody/visitation, as well as those who flee in the absence of any legally established order of custody/visitation.

B. Applicability of Criminal Custodial Interference Statutes

Despite common misconceptions, status as the parent and primary caretaker of a child does not, in itself, automatically authorize a parent to leave the state with their children without the consent of the other parent or guardian. In many states, the absence of a legal custody order, or even status as the sole legal custodian of a child, may not immunize an individual from prosecution under relevant state parental kidnapping laws. Generally, state parental kidnapping or custodial interference statutes may be divided into the following categories of applicability:

- Only applicable with legal custody/visitation order or after commencement of custody proceedings;
- Applicable with or without a legal custody order;
- Applicability ambiguous in the absence of a custody order—*see case law on applicability.*

1. Statute Applicable Only with Legal Custody/Visitation Order or Proceedings

Currently, thirteen states[35] have criminal custodial interference statutes that are only applicable in cases where custody proceedings have begun or a valid court order of custody/visitation exists and is violated. Thus, battered women who have not begun a custody/visitation proceeding may be able

35. These states are: Arkansas, Iowa, Louisiana, Maryland, Michigan, Mississippi, Nevada, North Carolina, Rhode Island, South Carolina, South Dakota, Texas, and Utah. *See* Appendix A.

to flee the state without facing criminal consequences. However, it should be noted that the absence of criminal consequences does NOT eliminate serious civil consequences, such as the likely possibility of the abuser filing for and challenging the survivor's right to custody of the children.

2. Statute Applicable With or Without Legal Custody/Visitation Order

Several state criminal custodial interference statutes are at least partially applicable to parents who flee with their children across state lines regardless of whether or not a valid custody or visitation order exists.[36] These statutes typically assume that parents inherently share equal rights to their child regardless of whether such rights have been documented through a custody order. These statutes are often characterized by broad definitions of the meaning of custody that emphasize the natural rights of parents as sufficient to merit protection under criminal custodial interference statutes. In these states, an individual fleeing domestic violence may be subject to criminal conviction unless she is able to invoke a statutory or common law criminal defense in the custodial interference prosecutions.

3. Applicability Ambiguous: See Case Law

Unfortunately, numerous state custodial interference statutes do not, on their face, clearly indicate whether or not a custody or visitation order is required to trigger applicability of the statute.[37] An examination of relevant case law may be helpful in clarifying the jurisdiction's position on the applicability of such statutes in the absence of clear statutory language.[38]

For example, in New York State, the issue of statutory applicability remains unsettled. Interstate custodial interference is a class-E felony[39] and is established by showing that "a relative of a child intending to hold such child permanently or for a protracted period, and knowing that he has no legal right to do so . . . takes or entices such child from his lawful custodian."[40] The statutory ambiguity arises in considering whether one can "knowingly without right" take a child from its lawful custodian in the absence of a custody order where both parents have parental rights as

36. As of November 2004, these states are: Arizona, California, D.C., Florida, Georgia, Hawaii, Idaho, Illinois (if parents are married), Kansas, Maine, Minnesota, Missouri, Montana, Nebraska, New Mexico, Tennessee, and Wisconsin. *See* Appendix A.

37. These states are: Alaska, Colorado, Connecticut, Delaware, Indiana, Kentucky, Massachusetts, Minnesota, Montana, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Vermont, Virginia, Washington, West Virginia, and Wyoming. *See* Appendix A.

38. *See generally* Liberty Aldrich, *Moving On: Relocation, Emergency Jurisdiction, and Custodial Interference*, in Lawyer's Manual on Domestic Violence: Representing the Victim 171, 187 (Julie A. Domonkos & Jill Laurie Goodman eds., App. Div., First Dep't of the Supreme Court of the State of New York, 1998).

39. *See* N.Y. Penal Law § 135.50.

40. *Id.* § 135.45.

established through marriage or paternity. While recent case law suggests that conviction for custodial interference may occur even in the absence of a custody order,[41] an earlier case held that prosecutors had to prove defendant's knowledge of a court order.[42] Lawyers must consult the appropriate state statutes and case law to determine how courts have ruled on the applicability of custodial interference statutes to parents who flee prior to the existence of any custody/visitation order.

C. Fleeing in Violation of a Court Ordered Custody or Visitation Award

All criminal parental kidnapping/custodial interference statutes apply in the event that a survivor flees her abuser with her children in violation of an existing legal custody or visitation order. In addition to a variety of civil penalties, a survivor may face enforcement of the original custody/visitation order pursuant to the PKPA. The PKPA is only applicable when a valid custody/visitation order already exists or there is an ongoing proceeding between the parents in which a temporary custody/visitation order has been issued.[43]

While the PKPA addresses numerous jurisdictional issues that arise as parents relocate with children across state lines without the knowledge or consent of the other parent, there are also important criminal implications that arise from attempts to enforce state custody orders under the PKPA. The PKPA allows requests to the Federal Parent Locator Service to locate abductor parents and abducted children.[44] It also clarifies that the federal Fugitive Felon Act applies to parental kidnapping charges that are felonies under state law.[45] This provision can have major consequences for survivors fleeing across state lines with their children, given that a majority of states classify interstate custodial interference as a felony. If the fleeing parent is charged with a felony under state law, that charge may be entered into the National Crime Information Center Database (NCIC).[46] Further,

41. People v. Morel, 566 N.Y.S.2d 653 (App. Div. 1991) (upholding indictment for custodial interference in the second degree despite absence of prior court order of custody/visitation).

42. People v. Lawrow, 447 N.Y.S.2d 213 (Dist. Ct. 1982) (state had to prove beyond reasonable doubt that defendant had knowledge that a custody order was in place).

43. *See* 28 U.S.C. § 1738A (2004) *at* http://assembler.law.cornell.edu/uscode/search/index.html. (The PKPA, which gives full faith and credit to custody determinations, is only applicable in cases where a temporary or final custody or visitation award has been granted by a court).

44. The Federal Parental Locator Service is a service of the U.S. Department of Health and Human Services, Administration for Children & Families. *See* http://www.acf.hhs.gov/programs/cse/newhire/fpls/fpls.htm.

45. *See* 18 U.S.C. § 1073 (2004).

46. Crimes may be entered into the NCIC by federal, state, and local law enforcement agents. *See* http://www.fas.org/irp/agency/doj/fbi/is/ncic.htm. ("The purpose for maintaining

if that parent's whereabouts are unknown, and state or local law enforcement wish to enlist the assistance of federal agents, the federal Fugitive Felon Act allows for the issuance of an Unlawful Flight to Avoid Prosecution (UFAP) warrant at the request of a state prosecutor.[47]

Survivors who are forced to flee in violation of an existing custody order should consider seeking temporary emergency custody jurisdiction in their destination state pursuant to the UCCJA or the UCCJEA. The process and likelihood of successfully securing emergency jurisdiction will vary by state depending on whether a state has adopted the UCCJEA or UCCJA on individual judicial discretion. Lawyers working with battered clients who are considering moving with their children to another state can avoid criminal consequences under the PKPA by seeking modification of existing custody or visitation order prior to leaving the state. Counsel should carefully assess the safety of such an action for the victim as it is likely that the abuser will be notified about the move through the court proceedings. Such orders can also be difficult to obtain. It is important to investigate the likelihood of success of such a court case in the jurisdiction and advise the client accordingly. If a survivor is charged with criminal custodial interference despite her attempt to secure temporary emergency jurisdiction in her new state, she should consult a criminal defense lawyer who may be able to work with prosecutors to have their charges dismissed.[48] This issue becomes even more critical for immigrant survivors, whose immigration status or options can be severely compromised by any form of criminal conviction.

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the NCIC system is to provide a computerized database for ready access by a criminal justice agency making an inquiry and for prompt disclosure of information in the system from other criminal justice agencies about crimes and criminals. This information assists authorized agencies in criminal justice and related law enforcement objectives, such as apprehending fugitives, locating missing persons, locating and returning stolen property, as well as in the protection of the law enforcement officers encountering the individuals described in the system").

47. Patricia M. Hoff, Parental Kidnapping: Prevention and Remedies (1997), *at* http://www.abanet.org/ftp/pub/child/pkprevnt.txt (The requirements that must be met prior to the Federal Bureau of Investigation's (FBI) commencement of a federal UFAP investigation in parental kidnapping cases are as follows: (1) the existence of a state felony warrant; (2) probable cause [for the FBI] to believe that the fugitive has fled the jurisdiction of the wanting state; (3) a written request from an appropriate state authority for federal assistance; and (4) the assurance that the fugitive will be extradited to the jurisdiction where seeking to prosecute the state charge. After these requirements are met, the FBI then will seek authorization for the filing of a request for a federal UFAP warrant from the U.S. Lawyer and will present the facts to a U.S. magistrate or judge. Once a UFAP warrant is issued, the FBI will attempt to locate the absconding parent; if the FBI locates the parent and/or children, the federal charges are dropped and extradition and prosecution under state law will proceed).

48. *See* Goelman, *supra* note 15, at 127.

D. Potential Defenses or Exceptions

When prosecution under a parental kidnapping or custodial interference statute is brought against a victim of domestic violence, she may have statutory and common law exceptions or defenses available to her. Generally, the common law defense of "necessity" or "choice of evils" is defined as "a justification defense for a person who acts in an emergency that he or she did not create and who commits a harm that is less severe than the harm that would have occurred but for the person's actions.[49] A parent facing prosecution under a custodial interference statute may argue, for example, that her decision to flee the state and violate criminal custodial interference prohibitions was necessary to protect herself or the child from imminent danger from the abusive parent. A necessity defense can be raised in any criminal case and may be used even in states that have not codified such defenses in their statutes.

Many jurisdictions only allow limited application of a necessity or choice of evils defense. If the defendant attempts to present such a defense, case law requires that it should fail if there was a reasonable, legal alternative to violating the law.[50] Under this standard, a survivor must demonstrate that her choice to violate interstate custodial interference statutes was necessary to prevent great harm to herself or her children at the hands of the abuser. Since a necessity defense assumes that the defendant had explored all available legal alternatives to stopping the threat of harm prior to committing the offense, it is conceivable that a battered woman, who flees the state with her children without having first attempted to contact the police or secure an order of protection, may find the defense of necessity unavailable to her. A survivor's genuine fear that involving law enforcement or seeking a protective order in the courts of the jurisdiction from which she fled may result in further retaliation by the batterer may thus go unrecognized by a court. Counsel for the victim should be prepared to present evidence of the danger to the victim and/or her children and should consider presenting expert testimony on the dynamics of domestic violence, the abuser's lethality and the validity of the victim's fears in cases where the necessity defense will be raised.

Some states have codified imminent harm defenses in their custodial interference statutes, but specifically preclude a defendant from raising such a defense unless she takes certain steps after the abduction, such as informing law enforcement of the reason for the abduction as well as the child's whereabouts and contact information.[51] The rationale behind these

49. BLACK'S LAW DICTIONARY 1053 (7th ed. 1999).
50. *See* United States v. Bailey, 444 U.S. 394 (1980).
51. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1302 (Allowing imminent harm defense if defendant

restrictions is to ensure that those fleeing imminent harm with their children will then proceed through established law enforcement and justice system channels to seek protection from abuse or to seek a change in the custody order.[52] Other states specifically preclude raising this type of a defense if the child was taken out of the state.[53]

Through the efforts of advocates for battered women, fourteen states currently have specific domestic violence related affirmative defenses to prosecution under custodial interference statutes.[54] Of these statutes, at least five states require survivors of domestic violence to demonstrate that they have followed particular procedures relating to their flight from the violence as a condition for invoking the statutory domestic violence defense to custodial interference.[55]

An example of typical procedural requirements for invoking a domestic violence necessity defense is found in the California parental kidnapping statute. The California statute is deemed inapplicable to parents who, with a "good faith and reasonable belief that the child, if left with the other person, will suffer immediate bodily injury or emotional harm," take or conceal the child from the other parent.[56] The California statute is notably progressive in its inclusion of a fear of imminent "emotional harm" to the child, making this statutory defense available when domestic violence has been committed against the absconding parent.[57]

To establish that the custodial interference statute is inapplicable to a survivor's case, California requires the survivor to follow certain procedures before benefiting from this statutory immunity. The fleeing parent must follow these procedures, which are common to several other states:

- Within a reasonable time after the taking of the child, make a report to the office of the district attorney of the county where the child resided before the action, including the name of the person, the current address and telephone number of the child and the abducting parent, and the reason for the abduction;

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initiates a protection order or custody proceeding stating fear of imminent harm to the child).

52. *See* Susan S. Kreston, *Prosecuting Parental Kidnapping*, NCPCA UPDATE (Nat'l Ctr. for the Prosecution of Child Abuse 1998), vol. 11, No. 4, at 1, *at* http://www.ndaa.org/publications/newsletters/apri_update_vol_11_no_4_1998.htm.

53. *See, e.g.*, N. H. REV. STAT. ANN. § 633:4 (interference with custody).

54. These states include: Arizona, California, D.C., Florida, Idaho, Illinois, Minnesota, Missouri, Nevada, New Jersey, Pennsylvania, Rhode Island, Washington, and Wisconsin.

55. These states include: Arizona, California, Florida, Nevada, and New Jersey. *See* Appendix A for a description of these procedures. (Typically, such states may require a fleeing parent to notify law enforcement of their reasons for fleeing, provide contact information in their destination state, and/or initiate custody proceedings pursuant to the jurisdictional statute in the home state).

56. CAL. PENAL CODE § 278.7.

57. *Id.*

- Within a reasonable time, commence a custody action consistent with the federal PKPA, the UCCJA or the UCCJEA; and
- Inform the home state DA's office of any change to the address or telephone number of the survivor parent and the child.[58]

Such requirements raise an immediate concern over maintaining the confidentiality of the survivor's location and contact information so that neither the batterer nor anyone acting for him can use the information to find, stalk, or harm the victim and/or her children. While some states, such as California, assure confidentiality of this information in cases where the reason for fleeing was domestic violence,[59] numerous survivors have experienced the dangers of inadvertent disclosure of confidential information by courts and law enforcement authorities. Counsel representing domestic violence victims in interstate custody and custodial interference cases should ask the court and other authorities involved to keep all contact and location information regarding the victim confidential.

In the absence of statutory domestic violence defenses against prosecution for parental kidnapping, eleven states provide a defense to custodial interference based on imminent danger to the welfare of the child.[60] Again, a defendant may be required to follow a sequence of procedures relating to her flight before invoking the "imminent harm to the child" defense.[61] Four states provide only for a general "good cause" defense.[62] Unfortunately, twenty states do not provide for any statutory exception or defense to prosecution for parental kidnapping.[63] In a jurisdiction where few or no defenses exist, a survivor may be able to raise a common law necessity defense discussed above.

When advising a client who may be subject to charges of criminal custodial interference, learn whether the state exempts domestic violence survivors from statutory applicability, provides for a domestic violence imminent harm defense, or only makes common law defenses available.

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58. *Id.* at (d). (In California, "a 'reasonable time' within which a report to the district attorney's office must be made is at least 10 days[;] . . . a reasonable time to commence a custody proceeding is at least 30 days").

59. *Id.* at (e). ("The address and telephone number of the person and the child provided pursuant to this section shall remain confidential unless released pursuant to state law or by a court order that contains appropriate safeguards to ensure the safety of the person and the child").

60. These states are: Colorado, Hawaii, Louisiana, Maryland, Michigan, New Hampshire, New York, Ohio, Vermont, West Virginia, Wyoming.

61. *See* Appendix A.

62. These states are: Alaska, Montana, Utah, and Virginia.

63. These states are: Connecticut, Delaware, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana (kidnapping), Maine, Massachusetts, Mississippi, Nebraska, New Hampshire (if interstate kidnapping), New Mexico, North Carolina, Oregon, South Carolina, South Dakota, Tennessee, and Texas.

III. Immigration Consequences of Criminal Custodial Interference Convictions

Avoiding custodial interference convictions is important for all battered women.[64] Effective legal representation of victims is essential so that victims can present all available defenses to the court in order to avoid a custodial interference conviction. If the victim agrees to a plea or is ultimately convicted of custodial interference, this conviction can be used against her by her abuser in subsequent child custody litigation. Such convictions can significantly undermine the victim's ability to obtain court orders that allow her to maintain custody of her children. In addition to these potential consequences, immigrant survivors of violence facing charges of criminal custodial interference must confront restrictive immigration laws that can severely impact their immigration status.

Especially given that interstate criminal custodial interference and related criminal charges are typically classified as felonies and tend to carry maximum sentences greater than one year, consequences of convictions under such charges for noncitizen immigrant victims could include any of the following:

- A battered immigrant can be deported if she commits any of a wide variety of crimes;
- She could be denied Violence Against Women Act (VAWA) immigration relief if she cannot show good moral character because of criminal history. VAWA allows abused immigrant spouses and children of U.S. Citizens or Legal Permanent Residents to self-petition for lawful permanent residency and/or avoid deportation through cancellation of removal;
- Even if she has an approved VAWA self-petition, she may be barred from obtaining permanent residence (green card) if she falls within one of the criminal grounds of inadmissibility;
- Her application for adjustment of status (permanent residence) or VAWA cancellation of removal can be denied if immigration authorities decide not to exercise discretion in her favor because of her criminal history; and

64. *See* ANN BENSON, WASHINGTON DEFENDER ASSOCIATION, IMMIGRATION CONSEQUENCES OF CRIMINAL CONDUCT: AN OVERVIEW FOR CRIMINAL DEFENDERS, PROSECUTORS AND JUDGES IN WASHINGTON STATE 1, 11 (2001). Criminal convictions for noncitizens can lead to deportation. Many actions that *are* not considered convictions in state courts are considered convictions under immigration law. For example, pre-trial diversion is considered a conviction under immigration law any time the defendant is required to admit guilt and/or admit into evidence facts sufficient to warrant a finding of guilt. For this reason, it is extremely important to contact an expert on immigration law and crimes whenever you have an immigrant client who (1) has been arrested, (2) has any history of criminal convictions, or (3) has a warrant issued for her arrest. For advise on the immigration consequences of criminal convictions, contact The Immigrant Women Program of Legal Momentum at IWP@legalmomentum.org or 202-326-0040.

- If deported/removed she may be barred from returning to the United States.[65]

A. Grounds of Inadmissibility

Criminal convictions primarily affect immigration status when they constitute grounds of inadmissibility or grounds of deportability.[66] Any time a person applies for permission to enter the United States or to change (adjust) their immigration status to that of a lawful permanent resident (green card holder), they must prove that they are admissible under immigration law.[67] Grounds of inadmissibility include criminal convictions.[68] Grounds of inadmissibility generally apply to noncitizens in the following situations:

- Undocumented noncitizens who entered the country illegally and have no legal status in the United States when immigration authorities initiate deportation/removal proceedings against them;
- noncitizen who is seeking entry into the United States;
- Any noncitizen who is applying for lawful permanent resident status; and
- Lawful permanent residents who are applying for U.S. citizenship.[69]

Thus, a battered immigrant could have her VAWA self-petition approved, and despite that approval, be denied legal permanent residency because she is inadmissible.[70] For battered immigrants in deportation proceedings who otherwise qualify for VAWA cancellation of removal, criminal convictions could lead to denial on the basis of inadmissibility.

B. Crimes of Moral Turpitude

Convictions for "crimes of moral turpitude" are another basis by which battered immigrants fleeing domestic violence with their children may be deprived of critical immigration benefits. Custodial interference convictions, which are felonies in virtually every state, may constitute grounds for inadmissibility or deportability as "crimes of moral turpitude" under immigration law.[71]

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65. *See Battered Immigrants and the Criminal Legal System*, in BREAKING BARRIERS, *supra* note 2, at § 7.

66. *See* INA §§ 212(a)(2), 237(a)(2), 8 U.S.C.A. §§ 1182, 1227 (criminal grounds of inadmissibility; criminal grounds for deportability).

67. *See* INA § 212(a)(2) (criminal grounds of inadmissibility).

68. *Id.*

69. BENSON, *supra* note 64, at 8.

70. *Id.*

71. *See* INA § 212(a)(2)(A)(i)(I) (crime of moral turpitude as criminal ground for inadmis-

A crime of moral turpitude is commonly defined as: "an act of baseness, vileness, or depravity in the private and social duties which a [person] owes to his [or her] fellow [people], or to society in general, contrary to the accepted and customary rule of right and duty between [people]."[72] In determining whether a crime constitutes moral turpitude, an immigration judge will examine the crime as defined by elements of the criminal statute rather than considering the defendant's actual conduct.[73] Thus, it is possible that a survivor of domestic violence who is convicted of criminal custodial interference, irrespective of the motivations for her actions, may be found to have committed a crime of moral turpitude.

Generally, whether a survivor fleeing domestic violence with her children will be convicted of a crime of moral turpitude will be dependent on the language of the state statute. For example, in Washington State, where flight from domestic violence is a defense to a charge of criminal custodial interference, experts conclude that it is unlikely that an individual with a custodial interference conviction will be found to have committed a crime of moral turpitude.[74] Within the context of custodial interference statutes, only three states require malice as an element of their custodial interference statutes.[75] An intent or malice requirement in the custodial interference statute makes it significantly more likely that an immigrant victim's conviction would be deemed a crime of moral turpitude under immigration law given that an element of the crime itself is indicative of moral turpitude.[76] Immigrant victims in these states should take particular care to avoid custodial interference convictions.

Even if a fleeing parent is found to have committed a crime of moral turpitude, she may be able maintain her admissibility under immigration law by invoking the waiver under Petty Offense Exception waiver.[77] This exception is *only* available if the maximum penalty possible for the crime the immigrant victim was convicted of does not exceed one year, and the immigrant was not *sentenced* to a term of imprisonment for more than six

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sibility); INA § 237(a)(2)(A)(i) (crime of moral turpitude as basis for expedited removal).

72. *See* Jordan v. DeGeorge, 341 U.S. 223, 235 n. 7 (1951).

73. Goldeshtien v. I.N.S., 8 F.3d 645 (9th Cir. 1993); Matter of Short, 20 I&N Dec. 136 (BIA 1989).

74. *Id. See* WASH. REV. CODE §§ 9A.40.060, 9A.40.070 (2004) (custodial interference in the 1st and 2nd Degree).

75. Including California, Florida, and New Mexico. *See* CAL. PENAL CODE § 278 (2004), N.M. STAT. ANN. § 30-4-4 (2004), FLA. STAT. ANN. § 787.03 (2004).

76. BENSON, *supra* note 64, at 60. While there is no definitive list of crimes which constitute moral turpitude, they can include: crimes (felonies or misdemeanors) in which there is an element of intentional or reckless infliction of harm to persons or property; felonies and some misdemeanors, in which malice is an element; or crimes in which either an intent to defraud or an intent to steal is an element.

77. *See* INA § 212(a)(2)(A)(ii)(II).

months. It is important to note that the key issue is the maximum penalty for the crime and not the actual time served. Unfortunately, this exception is generally unavailable for battered immigrants fleeing abuse with their children across state lines because almost every state makes interstate custodial interference a felony punishable by a sentence of over one year. Another waiver available for this grounds of inadmissibility can be found under INA § 212 (h). Under this section, a crime of moral turpitude, as well as several other grounds of inadmissibility, may be waived for a battered immigrant at the discretion of the General.

C. Grounds of Deportability

Any noncitizen may be subject to deportation.[78] This is true even for immigrant victims who have lawful permanent residency (green cards). Only after naturalization does the risk of deportation due to criminal convictions disappear. A battered immigrant who is convicted of custodial interference or another crime could potentially be subject to the grounds for removal discussed below.

1. Crime of Moral Turpitude

The statutory definition of deportability as a result of conviction of a crime of moral turpitude is:

> INA § 237((a)(2)(A)(i)): Conviction for one "crime involving moral turpitude committed within five years . . . of admission" to the United States (or 10 years if admitted as a lawful permanent resident), "for which a sentence of one year or longer *may be imposed*."

This ground is subject to a waiver under § 237(a)(2)(A)(v)—if "the alien subsequent to the criminal conviction has been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States."

As discussed above, a conviction of interstate custodial interference is typically a felony offense that carries a possible sentence of over one year. In the event that a victim is convicted of custodial interference during the time specified, and an immigration judge deems that her crime was one that demonstrated moral turpitude, she may be deported. To avoid deportation, a battered immigrant would need to overcome the very high threshold of obtaining a full and unconditional pardon by the U.S. President or State Governor.

78. *See* INA § 237(a)(2), 8 U.S.C.A. § 1227(a)(2) (criminal offenses as grounds for deportation).

2. AGGRAVATED FELONY

An immigrant "convicted of an aggravated felony at any time . . . is deportable.[79] The aggravated felony provision is defined by immigration law, not state criminal law, and includes twenty-one provisions that encompass hundreds of offenses.[80] Some examples include: murder, rape, child sexual abuse, trafficking in controlled substances, firearms offenses, child pornography, obstruction of justice or perjury with a sentence of one year or more, fraud or deceit if the loss exceeds $10,000, crimes of violence with a sentence of one year or more, and theft or burglary offenses (including receipt of stolen property) with a sentence of one year or more.[81] Any offense that falls within the aggravated felony definition triggers drastic immigration consequences.

While most of these crimes may not appear to apply to a survivor fleeing abuse with her children, it is not inconceivable that a survivor in such a situation may be charged with obstruction of justice for her failure to utilize recognized channels of custodial adjudication. Additionally, in states where malice or harm to a child are elements of the crime of custodial interference, it is within the realm of possibility that a survivor may be found to have committed a crime of violence. The language of these provisions is as follows:

> INA § 101(a)(43)(S)—"An offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year."[82] Custodial interference/parental kidnapping, especially when in violation of an existing court order, may be considered obstruction of justice. If a UFAP warrant is issued, a victim could face conviction of an aggravated felony relating to obstruction of justice as another ground for removal.
>
> INA § 101(a)(43)(F)—"A crime of violence (as defined in section 16 of Title 18) for which the term of imprisonment [is] at least one year."[83] The definition of "crime of violence" under 18 USC § 16 includes: 1) An offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another; or 2) Any felony that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

3. CRIME OF DOMESTIC VIOLENCE

Finally, it is not uncommon for batterers to obtain retaliatory or mutual protection orders against their partners.[84] Batterers frequently use protection

79. INA § 237(a)(2)(A)(iii).
80. INA § 101(a)(43), 8 USC § 1101(a)(43).
81. INA § 101(a)(43), 8 USC § 1101(a)(43).
82. *Id.* § 101 (a)(43)(S), 8 USC § 1101(a)(43)(S).
83. *Id.* § 101 (a)(43)(F), 8 USC § 1101(a)(43)(F).
84. *See* ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING (2000).

orders as yet another tool to control their victims by threatening to contact the police and/or immigration authorities and falsely accuse the victim of violating the protection order. If a victim is charged with violating the protective provisions of a civil protection order, she may be subject to INA § 237(A)(2)(E), a grounds for removal for perpetrators of domestic violence. It is extremely important that counsel for battered non-citizens defend their clients in retaliatory protection-order cases brought by their abusers.[85] No noncitizen victim should ever consent to the issuance of a protection order against her. If an immigrant victim acted in self-defense, she should put forth her self-defense case in a contested hearing opposing the issuance of the protective order against her. If the immigrant victim seeks help from counsel after a consent protection order has been issued against her, counsel should appeal the decision or seek to reopen the case and have it dismissed. If a battered immigrant was acting in self-defense and is charged by the Department of Homeland Security with having committed a perpetrating domestic violence either through self-defense or through violating her abuser's retaliatory protection order, she has the following waiver available to her:

> INA § 237(a)(7)—Waiver for a victim of domestic violence who was not the primary perpetrator in the relationship if, upon determination that she, *1) was acting in self-defense; 2) was found to have violated a protection order intended to protect the alien; or 3) she committed, was arrested for, or pled guilty to committing a crime—a) that did not result in serious bodily injury and b) where there was a connection between the crime and the alien's having been battered or subjected to extreme cruelty.*

The domestic violence grounds for removal under INA § 237(A)(2)(E) specifically excludes violations of custody or child support provisions that may have been included under a civil protection order. Thus, a victim cannot be charged with this basis for removal if her flight is in violation of the visitation provision of her own civil protection order.

D. Good Moral Character

A survivor convicted of criminal custodial interference or related crimes also risks being determined to lack good moral character, which is a factor in:

- VAWA self-petitions,

85. For an overview of basic concepts regarding the immigration consequences of crimes particular to immigrant survivors of violence, *see* ANN BENSON, OVERVIEW OF IMMIGRATION CONSEQUENCES OF CRIMINAL CONDUCT FOR IMMIGRANT SURVIVORS OF DOMESTIC VIOLENCE (2004) (available through the National Immigration Project of the National Attorneys Guild *at* www.national immigrationproject.org or 617-227-9727).

- VAWA cancellation of removal/suspension of deportation,
- Adjustment of Status *(e.g.,* to lawful permanent resident status), and
- Naturalization.

In each instance, the Department of Homeland Security assesses good moral character by determining first and foremost whether the applicant has criminal convictions. Applicants for VAWA are asked to provide evidence that they lack criminal convictions through a state background check, police clearance letters or fingerprints. To naturalize or become a legal permanent resident, fingerprints are required, which are matched against state and national criminal records data. Convictions for custodial interference could make proving good moral character much more difficult.

A battered immigrant woman convicted of a crime of moral turpitude or an aggravated felony may be ineligible for a VAWA self-petition or cancellation of removal because she will be barred from establishing good moral character. INA § 101(f) lists several permanent bars to establishing good moral character. Among other things, this section includes almost every criminal ground for inadmissibility or deportability. Noting that survivors of domestic violence may have committed crimes as a result of the physical abuse and/or extreme cruelty they experienced at the hands of their abusers, the Violence Against Women Act was amended to allow a limited waiver for certain survivors of domestic violence. This provision allows survivors of domestic violence to establish good moral character despite being barred under INA § 101(f) when the crime that led to the bar can be shown to be connected to the abuse suffered by the victim.[86] Consult an immigration lawyer who is an expert on the immigration consequences of criminal convictions to confirm whether your client's crimes may be waivable under this provision to allow her to establish good moral character.

IV. The Impact of Interstate Flight from Domestic Violence on Civil Custody Decisions

In addition to the threat of criminal sanctions for interstate custodial interference, battered women who flee across state lines may be subjected to severe civil penalties that could include modifications of the terms of

86. *See id.* at 9 (INA §204(a)(1)(C) provides that self petitioning applicants are not barred from showing good moral character (GMC) where: 1) the act or conviction is waivable under INA §212 or INA §237; and 2) the act or conviction is connected to the alien's having been battered or subjected to extreme cruelty. Many survivors may find that their crimes may be waivable under INA § 212(h)(C) or INA §237. If this is the case, they may be able to establish good moral character pursuant to INA § 204(a)(1)(C) if the crime, *e.g.,* criminal custodial interference, can be attributable to domestic violence).

custody, or even the potential loss of custody of their children. Survivors of violence frequently must balance risks to their physical and emotional safety with risks to their custodial rights over their children in deciding whether and how to leave an abusive relationship. While many jurisdictions have begun to consider the presence of domestic violence in custody and relocation determinations,[87] jurisdictions vary enormously with respect to their treatment of the dynamics of domestic violence when considering complex custody, visitation, and relocation cases. This section will provide a brief overview of the impact of relocation on custody determinations, and discuss options and prospects for battered women who plan to petition the court to relocate prior to leaving the state with their children.[88]

A. Friendly Parent Provisions

"The most widely accepted rationale for restricting the movement of custodial parents is that children's interests are best served by ensuring frequent and continuing contact with both parents" after the parents separate.[89] This rational is accepted despite research findings that severely limit this proposition in families where domestic abuse is present. Research demonstrates that, when "domestic violence [or severe conflict] is present between parents, children deteriorate markedly when subjected to frequent visitation transfers."[90]

In an attempt to maintain frequent and continuing contact between parents, several state child custody statutes explicitly encourage courts to favor child custody awards to the parent considered by the court most likely to encourage an open, frequent and loving relationship between the child and the other parent.[91] Some states accomplish this by including in their custody statute a public policy statement concerning a parent's abilities to foster such a relationship to develop between the child and the other parent.[92] Other states include such provisions in their list of factors that a court is required to "consider when determining the best interest of the child."[93] These provisions can be harmful to battered parents seeking custody.

87. *See* Merry Hofford et al., *Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice*, 29 FAM. L.Q. 197, 216 (1995).

88. *See generally* Janet M. Bowermaster, *Relocation Custody Disputes Involving Domestic Violence*, 46 U. KAN. L. REV. 433 (1998).

89. *Id.* at 446.

90. *Id.* at 447.

91. *Id.* at 446.

92. *See* The Family Violence Project Of The National Council Of Juvenile And Family Court Judges, *Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice*, 29 FAM. L.Q. 197, 201 (1995).

93. *Id.*

In jurisdictions that have these so-called "friendly parent" provisions, battered women who intentionally flee from their abusers to protect themselves and their children from further harm are particularly vulnerable to a finding of noncooperativeness in custody proceedings. Lawyers and other advocates for battered women have vigorously opposed such "friendly parent" provisions, and have claimed that the existence of such statutes perpetuates an abuser's ability to use the threat of losing custody of the children as a tool to further control the abused spouse.[94] In 1995, "the ABA's Center on Children and the Law stated that friendly parent provisions are inappropriate in domestic violence cases, and proposed that state legislatures amend such laws."[95] While expectations of cooperative parents persist, the work of advocates of battered women, coupled with the judiciary's growing awareness of domestic violence, has prompted many jurisdictions to now consider the existence of domestic violence as a factor in making custody determinations.[96]

To counter friendly parent expectations by courts and to fall within domestic violence protections, counsel representing battered women in contested custody cases should seek protection orders that provide evidence of abuse that can help ensure that custody awards are decided against the backdrop of the intimate partner violence.

Such orders are extremely helpful to immigrant victims for whom fear of loss of custody of children to an abusive parent with U.S. citizenship or more permanent immigration status can discourage her from seeking any kind of justice system help at all.[97] Protection orders can award an immigrant victim custody without regard to her immigration status,[98] and can provide her with important evidence that can help her immigration case.[99] Most importantly, going to court and obtaining a protection order against her abuser demonstrates to immigrant victims that despite her abuser's claims to the contrary, the justice system will help her.[100]

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94. *Id.* at 202.

95. *Id*. *See also* HOWARD A. DAVIDSON, A REPORT TO THE PRESIDENT OF THE AMERICAN BAR ASSOCIATION, THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN 1 (1994) (stating that children are harmed "cognitively, psychologically, and in their social development" by witnessing domestic violence against a parent at home).

96. NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, CUSTODY AND VISITATION DECISION-MAKING: WHEN THERE ARE ALLEGATIONS OF DOMESTIC VIOLENCE (1995).

97. *See generally* Mary Ann Dutton, Leslye E. Orloff, & Giselle Aguilar Hass, *Symposium Briefing Papers: Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL'Y 245 (2000).

98. For a fuller discussion *see Protection Orders* in BREAKING BARRIERS, *supra* note 2, at § 5.

99. For an in-depth discussion of immigration relief available for survivors of domestic violence, *see Battered Immigrants and Immigration Relief* in BREAKING BARRIERS, *supra* note 2, at § 3.

100. *See* Leslye E. Orloff, Mary Ann Dutton, *et. al.*, *Recent Development: Battered*

B. Fleeing the State Without the Children

As discussed throughout this article, battered parents attempting to flee abuse with their children face myriads of obstacles to safe relocation. Some parents are forced to leave their children behind when fleeing from a crisis of violence due to lack of resources to support themselves and their children, or out of fear that flight with their children may result in their batterer's successfully convincing prosecutors to initiate criminal proceedings against them. Rather than recognizing a parent's decision to flee as a response to imminent physical harm to the parent or her children, in such cases, a court may read a battered woman's flight from abuse as her abandonment of the children or as an indication of her inability to protect and care for them.[101]

The Model Code on Domestic Violence, drafted in 1994 by a multidisciplinary advisory committee comprised of judges, battered women's advocates, lawyers, law enforcement officers, defense lawyers and other professionals, addresses topics including criminal penalties and procedures, civil protection orders, and family and children.[102] One of the goals of the Model Code is to establish guidelines for child-custody determinations under which, once the court finds abuse by one parent against the other, the safety and well-being of the child and battered parent are the primary consideration in determining a custody arrangement that would be in the best-interests of the child.[103] The Code contains, for example, a presumption that it is not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of family violence, and also directs courts to give primary consideration to the safety and well-being of the child and of the parent who are victims of domestic violence.[104] Further, the Code specifically addresses the concern that abused parents' flight from abuse without the children might be viewed as abandonment, and provides battered parents with an affirmative defense against allegations of child abandonment. This approach serves to minimize any potential disadvantage a battered parent may face in subsequent custody proceedings. When assisting a client who has fled the jurisdiction due to abuse without her children, consult your state's custody statute to determine

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Immigrant Women's Willingness to Call for Help and Police Response, 13 UCLA WOMEN'S L.J. 43 (2003) (research has found that obtaining a protection order is a significant factor in an immigrant victim's decision to call the police for help).

101. *See* Bowermaster, *supra* note 88, at 451.

102. *See* MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE § 402 (Nat'l Council of Juv. & Fam. Ct. Judges 1994) [hereinafter "MODEL CODE"], *at* http://www.ncjfcj.org/dept/fvd/publications/main.cfm?Action=PUBGET&Filename=new_modelcode.pdf.

103. *Id.*

104. *See Id.* at § 402(1)(a).

whether your client may benefit from statutory protections due to her status as a survivor of domestic violence. Counsel should also consider presenting a brief to the court on this issue based on the Model Code and the ABA Center on Children's report on recommended steps courts should take when domestic violence exists in a custody case.

C. Fleeing the State With the Children

In addition to the criminal consequences discussed above, abused parents who flee the state with their children prior to or in violation of a custody order may face disadvantages in subsequent custody proceedings for interfering with the other parent's custodial rights.[105] The survivor may also risk offending a court's authority over the custody matter.[106] Some courts have demonstrated an inability to recognize and unwillingness to support an abused parent's decision to deprive the abusive parent of contact with the children in the course of fleeing the jurisdiction for safety reasons, even in light of extensive history of extreme physical, emotional, and sexual abuse of the fleeing parent by the other parent. For example, in *DeCamp v. Hein*, a Florida trial court focused primarily on the father's right to visitation by refusing to grant custody to a mother who had fled the state with her children, unless she returned to Florida. While the appellate court finally reversed the part of the order requiring the mother to return to Florida, it was evidence of the mother's willingness to permit liberal visitation with the father, rather than the long history of domestic violence perpetrated against the mother that finally persuaded the court to permit the relocation.[107] Examine your state statutes and relevant case law to develop a sense of how a court will respond in a custody proceeding involving a parent who has fled the jurisdiction with her children to escape abuse.

Finally, battered women who relocate with their children to avoid abuse may confront increased penalties due to a court's perception of the victim's flight from the jurisdiction as in contempt of the court's authority.[108] Experts describe the story of one woman who fled with her children without first informing the court out of fear that the court would punish her for her decision:[109]

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105. *See generally* Bowermaster, *supra* note 88.
106. *Id.*
107. *See, e.g.*, DeCamp v. Hein, 541 So. 2d 708 (Fla. Dist. Ct. App. 1989).
108. *See* Bowermaster, *supra* note 88, at 455.
109. *See* Lenore E. A. Walker & Glenace E. Edwall, *Domestic Violence and Determination of Visitation and Custody in Divorce, in* DOMESTIC VIOLENCE ON TRIAL: PSYCHOLOGICAL AND LEGAL DIMENSIONS OF FAMILY VIOLENCE 127, 131 (Daniel J. Sonkin ed., 1987).

> Lois ran away with her 2-year-old son and hid in a battered women's shelter in another state. Although she wrote the judge a letter explaining her continued fear for her own and her child's safety, he became irate at her willful disrespect of his previously issued visitation order and immediately transferred custody to her former husband . . . Nor was the risk of danger to the child important to the judge, who was exercising his power to punish Lois for not trusting the court to act in the best interests of her child.[110]

As discussed earlier, defenses or exemptions currently available in some state parental kidnapping/custodial interference statutes are very helpful to battered women. These exceptions "direct courts not to penalize . . . [survivors if they] suddenly move away in violation of a court order or . . . temporarily conceal the whereabouts of the children while they [are] fleeing domestic violence."[111] Family courts in some states may take into account flight from abuse in custody proceedings pursuant to state statutes or case law that require consideration of domestic violence in custody cases.[112]

When representing a battered custodial parent who has fled from one state to another with her children, if the case is being litigated in a state that considers domestic violence in custody cases, counsel should develop and present evidence in the custody case demonstrating the nexus between the flight, domestic violence, and the safety of the victim and her children. If relevant, counsel should also consider providing evidence that the children have witnessed the abuse and as a result, have been traumatized in the same way as children who have been physically abused by a parent. In making this argument, counsel may seek an expert witness and cite relevant research to support the argument, as this view is increasingly the prevailing view of experts among advocates for victims of child abuse and domestic violence. In states without such provisions in their statutes and case law, counsel should examine state statutes governing parental kidnapping and custodial interference. Where domestic violence-related defenses, exemptions, or exceptions exist in those statutes, advocates for battered women should argue that consideration of those same factors in custody cases is necessary to be consistent with the spirit and purpose of those statutes.

D. Petitioning to Relocate

For battered women in jurisdictions with particularly restrictive criminal custodial interference laws, one option is to petition a court for legal permission to relocate. Despite establishing a pattern of abuse, battered

110. *Id.*
111. Bowermaster, *supra* note 88, at 458.
112. *See generally* Hofford, *supra* note 87, at 199.

women who choose to seek a court's permission to relocate are not always successful in their request. However, in recent years, the growing awareness of domestic violence among the judiciary has led to an increased number of abused parents being granted permission to relocate with their children.[113]

Section 403 of the Model Code articulates a rebuttable presumption that nonabusive parents should be the custodial parents, and that they should be free to move with the children to the location of their choice.[114] This provision acknowledges that a battered parent may find increased safety and support in another jurisdiction, thus supporting the notion that relocation would be in the best interests of both the parent and child.[115] The standard set forth by the Model Code, as well as the accompanying comments that explain the approach taken by the National Council of Juvenile and Family Court Judges in making this recommendation, should be provided to the court to encourage the court to follow the lead of national judicial domestic violence experts in promoting victim safety by allowing relocation of victims and their children in domestic violence cases.[116]

While most states include "domestic violence as a statutory factor that courts must consider when making custody determinations[,][117] . . . [far] fewer have mandated that courts [1)] consider evidence of domestic violence as contrary to the best interests of the child or to a stated preference for joint custody, or [2)] expressly prohibit an award of joint custody

113. *See* Bowermaster, *supra* note 88, at 456. Some parents are allowed to move in the initial proceeding. *See* Carter L.M. v. Tracey W.P., No. CN94-6456, 1995 WL 775207, at *2 (Del. Fam. Ct. Mar. 28, 1995) (allowing woman to relocate with new husband, but requiring her to pay all costs of visitation from Scotland because it was her decision to move); Schuyler v. Ashcraft, 680 A.2d 765, 781-82 (N.J. Super. Ct. 1996) (affirming permission to relocate on appeal); McGee v. McGee, 637 N.Y.S.2d 816, 818-19 (N.Y.A.D. 1996) (affirming permission to relocate on appeal); Mitchell v. Mitchell, 619 N.Y.S.2d 182, 183-84 (App. Div. 1994) (affirming permission to relocate on appeal); Swain v. Vogt, 614 N.Y.S.2d 780, 782-83 (App. Div. 1994) (affirming permission to remove on appeal); Jacoby v. Carter, 563 N.Y.S.2d 344, 345 (App. Div. 1990) (affirming permission to relocate on appeal); Dobos v. Dobos, 431 S.E.2d 861, 863 (N.C. Ct. App. 1993) (affirming permission to relocate with child on appeal). Others are able to relocate only after an appeal. *See* Odom v. Odom, 606 So. 2d 862, 869 (La. Ct. App. 1992) (reversing loss of custody on appeal); Sheridan v. Sheridan, 611 N.Y.S.2d 688, 690 (App. Div. 1994) (reversing order to move back to retain custody on appeal); Gruber v. Gruber, 583 A.2d 434, 440 (Pa. Super. Ct. 1990) (reversing condition of remaining in jurisdiction to retain custody on appeal).

114. MODEL CODE § 403. Presumption concerning residence of child where there is at issue a dispute as to the custody of a child, a determination by a court that domestic or family violence has occurred raises a rebuttable presumption that it is in the best interest of the child to reside with the parent who is not a perpetrator of domestic or family violence in the location of that parent's choice, within or outside of the state.

115. Bowermaster, *supra* note 88, at 459.

116. *Id.* at 459.

117. *Id.*

when a court makes a finding that domestic violence has occurred."[118] While some jurisdictions have established a presumption against awarding sole or joint custody to an abusive parent, no state has yet followed the Model Code by adopting a special statutory provision for relocation cases involving domestic violence.[119] Despite the distinct historical tendency to preserve the visitation rights of the noncustodial parent, recent decisions by state supreme courts indicate a growing trend toward offering the custodial parent and her children the same level of protection and respect generally accorded to any nuclear family.[120]

The model that lawyers representing battered women should urge courts to follow includes: not awarding custody, in whole or in part,[121] to a parent with a history of inflicting domestic violence, granting visitation to such parent only if the safety and well-being of the abused parent and children can be protected, and including in all awards of visitation explicit protection for the child and abused parent.[122] Family court judges across the country who have received training on, and understand, domestic violence make custody awards to nonabusive parents using this approach.[123]

Unless the statutes and case law clearly include protective measures, battered women should be prepared by counsel to understand that relief might only be granted on appeal.[124] Since appellate relief can only be granted if the issues have been raised at the trial level, any battered woman seeking to relocate with her children should consider making every con-

118. *See* The Family Violence Project of the National Council of Juvenile and Family Court Judges, *supra* note 92, at 217.

119. *Id.* at 209.

120. *See* Bowermaster, *supra* note 88; *See, e.g.*, Vachon v. Pugliese, 931 P.2d 371 (Alaska 1996); *In re* Marriage of Burgess, 913 P.2d 473 (Cal. 1996) (*But see In re* Marriage of Navarro & LaMusga, No. S107355 (Cal. April 29, 2004); *In re* Marriage of Francis, 919 P.2d 776 (Colo. 1996); Mize v. Mize, 621 So. 2d 417 (Fla. 1993); Lamb v. Wenning, 600 N.E.2d 96 (Ind. 1992); Silbaugh v. Silbaugh, 543 N.W.2d 639 (Minn. 1996); Bell v. Bell, 572 So. 2d 841 (Miss. 1990); *In re* Marriage of Hogstad, 914 P.2d 584 (Mont. 1996); Harder v. Harder, 524 N.W.2d 325 (Neb. 1994); Trent v. Trent, 890 P.2d 1309 (Nev. 1995); Holder v. Polanski, 544 A.2d 852 (N.J. 1988); Tropea v. Tropea, 665 N.E.2d 145 (N.Y. 1996); Stout v. Stout, 560 N.W.2d 903 (N.D. 1997); Fossum v. Fossum, 545 N.W.2d 828 (S.D. 1996); Fortin v. Fortin, 500 N.W.2d 229 (S.D. 1993); Aaby v. Strange, 924 S.W.2d 623 (Tenn. 1996); Lane v. Schenck, 614 A.2d 786 (Vt. 1992); Bohms v. Bohms, 424 N.W.2d 408 (Wis. 1988); Love v. Love, 851 P.2d 1283 (Wyo. 1993). *But see In re* Marriage of Eckert, 518 N.E.2d 1041 (Ill. 1988).

121. Joan Zorza, *Recognizing and Protecting the Privacy and Confidentiality Needs of Battered Women*, 29 FAM. L.Q. 273, 305 (1995).

122. *Id.*

123. For technical assistance developing these arguments in your custody case on behalf of a battered woman who fled to your jurisdiction contact The National Council of Juvenile and Family Court Judges at 775-784-6012 or http://www.ncjfcj.org. For help with cases involving immigrant victims who flee, you may additionally contact the Immigrant Women Program of Legal Momentum at 202-326-0040 or iwp@legalmomentum.org.

124. Zorza, *supra* note 121, at 306.

stitutional argument to support her move.[125] Joan Zorza suggests that a battered woman make the following constitutional arguments supporting her position that she should be allowed to relocate:[126]

- Her right to travel interstate is [based] in . . . the Privileges and Immunities Clause of Art. IV, § 2, the Privileges and Immunities Clause of the Fourteenth Amendment, the Due Process Clause of the Fifth Amendment, the Commerce Clause, and freedom of association under the First Amendment of the U.S. Constitution.
- The denial of the relocation would impermissibly discriminate against her on the basis of her gender, her marital status, her being a parent of minor children, and "her being an abused person who is being denied the ability to protect herself and/or her child[ren]" in violation of the Equal Protection Clause.
- "A denial of the relocation would discriminate against the child(ren)'s right to interstate travel and, [potentially, their right] to be protected by their custodial parent from witnessing and/or experiencing further abuse."
- "A denial of the relocation would deny the mother her fundamental right to (re)marry [(if she does intend to remarry)], to create a new family, and to enjoy the privacy of the familial association."
- If she is not relocating to flee the father, "[t]he court could consider the alternative that the father could move to be near his child(ren) rather than restrict her from moving the child(ren)."
- "The denial of the relocation [also potentially] deprives her of state constitutional rights" (such as fundamental rights protected under the state constitution or the state's equal rights amendment, if the state has one).

In addition, Zorza suggests that the abused woman be prepared to raise her best factual arguments as follows:[127]

- That the court should take domestic violence and concerns regarding the safety of both the battered parent and child(ren) into account when adjudicating any custody and/or relocation case.
- Why other solutions are not possible or will only increase the danger to the battered woman and her child, including why she cannot remain; what other alternatives she has explored, and why they will not work or would involve any less hardship for the father; and that couples counseling or family therapy will not

125. *Id.*
126. *Id.* at 307.
127. *Id.* at 307-308.

help, but actually further aggravates the abuser's power in the relationship and endangers battered women and their children.

- "Anything which the abuser has done (*e.g.*, abusing or harassing her, not paying support, etc.) that makes it harder for her to remain (*e.g.*, that he has or will cause her to be evicted, lose her job, or function less effectively as a parent)."
- "To the extent that the father has not had a very meaningful relationship with the child(ren) and/or only (or mainly) opposes the move to prevent her from getting on with her life, and hence has no legally permissible reason to prevent the relocation."
- All the reasons why the move will benefit her child(ren), such as better work prospects [for the survivor]; more emotional support from family [and friends]; better child-care options; better financial situation, especially if she will be able to be off public assistance; that her child(ren) used to live there and still have contacts with friends, church, doctor, etc.; better schools for herself or her child(ren); better medical situation."
- If applicable, "that her child(ren) are of sufficient age to give their consent and/or desire, or at least do not oppose, the move."
- "Any reasons why the move will be desirable/necessary for her, including what definite plans she has for herself and her child(ren)."

V. Custodial Interference Laws and Ethical Issues

Numerous ethical issues related to professional conduct may arise for a lawyer representing a client whose need to find safety for herself and her children intersects with state criminal custodial interference laws. Within the context of a client's flight from the jurisdiction for reasons of safety, these rules of ethics may appear to conflict with fundamental principles of advocating on behalf of the safety and best interests of a survivor of domestic violence and her children. Through a discussion of the scope and applicability of relevant ethical rules of professional responsibility, this section hopes to provide some general guidance for lawyers counseling clients who have or are planning to flee domestic violence by leaving the jurisdiction with their children. As emphasized throughout this article, the applicability of these and other rules as well as their consequences are largely fact-specific and frequently vary by jurisdiction.

A. The Rules

The American Bar Association's Model Rules of Professional Conduct (Model Rules) have been adopted in some manner by approximately forty-

one states.[128] Other states either follow the American Bar Association's Model Code of Professional Responsibility (which preceded and was replaced by the Model Rules) or their own combination of rules.[129] These rules prescribe minimum standards for upholding the professional responsibility of lawyers to their clients and to the profession.

When representing a client who has or is contemplating fleeing the state with her children, the following two Model Rules may be triggered:

- Rule 1.2(d)[130] states: "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." Given the existence of custodial interference statutes that criminalize a parent's flight from the jurisdiction, questions arise as to a lawyer's ethical obligations when advising a survivor who wishes to flee out of state with her children.
- Rule 1.6[131] describes the nature of lawyer-client privilege and its exceptions. Lawyers representing clients who have fled the jurisdiction with children may find themselves obligated to disclose their client's whereabouts to a court under one or more of the exceptions to this privilege.

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128. Lewis Becker, *Ethical Responsibilities of a Lawyer for a Parent in Custody and Relocation Cases: Duties Respecting the Child and Other Conundrums*, 15 J. AM. ACAD. MATRIM. LAW. 33, 34 (1998).

129. *Id.*

130. MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2002).

131. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2002):

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order".

B. Rule 1.2(d)

As discussed above, jurisdictions vary with respect to the scope and applicability of criminal custodial interference laws. The legal relationship of the parents, the existence of a valid custody order, the destination of the fleeing parent, and the reason for her flight from the jurisdiction are just some of the variables that determine the applicability of the law as well as the availability of defenses. An analysis of the ethical implications of counseling such a client must therefore begin with an assessment of the individual client's position with respect to relevant state statutory and common law provisions.

Under Rule 1.2(d), a lawyer may not counsel or assist a client to engage in criminal or fraudulent behavior. The comments that follow this Rule establish several exceptions to this general Rule. This prohibition does not preclude a lawyer from giving an "honest opinion about the actual consequences" that may result from the client's conduct and suggests that a client's use of such advice towards criminal ends does not make the lawyer a party to such action.[132] Further, the rule creates an exemption for disobedience of a statute or regulation or its interpretation by governmental authorities for purposes of determining its validity or interpretation.[133] The Restatement (Third) of The Law Governing Lawyers suggests that:

> Different considerations may apply when the contemplated client activity that a lawyer counsels or assists is criminal but the client, having been counseled that the activity is criminal, nonetheless proposes to commit the act for reasons of conscience. The disciplinary consequences of lawyer involvement in such instances of civil disobedience have not been adjudicated and the Restatement takes no position on them.[134]

While these rules place limitations on the ability of a lawyer to represent a survivor of domestic violence who wishes to flee the jurisdiction, it is fairly clear from the comments that follow Rule 1.2(d), that simply counseling a client on the potential ramifications of interstate flight from

132. MODEL RULES OF PROF'L CONDUCT R. 1.2(d) cmt. 9 (2002): ("Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity").

133. MODEL RULES OF PROF'L CONDUCT R. 1.2(d) cmt. 12 (2002): (". . . The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities").

134. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 94 (2004).

abuse should not trigger disciplinary consequences. Further, the exceptions provided for in the comments that follow Rule 1.2(d) may present opportunities for lawyers to challenge the applicability of criminal custodial interference statutes to survivors of domestic violence whose flight was motivated by the abuse. If a lawyer chooses to represent a client who has fled the jurisdiction with her children, she should do so with a strong working knowledge of defenses available for these survivors.

In jurisdictions that exempt survivors of domestic violence from their criminal custodial interference statutes, a lawyer's counsel and representation of a client who wishes to flee the state appears unlikely to violate Rule 1.2(d). Similarly, in jurisdictions where flight from domestic violence is a defense to a charge of parental kidnapping, a lawyer's advice to a client on the legal implications of her decision and subsequent defense of a client who has chosen to flee also appear unlikely to violate Rule 1.2(d). Here, an understanding of when a client's actions will trigger criminal custodial interference statutes may be determinative in anticipating a defense to a Rule 1.2(d) violation. In jurisdictions where the applicability of criminal custodial interference statutes to survivors of domestic violence is unclear, mere advice to a client on the consequences of interstate flight should not constitute a Rule 1.2(d) violation. However, counsel for the client should be familiar with common-law defenses to a charge of criminal custodial interference.

1. Case Law: People v. Chappel

One case often cited in discussions of the intersection of domestic relations law and standards of professional responsibility is *People v. Chappel*[135] which illustrates what can appear to be the murky conflict between zealous representation of a client and ethical obligations that prohibit assisting a client in the commission of a crime. *People v. Chappel* involved a custody dispute amidst a dissolution proceeding where a client wished to leave the state with her children contrary to a custody order and mutual restraining order prohibiting either party from leaving Colorado. Chappell advised her client "as her lawyer to stay, but as a mother to run."[136] Chappell also informed her client about underground networks that were available to individuals in her situation, assisted her in emptying her bank accounts, and advised her as to how she could avoid being caught. The client was subsequently caught and charged with a violation of a custody order under Colorado law, a class 5 felony. The client pled guilty to the charge in exchange for a three year deferred sentence. The lawyer, however, was disbarred and her conduct was found to violate:

135. People v. Chappell, 927 P.2d 829 (Colo. 1996).
136. *Id.*

- R.P.C. 1.2(d) (a "lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent");
- R.P.C. 3.3(a)(2) (a "lawyer shall not knowingly fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client");
- R.P.C. 8.4(b) ("it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects"); and
- R.P.C. 8.4(c) ("it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation").[137]

Despite some ambiguity as to whether the "underground" resources provided to her client by Chappell were in fact domestic violence shelters, there does not appear to be any evidence of a history of domestic violence in this case. Chappell's lawyer knowingly assisted her client in illegal conduct, including acts that far exceeded the scope of advice.

A lawyer representing a battered parent who wishes to flee the state with her children would arguably not be in the same position as Chappell. If such a client chooses to flee the state after being advised of the legal implications of her decision, a lawyer could arguably rely on her good faith belief that her client's conduct may not be found criminal under statutory and common-law defenses available to victims of domestic violence in that jurisdiction. Further, Comment 9 to Rule 1.2(d) suggests that a lawyer in such a position would not be implicated in the action of the client unless there is evidence of assisting the client beyond discussion of legal implications.[138]

2. CASE LAW: IN RE ROSENFELD

Nevertheless, the risk of disciplinary consequences for counsel will most likely increase when a client flees the jurisdiction in violation of a custody order. For example, in *In re Rosenfeld*[139] the client was given temporary custody of her daughter, but the father was given visitation rights on weekends. Concerned that the father had been sexually abusing the child, the client filed a relief-from-abuse petition to prevent the father

137. *Id.*

138. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(d)(2002).

139. *In re* Rosenfeld, 601 A.2d 972 (Vt.1991), cert. denied, Rosenfeld v. Vermont, 112 S.Ct. 1968 (1992). *See* Joel S. Newman, *Legal Advice Towards Illegal Ends*, 28 U. RICH. L. REV. 287 (1994).

from further visits. The court consolidated the relief-from-abuse petition with the permanent custody hearing and refused to prohibit the father from visiting his daughter on the one weekend remaining before the hearing.[140]

The lawyer told the mother that he could not advise her to violate the court order granting the father visitation rights. However, "he told her that he did not think that the judge would hold it against her if she denied visitation."[141] He suggested that if she planned to violate the court order, she and her daughter should leave home for the weekend. This tactic would allow her to avoid a direct confrontation with her ex-husband.

The court referred the matter to a fact-finding committee of the Vermont Bar which noted that "similar situations arose often in family practice and many lawyers 'choose to assure the safety of the child over the sanctity of the court order.'"[142] In view of "the jeopardy his client perceived in granting visitation, the inability to place the matter before the court prior to the weekend visit, the loss of only one weekend visit, and the short time prior to the court hearing,"[143] the committee found no violation. The court rejected the committee report, concluding that the factors relied upon by the committee could be used to mitigate punishment, but not to ignore the violation. The lawyer was suspended for six months with his reinstatement conditioned upon a passing score on a professional responsibility exam and a demonstration of improved office management skills.[144]

While the lawyer's advice to the client to go out of town for the weekend does push the bounds of what may be permissible under Comment 9 of Rule 1.2(d), the lawyer's advice to his client, may be perceived by some as a permissible honest opinion of potential consequences of depriving visitation. Thus, counsel should be aware that individual judicial discretion may result in disciplinary consequences for a lawyer despite her belief that she was acting within the bounds of the Model Rules.

3. Approaches to Client Advocacy

The ethical questions raised by these scenarios can be discussed within a context of empowerment based approaches to representing survivors of domestic violence. Approaches to representing victims of domestic violence can generally be divided into two categories: directive and empowering.[145] The directive model is most closely aligned with the traditional approach

140. Rosenfeld, 601 A.2d at 975.
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. Erin L. Han, *Note: Mandatory Arrest and No-Drop Policies: Victim Empowerment In Domestic Violence Cases*, 23 B.C. Third World L.J. 159 (2003).

to lawyering employed by most lawyers. Under that model, the lawyer tells her client what she ought to do, given the lawyer's assessment of the client's situation.[146] The empowerment model is quite contrary to the traditional style of lawyering employed by the directive model, and places an emphasis on allowing the client to maintain a sense of autonomy throughout the legal process.[147] Under the empowerment model, the client is the decision-maker.[148] The lawyer simply provides information in a setting that is safe and conducive for contemplation and ultimately allows the client to decide what to do with her situation.[149] The client-empowerment based model of lawyering is widely advocated and used among lawyers for survivors of domestic violence across the country. The guidance provided by the Comments to the Model Rules suggests that this approach to client advocacy, with its focus on discussions of options and legal implications, results in the best representation of battered clients while better assuring the lawyer's compliance with the bounds of professional conduct.

C. Rule 1.6: Arguments Against Mandatory Disclosure of a Client's Whereabouts

Model Rule 1.6 raises additional ethical concerns for lawyers representing clients who wish to flee the jurisdiction. This rule establishes the scope of lawyer-client privilege and provides for exceptions to such privilege when a client has committed a crime or an act of fraud. Under Rule 1.6, an lawyer may be required to disclose the whereabouts of her client or face contempt. Caselaw on this matter has been varied and is highly fact specific. The primary arguments that support nondisclosure of the client's whereabouts are 1) the safety of the client and her children and 2) the best interests of the children.

Some courts have not required lawyers to disclose the client's whereabouts on the grounds that such disclosure would jeopardize the safety of the client.[150] In *Taylor v. Taylor*, a divorce action, the wife was awarded custody of the couple's child.[151] Subsequently, the former husband sought modification of the decree. The lawyer was not retained by the wife following the finalization of the divorce. Notice of the modification action

146. DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT CENTERED APPROACH 17–18 (1991).

147. *Id.*

148. *Id.*

149. *Id.*

150. *See generally* Shelly K. Hillyer, *The Lawyer-Client Privilege, Ethical Rules of Confidentiality, and Other Arguments Bearing on Disclosure of a Fugitive Client's Whereabouts*, 68 TEMPLE. L. REV. 307 (1995).

151. Taylor v. Taylor, 359 N.E.2d 820 (Ill. App. Ct. 1977).

was not served on the former wife, but was served on the lawyer. Neither the ex-wife, nor anyone on her behalf, appeared before the court with respect to the former husband's petition. When the trial court directed the lawyer to divulge the former wife's address, the lawyer refused and was subsequently held in contempt.[152] The lawyer insisted that the former wife communicated her address to him in the strictest confidence and the reason for not revealing her address involved her genuine fear for the safety of herself and her child. In reversing the contempt finding, the appellate court indicated that the most important fact it considered was that the confidentiality of the communication was based on the former wife's established fear of harassment from the former husband. The court felt that a client in this type of situation should not have to worry whether a court might compel her lawyer to disclose information that would threaten her safety. The court acknowledged that compelled disclosure in this type of case would "seriously undermine the ability of lawyers to handle these delicate, explosive situations in the future."[153]

While *Taylor* offers strong arguments in favor of maintaining the confidentiality of a fleeing client's whereabouts, some other jurisdictions have mandated disclosure of such information under the "crime or fraud" exception to the lawyer-client privilege.[154] Each of these cases has involved a client who violated a court order. Once again, a client's flight from the jurisdiction in violation of a custody order can have negative consequences not only for the client, but her lawyer as well. *Taylor* does, however, establish a precedent whereby flight from violence, even when in violation of a court order, can avoid ethical consequences. Accordingly, some of these cases have distinguished *Taylor* as applicable to situations where safety was a motivating concern for maintaining confidentiality.[155]

These ethical questions should serve as a guide for lawyers representing survivors fleeing domestic violence. The need for zealous, competent, sensitive legal assistance is critical to the positive resolution of a custodial interference/interstate custody battle.

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152. Taylor, 359 N.E.2d at 821.

153. *Id.* at 142.

154. Hillyer, *supra* note 150, at 319. *See* Matter of Jacqueline F., 391 N.E.2d 967 (1979); Jafarian-Kerman v. Jafarian-Kerman, 424 S.W.2d 333 (1967).

155. *See* Hillyer, *supra* note 150, at 319. *See, e.g.*, Jacqueline F., 391 N.E.2d 967 (1979) *(*suggesting that the "malicious and wanton" disobedience of a court order may be distinguished from a survivor's desire to flee from abuse to ensure the safety and best interests of her child.) *See generally* Paul D. Knothe, & Amy Horowitz, *Walking the Tightrope Between Advising and Assisting Clients With Criminal or Fraudulent Conduct: Can the ABA Provide Better Guidance?*, 15 GEO. J. LEGAL ETHICS 809 (2002).

VI. Conclusion

There are several strategies for advising survivors who wish to flee the state with children.[156] The complex intersections of criminal custodial interference statutes with immigration provisions can make the systemic barriers faced by immigrant survivors of intimate partner violence who hope to escape abuse and remain in this country seem insurmountable. A basic awareness of the consequences that may arise from these legal intersections can provide an immigrant survivor with the information and counsel she may need to attain the safety she desires for herself and her children.

A lawyer advising a client who is considering fleeing across state lines with her children to escape an abusive partner must consider numerous factors. Above all, a survivor will need to evaluate what will best keep her and her children safe. A survivor is best equipped to assess her own safety when considering how her abusive partner may retaliate. If she fears that her abuser will harm or kill her or their children, and is convinced that no intervention by the legal system will prevent him from retaliating, this must guide her decision-making.[157] Her decision will also depend upon the protections that are available to her in each state, such as family support, supportive friends, economic opportunities, responsiveness of the community to domestic violence, services to assist domestic violence victims, and the legal protections available for her and her children in each state. Understanding the laws related to custody jurisdiction, relocation, and flight across state or tribal lines is critical to assisting the survivor to make an informed decision about her safety and the safety of her children.

The following list of questions and answers are designed to guide lawyers though the process of determining how to advise a battered immigrant client contemplating fleeing with her children to another jurisdiction. This section of questions is followed by a chart that summarizes state statutes and provides lawyers with an overview of each state's approach to the issues discussed in this chapter. This chart is intended to provide a starting point for your research on these issues.

1. What type of parental kidnapping, custodial interference, or child concealment law does the original state have?

As discussed above, a survivor and her lawyer should understand how

156. Goelman, *supra* note 15.

157. A survivor's fears of her abuser's retaliation and/or the difficulty of enforcing civil protection orders should be recognized and validated. While law enforcement response to domestic violence has greatly improved, such response is not yet universal. *See, e.g.,* Gonzales v. City of Castle Rock, 366 F.3d 1093 (2004) (Police officers' failure to enforce valid domestic abuse restraining order issued under statute mandating enforcement of such orders deprives protected party of property interest without procedural due process in violation of Fourteenth Amendment).

the law defines and treats crimes of parental kidnapping/custodial interference. While some state criminal custodial interference laws do not apply as long as no court order is in effect, other states criminalize depriving the other parent of contact with the children whether or not a custody order is in effect. Consult your state statutes to determine whether such statutes are applicable to your client. Inapplicability of criminal custodial interference statutes does not necessarily mean that your client will not be penalized for fleeing custody actions initiated subsequent to her flight.

2. Is there a defense or exemption related to domestic violence that could protect your client from criminal charges if she flees across state lines with the children?

Your client may be able to benefit from a variety of state law exemptions or affirmative defenses to parental kidnapping/custodial interference charges. Some state laws exempt flight from domestic violence from applicability under their criminal custodial interference statutes[158] or include flight from domestic violence as an affirmative defense under the state statute.[159] A few laws permit flight from the jurisdiction, but then require survivors to meet certain conditions such as making a report to law enforcement and commencing a custody case within a reasonable period of time after fleeing the state.[160] Others permit flight to protect the parent[161] or the child from imminent harm.[162] Others have a general "good cause" defense,[163] or rely upon the criminal defense of necessity.[164]

Before fleeing with the children, survivors should know whether they might rely on any exemptions in the event that criminal charges are brought against them. Charges of parental kidnapping/custodial interference can result in jail time or loss of custody.

3. If your client is a battered immigrant and is not a citizen of the United States, what are the possibilities that either the original state or the new state could prosecute her for parental kidnapping or custodial interference and how do you assess the potential harm to her future eligibility for legal immigration status?

First assess whether your client may qualify for VAWA or U Visa immigration relief, and determine whether the abusive spouse or parent has filed immigration papers for her and/or her children. Many victims

158. *See, e.g.*, FLA. STAT. § 787.03(6).
159. *See, e.g.*, 720 ILL. COMP. STAT. 5/10-5(c)(3).
160. *See, e.g.*, CAL. PENAL CODE § 278.7(c).
161. *See, e.g.*, IDAHO CODE § 18-4506(2)(b).
162. *See, e.g., id.* § 18-4506(2)(a).
163. *See, e.g.*, HAW. REV. STAT. § 707-726(2).
164. *See, e.g.*, Gerlach v. State, 699 P.2d 358 (Alaska Ct. App. 1985) (explains necessity defense to a criminal custodial interference matter).

will qualify to file a VAWA self-petition, a U Visa application[165] or for VAWA cancellation of removal. Assess the strength of her immigration case and initiate that case. Determine what, if any, criminal prosecution or sanctions for violation of existing court orders could occur if the victim fled the jurisdiction with her children. Consult an expert on immigration law and crimes to determine what effect any criminal conviction based on a court's finding that the victim has violated court orders could have on her attaining approval of her domestic violence-related immigration case, and her attaining lawful permanent residence in light of that conviction.[166]

4. What type of relocation statute does the state have?

State civil laws also vary by jurisdiction as to whether, and under what circumstances, they permit a parent who has custody of the child to leave the state. Depending upon the state's relocation law and a general sense of typical court rulings, a survivor may wish to petition the court to relocate prior to leaving the state. Thoroughly consult your state's relevant statutes and case law to understand the statutory and applied parameters of such laws. Contact your state domestic violence coalition for a list of lawyers who can advise you on family court practice in your area. Urge your state to adopt the Model Code's provisions that emphasize the importance of considering domestic violence in custody and relocation cases.

5. Would a survivor be violating a court order by fleeing the jurisdiction?

Most states allow victims to file for and receive protection orders in the state to which they flee, even when the violence occurred in another state.[167] However, the victim may choose not to obtain a protection order in the new state for safety reasons so as to not provide the abuser information about her location. The protection order case will require service of documents on the abuser. Some victims only seek orders in the new state when the abuser knows or learns she has relocated there.

Courts generally disfavor intentional violations of valid court orders. Barring immediate safety concerns, survivors should, if at all possible, ask a court to modify an existing custody or visitation order prior to leaving the state. If no order exists, a survivor may not wish to obtain a protection order prior to fleeing the state; protection orders may grant visitation to the perpetrator and thereby increase the chances that a battered parent would violate the visitation provisions of such an order if forced to leave the jurisdiction for safety reasons.

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165. *See Alternative Forms of Relief for Battered Immigrants and Immigrant Victims of Crime: U Visas and Gender-based Asylum , in* BREAKING BARRIERS, *supra* note 2, at § 3.6.

166. *See, Battered Immigrants and the Criminal Legal System, in* BREAKING BARRIERS, *supra* note 2, at § 7. For referrals to immigration lawyers, contact: National Immigration Project – gail@nationalimmigrationproject.org or The Immigrant Women Program of Legal Momentum at IWP@legalmomentum.org or 202-326-0040.

167. Klein & Orloff, *supra* note 2.

6. How have courts in each of the states typically handled interstate custody matters that involved domestic violence?

It will be useful for a survivor to know whether courts in the original state and in the new state tend to penalize victims of domestic violence in child custody cases for flight across state lines.

7. Do the two states have different custody laws related to domestic violence?

Custody laws vary greatly, and one state may consider domestic violence to a greater degree in custody decisions than the other state. This legal standard in each state may be important for a survivor to know prior to flight from abuse.

8. Do the states have different laws protecting the confidentiality of information about domestic violence survivors?

If a domestic violence survivor needs to have her identifying information such as address or telephone number kept confidential for safety reasons, she should be aware of what the different states' laws require with respect to confidentiality.

9. When can a court modify a custody or visitation order that was issued by a court in another state?

The federal PKPA gives continuing jurisdiction to the state that issued the initial custody determination.[168] The issuing state then retains jurisdiction over the matter as long as it can do so under state law, and at least one parent or the child continues to live there. A court may modify a custody or visitation order from another state only if 1) it has jurisdiction to do so, and 2) the court of the initial state no longer has jurisdiction or has declined to exercise it.[169]

168. See previous discussion of PKPA, UCCJEA, UCCJA jurisdictional issues concerning modification of a custody or visitation order. *Also see* MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE, *supra* note 102.

169. *See, e.g.*, Stoneman v. Drollinger, 64 P.3d. 997, 997, 1005-1006 (Mont. 2003) ("[T]he protection of the parties, the years the children had resided in Washington, the significant distance between courts, the parties' disparate financial circumstances, the location of evidence and convenience of witnesses, and the familiarity factors, all supported the trial court declining jurisdiction to allow the Washington court to exercise jurisdiction" after mother fled from Oregon to Washington due to domestic violence).

Appendix A

State **Statute Citation** **(Statute Title)**	**A) Intrastate Penalty (Max. Sentence)** **B) Interstate Penalty (Max. Sentence)**	**Available Defenses**	**Applicability of Statute** **Notes**
Alabama ALA. CODE § 13A-6-45 (Interference with Custody)	A/B) Class C Felony (10 yrs)	No crime if sole purpose is to assume lawful control of child.	Not likely to be applicable to parents (no crime if sole purpose is to assume lawful control of child.)
Alaska ALASKA STAT. § 11.41.320 (Custodial Interference 1st Degree) ALASKA STAT. § 11.41.330 (2nd Degree)	A) Class A misdemeanor (1 Yr) B) Class C Felony	1) General Just Excuse Defense " includes illness of child" 2) See case law for DV exception.	Ambiguous—see case law ("knowing that the person has no legal right to do so") *Note:* Withholding of visitation also violates this statute. (ALASKA STAT. § 11.51.125)
Arizona ARIZ. REV. STAT. ANN. § 13-1302 (Custodial Interference) ARIZ. REV. STAT. ANN. § 13-1305 (Access Interference)	Custodial Interference: A) Class 6 Felony (1 yr) B) Class 4 Felony Access Interference: A) Class 2 Misdemeanor B) Class 5 Felony	Defense available IF: 1) Defendant has begun protection order or custody proceeding and the petition states defendant's belief that child was at risk with other parent AND 2) defendant is child's parent with "right of custody" AND *either* a) has a good faith and reasonable belief that the removal is necessary to protect child from imminent harm or b) is a victim of DV and has reasonable belief that child will be in immediate danger if left with other parent	Applicable w/ or w/o custody/visitation order *Note:* Mother is legal custodian of child until paternity is established.
Arkansas ARK. CODE ANN. § 5-26-502 (Interference with Custody)	A) Class A Misdemeanor (1 yr) B) Class D Felony (6 yrs)	Affirmative Defense: imminent harm to child	Custody/Visitation Order Req. for Applicability
California CAL. PENAL CODE § 278 (Child Abduction)	A) 1 yr to 2, 3, or 4 yrs B) 1 yr to 2, 3, or 4 yrs Aggravation for Int'l Abduction	Statute inapplicable for victim of DV who reasonably believes that child, if left with other parent, will suffer *physical or* ***emotional*** *harm.* Defendant must 1) make a custody petition pursuant to UCCJEA /PKPA, 2) make report to DA of child's original state with contact info of child & parent detailing reasons for fleeing and 3) inform law enforcement re: any changes in address See CAL. PENAL CODE § 278.7	Applicable w/ or w/o custody/visitation order *Notes:* 1) See Uniform Parentage Act for standard in the absence of a custody/visitation order. 2) Statute language includes "maliciously." See CAL. PENAL CODE § 278.
Colorado COLO. REV. STAT. § 18-3-304 (Violation of Custody Order)	A) Class 5 felony (Up to 3 yrs) B) Class 5 felony (Up to 3 yrs) Int'l - Class 4 felony	Affirmative Defense: "Offender reasonably believed that his conduct was necessary" to safeguard child	Custody/Visitation Order Req. for Applicability
Connecticut CONN. GEN. STAT. ANN. § 53a-97 (Custodial Interference 1st Degree) CONN. GEN. STAT. ANN. § 53a-98 (2nd Degree)	A) Class A Misdemeanor (Up to 1 yr) B) Class D Felony (1-5 yrs)	NO STATUTORY DEFENSE	Ambiguous—see case law ("knowing he has no right to do so") *See State v. Vakilzaden*, 742 A. 2d 767, 771 (Conn. 1999) ("the father and mother of every minor child are joint guardians")
Delaware DEL. CODE ANN. tit. 11, § 785 (Interference with Custody)	A) Class A Misdemeanor (1 Yr) B) Class G Felony (1-2 yrs Max)	NO STATUTORY DEFENSE	Ambiguous - see case law ("knowing the person has no legal right to do so")
District of Columbia D.C. CODE §§ 16-1021 to 1026 (Parental Kidnapping)	A) Misdemeanor B) Felony Conviction, if abduction is for over 30 days (imprisonment for 1 yr)	Statute NOT violated if: 1) Action was taken by the "parent fleeing from imminent physical harm to parent" or 2) To protect child	Applicable w/ or w/o custody/visitation order

Florida FLA. STAT. ANN. § 787.03 (Interference with Custody)	A/B) Felony of 3rd degree (5 yrs max.)	Defense that: 1) Defendant was victim of DV and 2) That act was required to protect child BUT MUST: 1) W/in 10 days report name, new address, and reason for flight, 2) Begin custody proceeding consistent with PKPA/UCCJA, and 3) Inform former state of child's whereabouts	Applicable w/ or w/o custody/visitation order Statute uses: "malicious intent to deprive another person" language Higher penalties if contrary to court order.
Georgia GA. CODE ANN. § 16-5-45 (Interference with Custody)	A/B) Misdemeanor (Felony upon 3rd conviction)	NO STATUTORY DEFENSE	Applicable w/ or w/o custody/visitation order
Hawaii HAW. REV. STAT. ANN. §§ 707 to 727 (Custodial Interference 1st and 2nd degree)	A/B) Class C Felony (5 yrs)	"Good cause" to believe act was for the protection of the child from immediate bodily injury	Applicable w/ or w/o custody/visitation order
Idaho IDAHO CODE § 18-4506 (Child Custody Interference)	A) Misdemeanor (if child returned prior to arrest) B) Felony	Affirmative Defenses: 1) DV 2) Protection of Child	Applicable w/ or w/o custody/visitation order
Illinois 720 ILL. COMP. STAT. ANN. 5/10-5 (Child Abduction)	A/B) Class 4 felony (1 yr)	Statute not violated if child is taken to a DV shelter Affirmative Defense: Fleeing DV	Applicable w/ or w/o custody/visitation order if parents are married. *Note:* Mother presumed to have custody if unmarried and/or father is paying child support.
Indiana IND. CODE § 35-42-3-4 (Interference with Custody)	A) 1. Class C misdemeanor w/o court order, 2. Class B if in violation of a court order B) 1. Penalty unclear w/o court order, 2. Class D felony if in violation of a court order	NO STATUTORY DEFENSE	Ambiguous—see case law *Note:* Statute IS applicable w/ or w/o custody order as a Class C misdemeanor for concealment of the child
Iowa IOWA CODE § 710.6 (Violating Custodial Order)	A/B) Class D felony (5 yrs) If violation of visitation order, serious misdemeanor	NO STATUTORY DEFENSE	Custody/Visitation Order Req. for Applicability
Kansas KAN. STAT. ANN. § 21-3422 (Interference with Parental Custody) *See factors for aggravation*	A/B) Class A misdemeanor	NO STATUTORY DEFENSE	Applicable w/ or w/o custody/visitation order *Note:* Aggravated interference if child is concealed in unknown place: Severity Level 7 person felony
Kentucky KY. REV. STAT. ANN. § 509.070 (Custodial Interference)	A/B) Class D Felony (1-5 yrs)	NO STATUTORY DEFENSE Defense does exist if the child is returned voluntarily by the parent before an arrest or before issuance of warrant	Ambiguous—see case law ("knowing he has no legal right to do so")
Louisiana LA. REV. STAT. ANN. § 14:45 (Simple Kidnapping) LA. REV. STAT. ANN. § 14:45.1 (Interference with Custody of a Child)	A/B) Simple Kidnapping: (5 yrs) A/B) Interference with custody: (6 mo)	Simple Kidnapping: NO STATUTORY DEFENSE Interference w/ Custody Defense: Action necessary to protect child	Custody/Visitation Order Req. for Applicability of both (possible to be charged with both simple kidnapping and custodial interference)
Maine 17-A ME. REV. STAT. § 303 (Criminal Restraint by a Parent)	A/B) Class C Crime (5 yrs)	NO STATUTORY DEFENSE	Applicable w/ or w/o custody/visitation order for interstate removal
Maryland MD. CODE ANN., FAM. LAW §§ 9-304 & -305 (Prohibited Acts w/in and w/out State)	A) Misdemeanor (30 day imprisonment) B) Felony, if abduction for more than 30 days (1 yr) International Abduction is a Felony (3 yr)	May file a petition in court of equity stating: 1) Threat to child's health or safety and 2) wish to modify custody order; *Note:* Defense may only be used if petition filed 96 hours of the abduction	Custody/Visitation Order Req. for Applicability

Massachusetts MASS. GEN. LAWS ANN. ch. 265, § 26A (Custodial Interference by Relatives)	A) (1 yr) B) (5 yrs)	NO STATUTORY DEFENSE	Ambiguous—see case law ("without lawful authority")
Michigan MICH. COMP. LAWS ANN. § 750.350a (Taking or Retaining Child...)	A/B) Felony (1 yr and 1 day)	Complete defense if action is taken to protect child from imminent and "actual threat of physical or mental harm, abuse, or neglect"	Custody/Visitation Order Req. for Applicability
Minnesota MINN. STAT. § 609.26 (Depriving Another of Custodial or Parental Rights)	A/B) (Max of 2-4 yrs)	Affirmative Defenses 1) DV/Sexual Assault exception 2) Child protection exception	Applicable w/ or w/o custody/visitation order (Some ambiguity— see case law)
Mississippi MISS. CODE ANN. § 97-3-51 (Interstate Removal of Child Under Age Fourteen by Noncustodial Parent or Relative)	A) N/A B) Felony (3 yrs)	NO STATUTORY DEFENSE	Custody/Visitation Order Req. for Applicability (Interstate only)
Missouri MO. REV. STAT. § 565.150 (Interference with Custody) MO. REV. STAT. § 565.153 (Parental Kidnapping)	A/B) Class D Felony (10 yrs)	Absolute Defense: Fleeing a pattern or incident of domestic violence	Interference with Custody: Ambiguous—see case law ("knowing that he has no legal right to do so") Parental Kidnapping: Custody/Visitation Order Req. for Applicability
Montana MONT. CODE ANN. § 45-5-634 (Parenting Interference) MONT. CODE ANN. §§ 45-5-632 & 633 (Interference or Aggrav. Int. with Parent-Child Contact)	A/B (10 yr max)	NO STATUTORY DEFENSE Defense for Interference w/Parent Child Contact: Reasonable Cause	Parenting interference: Applicable w/ or w/o custody/visitation order Interference with parent-child contact: Custody/Visitation Order Req. for Applicability
Nebraska NEB. REV. STAT. § 28-316 (Violation of Custody)	A) Class II Misdemeanor, w/o custody order (6 months) B) Class IV Felony, w/ custody order (5 yrs)	NO STATUTORY DEFENSE	Applicable w/ or w/o custody/visitation order
Nevada NEV. REV. STAT. 200.359 (Detention, Concealment or Removal of Child from Person Having Lawful Custody or from Jurisdiction of Court)	A/B) Category D Felony (1-4 yrs)	Exceptions for : 1) DV or 2) Child welfare IF detention is reported to law enforcement or child welfare services within 24 hours after removal of the child or reasonable time thereafter	Custody/Visitation Order Req. for Applicability
New Hampshire N.H. REV. STAT. ANN. § 633:4 (Interference with Custody)	A) Misdemeanor B) Class B Felony (1-7 yrs)	Intrastate – "good faith protection of child"; must show petition documenting danger and requesting modification of custody within 72 hours of abduction Interstate: NO STATUTORY DEFENSE	Ambiguous—see case law (See RSA 458:17 for definition of "lawful physical custody")
New Jersey N.J. STAT. ANN. § 2C: 13-4 (Interference with Custody)	A) 3rd degree crime (No imprisonment) B) 2nd degree crime if outside United States or if child is concealed for over 24 hours	Affirmative Defense: 1) Child welfare if a report is made within 24 after removal of the child in the new jurisdiction 2) Domestic violence if notice of child's whereabouts is given to law enforcement OR if a new custody action is commenced	Applicable w/ or w/o custody/visitation order (Some ambiguity—see case law)
New Mexico N.M. STAT. ANN. § 30-4-4 (Custodial Interference)	A/B) 4th degree felony (18 months)	NO STATUTORY DEFENSE	Applicable w/ or w/o custody/visitation order *Note:* Language includes "maliciously"

New York N.Y. PENAL LAW § 135.50 (Custodial Interference in the 1st Degree) N.Y. PENAL LAW § 135.45 (Custodial Interference in the 2d Degree)	A) Class A Misdemeanor B) Class E Felony (4 yrs)	Affirmative Defense: Emergency to protect child victim from abuse	Ambiguous—see case law
North Carolina N.C. GEN. STAT. § 14-320.1 (Transporting Child Outside the State with the Intent to Violate Custody Order)	A) N/A B) Class I Felony (5 yrs)	NO STATUTORY DEFENSE	Custody/Visitation Order Req. for Applicability
North Dakota N.D. CENT. CODE § 12.1-18-05 (Removal of Child from State in Violation of Custody Order)	A) N/A B) Class C Felony	NO STATUTORY DEFENSE	Custody/Visitation Order Req. for Applicability
Ohio OHIO REV. CODE ANN. § 2919.23 (Interference with Custody)	A) 1st degree misdemeanor B) Felony - 5th degree	Affirmative Defense: 1) Child's health/safety and 2) In good faith gave notice to law enforcement as to whereabouts of the child within reasonable amount of time	Ambiguous—see case law ("knowing the person is without privilege to do so")
Oklahoma OKLA. STAT. tit. 21, § 891 (Child Stealing)	A/B) Felony	NO STATUTORY DEFENSE	Applicable w/ or w/o custody/visitation order (Some ambiguity—see case law)
Oregon OR. REV. STAT. § 163.245 (Custodial Interference in the 2d Degree) OR. REV. STAT.§ 163.257 (Custodial Interference in the 1st Degree)	A) Class C Felony (5 yrs) B) Class B Felony (10 yrs)	NO STATUTORY DEFENSE	Ambiguous—see case law ("no legal right to do so")
Pennsylvania 18 PA. CONS. STAT. § 2904 (Interference with Custody of Children) 18 PA. CONS. STAT. § 2909 (Concealment of Whereabouts of a Child)	A/B) Felony 3rd Degree (Both)	1) Child welfare 2) Defendant is parent and there is no court order of custody 3) For Concealment statute, there is a "reasonable response to DV" defense	Custodial interference Statute: Ambiguous—see case law ("when he has no privilege to do so")
Rhode Island R.I. GEN. LAWS § 11-26-1.1 (Childsnatching) R.I. GEN. LAWS § 11-26-1.2 (Abduction of Child Prior to Court Order)	A/B) Felony (2 yr)	Child snatching: DV Affirmative Defense Abduction: Statute Inapplicable if abduction is to protect child from imminent OR if fleeing DV	Custody/Visitation Order Req. for Applicability
South Carolina S.C. CODE ANN. § 16-17-495 (Custodial Interference)	A) N/A B) Felony (Max 5 yrs)	NO STATUTORY DEFENSE	Custody/Visitation Order Req. for Applicability
South Dakota S.D. CODIFIED LAWS § 22-19-9 (Violation of Custody Order by Parent) S.D. CODIFIED LAWS § 22-19-10 (Removal of Child from State)	A) Class 1 Misdemeanor (1st offense, then Class 6 Felony) B) Class 5 Felony (5 yrs)	Defense: only if other lawful custodian fails to report abduction within 90 days	Custody/Visitation Order Req. for Applicability

Tennessee TENN. CODE ANN. § 39-13-306 (Custodial Interference)	A/B) Class E Felony (1-6 yrs)	Defense if "clear and present danger" to child or child returned before arrest	Custody/Visitation Order Req. for Applicability *Note:* Class A misdemeanor if child is voluntarily returned
Texas TEX. PENAL CODE ANN. § 25.03 (Interference with Child Custody)	A/B) "State Jail" Felony	NO STATUTORY DEFENSE	Custody/Visitation Order Req. for Applicability
Utah UTAH CODE ANN. § 76-5-303 (Custodial Interference)	A) Class A Misdemeanor (1 yr) B) Felony 3rd degree (5 yrs)	Defense: Good cause	Custody/Visitation Order Req. for Applicability
Vermont VT. STAT. ANN. tit. 13, § 2451 (Custodial Interference)	A/B) (Max 5 yrs)	Defense: Good faith act to protect child	Can show defense by filing modification of custody in VT court within 72 hours Ambiguous—see case law ("no legal right to do so")
Virginia VA. CODE ANN. § 18.2-47 (Abduction and Kidnapping Defined) VA. CODE ANN. § 18.2-49.1 (Violation of Court Order Regarding Custody and Visitation)	Kidnapping: A) Class 1 Misdemeanor + Contempt (Up to 12 mo), B) Class 6 Felony (5 yrs) + Contempt Violation of Court Order of Custody: A) (Fine) B) (5 yrs)	Justification or excuse	Kidnapping: Ambiguous—see case law ("withholds from another entitled to his charge") Violation of Court Order of Custody: Custody/Visitation Order Req. for Applicability
Washington WASH. REV. CODE §§ 9A.40.060 & 9A.40.070 (Custodial Interference in the 1st and 2nd Degree) WASH. REV. CODE § 9A.40.080 (Custodial Interference - Defense)	A/B) Class C felony (5 yrs)	1) Protection of child 2) Flight from DV *Note:* Must show that Defendant sought assistance of police before fleeing	Ambiguous — see case law ("intent to deny child access" for custody (1st) or visitation (2nd))
West Virginia W. VA. CODE § 61-2-14d (Concealment or Removal of Minor Child from Custodian or from Person Entitled to Visitation)	A/B) Felony (1-5 yrs)	Welfare of child	Ambiguous—see case law ("Intent to deprive another person of lawful custody")
Wisconsin WIS. STAT. § 948.31 (Interference with Custody by Parent or Others)	A/B) Class F Felony (2 yrs, 6 mo)	Affirmative Defense: Taken by parent fleeing DV/SA	Applicable w/ or w/o custody/visitation order
Wyoming WYO. STAT. ANN. § 6-2-204 (Interference with Custody)	A/B) (Not more than 2 years)	Affirmative Defense: Welfare of child in immediate danger	Ambiguous—see case law ("having no privilege to do so") *Note:* Concealment of child in confidential location a felony with maximum sentence of 5 yrs.