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Criminal and Civil Implications for Battered Immigrants Fleeing Across State Lines with Their Children^{1,2}

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The Need to Relocate: Introduction to “Parental Kidnapping”/“Custodial Interference”³

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.⁴ While some

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² In this Manual, the term “victim” has been chosen over the term “survivor” because it is the term used in the criminal justice system and in most civil settings that provide aid and assistance to those who suffer from domestic violence and sexual assault. Because this Manual is a guide for attorneys and advocates who are negotiating in these systems with their clients, using the term “victim” allows for easier and consistent language during justice system interactions. Likewise, The Violence Against Women Act’s (VAWA) protections and help for victims, including the immigration protections are open to all victims without regard to the victim’s gender identity. Although men, women, and people who do not identify as either men or women can all be victims of domestic violence and sexual assault, in the overwhelming majority of cases the perpetrator identifies as a man and the victim identifies as a woman. Therefore we use “he” in this Manual to refer to the perpetrator and “she” is used to refer to the victim. Lastly, VAWA 2013 expanded the definition of underserved populations to include sexual orientation and gender identity and added non-discrimination protections that bar discrimination based on sex, sexual orientation and gender identity. The definition of gender identity used by VAWA is the same definition as applies for federal hate crimes – “actual or perceived gender-related characteristics.” On June 26, 2013, the U.S. Supreme Court struck down a provision of the Defense of Marriage Act (DOMA) (United States v. Windsor, 12-307 WL 3196928). The impact of this decision is that, as a matter of federal law, all marriages performed in the United States will be valid without regard to whether the marriage is between a man and a woman, two men, or two women. Following the Supreme Court decision, federal government agencies, including the U.S. Department of Homeland Security (DHS), have begun the implementation of this ruling as it applies to each federal agency. DHS has begun granting immigration visa petitions filed by same-sex married couples in the same manner as ones filed by heterosexual married couples (<http://www.dhs.gov/topic/implementation-supreme-court-ruling-defense-marriage-act>). As a result of these laws VAWA self-petitioning is now available to same-sex married couples (this includes protections for all spouses without regard to their gender, gender identity - including transgender individuals – or sexual orientation) including particularly:

- victims of battering or extreme cruelty perpetrated by a U.S. citizen or lawful permanent resident spouse against a same sex partner in the marriage is eligible to file a VAWA self-petition; and
- an immigrant child who is a victim of child abuse perpetrated by their U.S. citizen or lawful permanent resident step-parent is also eligible when the child’s immigrant parent is married to a U.S. citizen or lawful permanent resident spouse without regard to the spouse’s gender.

³ For more information on this topic, visit <http://niwaplibrary.wcl.american.edu/family-law-for-immigrants/parental-kidnapping>.

⁴ See Sara 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 period⁵. The experience of immigrant victims of violence who leave their abusers is marked by the additional obstacles of linguistic and cultural barriers, limited access to public benefits, and a fear of deportation that further hinder their access to critical protective services.⁶

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 very far away. While civil or criminal protection orders may deter some abusers from retaliating against their former partners, abusive behavior, such as physical violence, stalking, harassment, threats of violence, and threats to take away the children frequently occurs in violation of such orders after a survivor's decision to leave her abusive partner.⁷ The abuser's disregard of prohibitions on such behavior coupled with widespread lack of enforcement of protection orders only serves to empower the batterer to continue his abusive tactics.⁸ It is no surprise that many survivors, determined to put an end to their ex-partners' 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 from their abusers. In other cases, a victim may wish to flee out-of-state to live with her family members who offer her and her children a safe, caring, supportive, and familiar environment while healing from the physical and psychological injuries resulting from the abuse. Immigrant women and women of color who flee their abusers most often choose to move to houses of friends of family members rather than use domestic violence shelters.⁹ Moving to find shelter with friends or relatives offers many immigrant victims safety in a culturally and linguistically comfortable environment.

While the decision to flee a pattern of abuse and regain physical, emotional, and economic autonomy in a location unknown to the abuser may appear to be in the best interest of the survivor and her children, many survivors and advocates may be surprised to learn of the severe legal consequences that may arise from such a decision. 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.¹⁰ Further, survivors may also face restrictive state civil statutes on child custody and related case law that encourage adverse custody decisions to penalize parents who deprive the other parent of access to or contact with their children.¹¹

However, through the work of attorneys and advocates for survivors of intimate partner violence, 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.

⁵ Note that VAWA 2013 § 1221 and INA § 8 U.S.C. 1101 (a)(15)(T)(ii)(III) Allows adult or minor children of derivative family members to file as beneficiaries of a T visa and to join the visa holder in the US, but "only if those children face a present danger of retaliation in their home country by the traffickers".

⁶ See Catherine E. 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).

⁷ Buel, *supra* note 1, at 19.

⁸ SARAH COLSON & PETER FINN, NAT'L INST. OF JUSTICE, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE AND ENFORCEMENT 2, 7 (1990).

⁹ 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).

¹⁰ 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 through July 31, 2002, see the American Prosecutors Research Institute website at http://www.ndaa.org/pdf/parental_kidnapping.pdf.

¹¹ 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).

Battered Immigrants and Family Law Issues: Custody, Support and Divorce

The following section 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.¹² Specifically, it will discuss the 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 section will also provide an overview of the implications of interstate parental relocation on civil family court custody determinations.

A BRIEF OVERVIEW OF THE UCCJA, UCCJEA, AND THE PKPA

Battered women and their attorneys should be aware that fleeing with a child across state lines, even if for safety reasons, may not automatically justify the removal of the child in the eyes of the court. 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. An understanding of the laws that govern interstate custody is crucial to serving the best interests of battered clients in such situations.¹³

This section will provide a brief overview of three types of statutes governing custodial jurisdiction that commonly arise in interstate custody proceedings: the Uniform Child Custody Jurisdiction Act (UCCJA), the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), and the federal Parental Kidnapping Prevention Act (PKPA). The most common statutory obstacles faced by survivors of domestic violence fleeing the state with their children arise under UCCJA/UCCJEA state custodial jurisdiction statutes, the federal PKPA, 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. A more extensive discussion of these provisions may be found in the Jurisdiction Chapter of this manual, which discusses in detail the fact that, as a matter of law, battered immigrants have the same access to the courts in family law matters as U.S. citizens without regard to documented or undocumented immigration status. The provisions of state custody statutes and the UCCJA, UCCJEA and PKPA jurisdictional statutes apply equally to both immigrant and nonimmigrant women and thus will be discussed generally here as they apply to all domestic violence victims.

Generally, the UCCJA, UCCJEA and PKPA help courts to determine which state has the authority to make a custody decision when the children and their parents do not all reside in the same state. These statutes govern jurisdictional determinations regarding which state's courts must decide custody, and when states are required to offer another state's custody order full faith and credit. They *do not* provide guidelines to assist courts in determining who gets custody or what kind of visitation arrangements should be made.

In situations involving domestic violence, the most common circumstances in which the UCCJA, the UCCJEA and/or the PKPA used are:

- Where a battered woman and her child flee to another state before a custody or visitation order has been issued or in violation of a custody or visitation order;
- Where a batterer abducts the child in violation of a custody or visitation order.

UCCJA

The UCCJA stands for the Uniform Child Custody Jurisdiction Act.¹⁴ Created in 1968, the UCCJA was designed to foster uniformity among the state laws governing jurisdiction over, and enforcement of child

¹² Battered immigrants who flee to another country with their children to escape abuse will face complex international law custody and jurisdiction provisions. For an extensive discussion on the implications of fleeing the country with ones children, see BREAKING BARRIERS, Implications of the Hague International Child Abduction Convention: Cases and Practice.

¹³ NOW LEGAL DEFENSE AND EDUCATION FUND, INTERSTATE CUSTODY: UNDERSTANDING THE UCCJA, THE UCCJEA, AND THE PKPA (1999).

¹⁴ See Uniform Child Custody Jurisdiction Act (UCCJA), available at <http://www.law.cornell.edu/uniform/vol9.html#child>, for links to state UCCJA statutes. (To date, the following states have adopted the UCCJA: Delaware, Florida, Hawaii, Illinois,

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 states. The UCCJA specifies *which court* may decide a custody case, and does not govern the substance of how such a case should be decided. While these guidelines have been adopted in some form by all fifty states, as of January 2004, thirty-five states have repealed their prior state UCCJA statute and have enacted statutes that conform to a newer uniform law, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which is further discussed below.¹⁵

The primary feature of the UCCJA is its codification of the four bases by which a court may assume jurisdiction over a custody matter: “home state,” “significant connection,” “emergency,” and “more appropriate forum.”¹⁶ The “home state” is the state where the child lived with a parent or a person acting as a parent for at least 6 months immediately before the custody action was filed. *Home state* jurisdiction exists in the child’s current home state or in a state that was the child’s home state within 6 months before the case began.¹⁷ A state has *significant connection* jurisdiction if the child and at least one parent can establish a significant connection with the state by demonstrating substantial evidence about the centrality of the child’s care, protection, training, and personal relationships in that state. A court may 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.¹⁸ Finally, a court may exercise jurisdiction upon a determination that the state is a *more appropriate forum* when no other state is successfully able to establish jurisdiction over the matter *or* when another state declines to exercise jurisdiction based upon a determination that the other state provides a more appropriate forum for the adjudication of the custody matter.¹⁹

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. “Emergency jurisdiction” is the temporary power of a court to make decisions in a case to protect a child from harm.²⁰ This type of jurisdiction is temporary and is invoked solely for the purpose of protecting the child until the state that has jurisdiction enters an order. An order issued by a court exercising “emergency jurisdiction” is not a permanent order regarding custody or visitation. However, as discussed above, the court with jurisdiction over the matter may decline jurisdiction if it is convinced that it is an inconvenient forum and that the other state will provide a more appropriate forum for the custody proceeding involved.

Indiana, Kentucky, Maryland, Massachusetts, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Vermont, Virgin Islands, Wisconsin, Wyoming.)

¹⁵ See Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), available at <http://www.law.cornell.edu/uniform/vol9.html#child>, for links to state UCCJEA statutes. (To date, the following states have adopted the UCCJEA: Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kentucky, Maine, Michigan, Minnesota, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington, West Virginia.)

¹⁶ For an extensive explanation of the UCCJA and UCCJEA, see Breaking Barriers Immigration Status and Family Court Jurisdiction Chapter 8.

¹⁷ Adapted from Deborah Goelman & Christine McLeod Pate, Applying Jurisdictional Statutes in Interstate Custody Cases to Protect Survivors and Their Children (Power Point Presentation, 2004).

¹⁸ *Id.* “Emergency jurisdiction” is the temporary power of a court to make decisions in a case to protect a child from harm. See UCCJA § 3(3)(ii); UCCJEA art. 2, § 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. In some states, the state’s version of the UCCJA or case law extends emergency jurisdiction to domestic violence cases where a parent was abused or threatened, even if the child was not physically abused.

¹⁹ *Id.* A court having jurisdiction, as explained above, may decline to exercise jurisdiction if it is an inconvenient forum and a court in another state is a more appropriate forum. Courts may consider factors, such as: 1) whether another state has a closer connection with the child or the child’s family; or 2) whether the exercise of jurisdiction by a court of this state contravenes any of the purposes stated in the UCCJA. Domestic violence is not explicitly included as a factor in the model statute, but case law in many states has held that courts may consider domestic violence in making inconvenient forum decisions. Further, 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. Case law in many states has 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. Nevertheless, a survivor runs the risk that a court may find that she has acted with “unclean hands” under such circumstances.

²⁰ See UCCJA § 3(3)(ii).

Battered Immigrants and Family Law Issues: Custody, Support and Divorce

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 establish secure emergency jurisdiction and attempt to convince the other court, the court of the home state, to decline jurisdiction. Further, in some states, the state 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.²¹

UCCJEA

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), created in 1997 to help reconcile discrepancies between the UCCJA and federal laws such as the Parental Kidnapping Prevention Act (PKPA) and the Violence Against Women Act (VAWA), again only addresses which court should decide a custody case, and does not address how such a case should be decided. Like the UCCJA, the UCCJEA also utilizes the four jurisdictional bases of home state, significant connection, emergency, and more appropriate forum. Unlike the UCCJA, however, the UCCJEA prioritizes home state jurisdiction and, except in the case of emergencies, prohibits a court from exercising jurisdiction if a proceeding consistent with the UCCJEA is pending elsewhere.²²

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, or a *parent or sibling of the child*, has been abused by the other parent.²³ This expands the basis for emergency jurisdiction provided for by the UCCJA to more fully include and protect a battered parent's decision 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 factors a state must consider in declining jurisdiction offer greater protection for survivors of domestic violence. 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.²⁴ If a court declines jurisdiction, the UCCJEA allows a temporary emergency jurisdiction order to become permanent, when the issuing state becomes the home state.²⁵ 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 clarifies that "domestic 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."²⁶

PKPA

The PKPA stands for the Parental Kidnapping Prevention Act.²⁷ It is a federal law enacted in 1980 and largely motivated by the same principles as state UCCJA statutes. The PKPA was designed to discourage interstate conflicts, deter interstate abductions, and promote cooperation between states about interstate custody matters. As part of the Violence Against Women Act of 2000, the PKPA's definition of "emergency jurisdiction" was broadened to cover domestic violence cases 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/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 when 1) they are deciding whether to enforce a custody determination made by a court in another state or tribe; 2) they are deciding whether to exercise jurisdiction even though there is a custody proceeding already pending in another jurisdiction; and 3) they are asked to modify an existing custody or visitation order from another jurisdiction.²⁸

²¹ Adapted from Deborah Goelman & Christine McLeod Pate, *supra* note 14.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ UCCJEA art. II § 208, Comment, *available at* <http://www.law.upenn.edu/bll/ulc/fnact99/1990s/uccjea97.htm>.

²⁷ See 28 U.S.C. § 1738A (1999).

²⁸ Adapted from Deborah Goelman and Christine McLeod Pate, *supra* note 14.

The PKPA shares the same jurisdictional bases as the UCCJEA. The PKPA recognizes continuing jurisdiction in the state that issued the initial custody determination consistent with the PKPA. 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.²⁹

While the PKPA does not explicitly carry criminal consequences, the Federal Fugitive Felon Act does operate in conjunction with the PKPA to locate parents who have crossed state lines with their children without the knowledge or consent of the other parent.³⁰ 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.

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.³¹ Currently, almost every state criminally forbids custodial interference by parents or relatives of the child.³² While these statutes may share similarities in name, purpose and structure, statutory provisions concerning the definition of lawful custodian, the availability of statutory exceptions or defenses, and the severity of the criminal penalty for conviction vary greatly between states. An advocate for a survivor who has already left or wishes to leave the state with her children should carefully consult the relevant statutes 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 varied approaches taken by state statutes.

THE DEFINITION OF "CUSTODY" OR "LAWFUL CUSTODIAN" IN PARENTAL KIDNAPPING STATUTES

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 lines, it is important to determine the legal relationships that exist between the battered immigrant client, the other parent, and the child. Depending on the state in which she resides, factors such as: 1) whether your client is married to the father of her children; 2) has established paternity of the children if she is unmarried; or 3) has entered into a legal custody or visitation order, may affect the applicability of custodial interference statutes to the client's situation. Examine the state custodial interference statute to see how it defines custodial relationships. Then determine whether the relationship between the battered immigrant client and her abuser fits within the statutory definition. Once it has been established that their relationship falls under the statute, counsel should next examine whether flight will or has occurred after a custody order was entered. 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.

²⁹ *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.

³⁰ See 28 U.S.C. § 1738A; 42 U.S.C. § 653-655, 663; 18 U.S.C. § 1073 note (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 [28 U.S.C. § 1738A and note, among other things; for full classification of this Act, consult U.S.C. Tables volumes] set forth in section 302 [42 U.S.C. § 502], 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.)

³¹ THE NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, FAMILY ABDUCTION: PREVENTION AND RESPONSE ix (2002), at http://www.missingkids.com/en_US/publications/NC75.pdf. (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.")

³² See end section on state custodial interference statutes.

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 a manner that violates an existing legal custody or visitation order. In addition to a variety of civil penalties she may face as a result of her violation of a custody/visitation order discussed below, a survivor may face enforcement of the original custody/visitation order pursuant to the federal Parental Kidnapping Prevention Act (PKPA). The PKPA is only applicable when a valid custody/visitation order already exists or there is a proceeding between the parents.³³

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, the primary focus of this section will be on the 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.³⁴ It further clarifies that the federal Fugitive Felon Act, 18 U.S.C. § 1073, applies to state felony parental kidnapping cases. This provision is of critical significance to 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 (NCIC).³⁵ Further, 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.

The requirements that must be met prior to the Federal Bureau of Investigation's (FBI) commencement of a federal Unlawful Flight to Avoid Prosecution (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) the written request of an appropriate state authority for federal assistance; and (4) the assurance that the fugitive will be extradited to the jurisdiction where sought for prosecution for 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. Attorney 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.³⁶

One option for survivors who intend to modify an existing custody order or petition for custody for the first time in the new state is to attempt to secure temporary emergency custody jurisdiction in their destination state pursuant to the UCCJA/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 and will further depend on individual judicial discretion.

Fleeing in the Absence of a Court-Ordered Custody or Visitation Award

Despite common misconceptions, status as the parent and primary caretaker of a child does not automatically authorize a parent to leave the state with their children without the consent of the other parent or guardian. In

³³ See 28 U.S.C. § 1738A, available at <http://www4.law.cornell.edu/uscode/28/1738A.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.)

³⁴ 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>.

³⁵ 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 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.)

³⁶ PATRICIA M. HOFF, PARENTAL KIDNAPPING: PREVENTION AND REMEDIES (1997), available at <http://www.abanet.org/ftp/pub/child/pkprevnt.txt>.

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:

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

Statute Applicable Only with Legal Custody/ Visitation Order or Proceedings

Currently, thirteen states³⁷ have criminal custodial interference statutes that are only applicable in situations where a custody proceeding has 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 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.

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.³⁸ 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.

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.³⁹ 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.⁴⁰

For example, in New York State, this issue of statutory applicability remains unsettled. Interstate custodial interference in New York State is a class E felony.⁴¹ The offense is established by showing that "a relative of a child...intending to hold such child permanently or for a protected period, and knowing that he has no legal right to do so...takes or entices such child from his lawful custodian."⁴² The statutory ambiguity arises in

³⁷ These states are: Arkansas, Iowa, Louisiana, Maryland, Michigan, Mississippi, Nevada, North Carolina, Rhode Island, South Carolina, South Dakota, Texas, and Utah. See end of section for state statute information.

³⁸ 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 end of section for state statute information.

³⁹ 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 end of section for state statute information.

⁴⁰ 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 Dept. of the Supreme Court of the State of New York, 1998).

⁴¹ See N.Y. PENAL LAW § 135.50.

⁴² *Id.* § 135.45.

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considering whether one can “knowingly without right” take a child from its lawful custodian in the absence of a custody order through which both parents have parental rights as established through marriage or paternity. This ambiguity persists in case law: while recent case law suggests that conviction for custodial interference may occur even in the absence of a custody order,⁴³ an earlier case held that prosecutors had to prove defendant’s knowledge of a court order.⁴⁴

Consult the state’s 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.

POTENTIAL DEFENSES OR EXCEPTIONS THAT CAN BE USED BY DOMESTIC VIOLENCE VICTIMS WHO FLEE ABUSE WITH THEIR CHILDREN.

When prosecution under a parental kidnapping or custodial interference statute is brought against a victim of domestic violence, a battered woman fleeing abuse with her child 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 justificational 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.”⁴⁵ 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.⁴⁶ 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 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 into their custodial interference statutes, but specifically precludes a defendant from raising such a defense to take 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. Other states specifically preclude raising this type of a defense if the child was taken out of the state.⁴⁷ The rationale behind these restrictions or imminent harm defenses 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.⁴⁸

⁴³ *People v. Morel*, 566 N.Y.S.2d 653 (App. Div. 1991) (upheld indictment of custodial interference in the second degree despite absence of prior court order of custody/visitation).

⁴⁴ *People v. Lawrwo*, 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).

⁴⁵ BLACK’S LAW DICTIONARY 1053 (7th ed. 1999).

⁴⁶ See *United States v. Bailey*, 444 U.S. 394 (1980).

⁴⁷ See, e.g., N. H. REV. STAT. ANN. § 633:4 (interference with custody).

⁴⁸ See Susan S. Kreston, *Prosecuting Parental Kidnapping*, NCPA UPDATE (Nat’l Ctr. for the Prosecution of Child Abuse 1998), vol. 11, No. 4, at 1, available at http://www.ndaa.org/publications/newsletters/apri_update_vol_11_no_4_1998.htm.

Through the efforts of advocates for battered women, fourteen states currently have specific domestic violence related affirmative defenses against prosecution under custodial interference statutes.⁴⁹ 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 to invoking the statutory domestic violence defense to custodial interference.⁵⁰

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.⁵¹ 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 abducting parent.⁵²

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 the following commonly prescribed procedures:

- 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 person, the current address and telephone number of the child and the abducting parent, and the reason for the abduction.⁵³
- Within a reasonable time, commence a custody action consistent with the federal PKPA, the UCCJA or the UCCJEA,
- Inform the home state DA’s office of any change to the address or telephone number of the survivor parent and the child.

Such procedures 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, requiring a survivor to disclose her exact location and contact information raises serious concerns regarding her physical safety in her new location.⁵⁴ Counsel representing domestic violence victims in interstate custody and custodial interference cases should ask the court to keep all contact and location information regarding the victim confidential. If the information is being provided to a prosecutor’s office, the prosecution should be asked to keep the survivor’s contact information confidential so that they do not become the conduit through which the abuser is able to stalk or otherwise harm the victim.

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.⁵⁵ A defendant may be required to follow a sequence of procedures relating to her flight before invoking the “imminent harm to the child” defense.⁵⁶ Four states provide only for a general “good cause” defense.⁵⁷

⁴⁹ These states include: Arizona, California, D.C., Florida, Idaho, Illinois, Minnesota, Missouri, Nevada, New Jersey, Pennsylvania, Rhode Island, Washington, and Wisconsin.

⁵⁰ These states include: Arizona, California, Florida, Nevada, and New Jersey. See chart at the end of this chapter 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.)

⁵¹ CAL. PENAL CODE § 278.7.

⁵² *Id.*

⁵³ *Id.* (In California, a “reasonable time” within which a report to the DA’s office must be made is at least 10 days; a reasonable time to commence a custody proceeding is at least 30 days.)

⁵⁴ *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.”)

⁵⁵ These states are: Colorado, Hawaii, Louisiana, Maryland, Michigan, New Hampshire, New York, Ohio, Vermont, West Virginia, Wyoming.

⁵⁶ See end of section for a description of such procedures.

⁵⁷ These states are: Alaska, Montana, Utah, and Virginia.

Unfortunately, twenty states do not provide for any statutory exception or defense to prosecution for parental kidnapping.⁵⁸ In a jurisdiction where few or no defenses exist, a survivor may be able to raise a common-law “necessity” defense. 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.

IMMIGRATION CONSEQUENCES OF CRIMINAL CUSTODIAL INTERFERENCE CONVICTIONS

Avoiding custodial interference convictions is important for all battered women. 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. Convictions can significantly undermine the victim’s ability to obtain court orders that allow her to maintain custody of her children.

Non-citizen victims of domestic violence must be particularly careful to avoid criminal convictions for custodial interference. Custodial interference convictions are felonies in virtually every state and may be “crimes of moral turpitude” under immigration laws. When a parental abduction occurs in violation of an existing court order, the conviction may be for obstruction of justice. These criminal convictions carry with them potentially severe immigration consequences for non-citizen immigrant victims, which could possibly include any of the following:

- The possibility of a negative discretionary finding, leading to a denial of naturalized citizenship;
- Deportation based upon conviction of an aggravated felony;
- Permanent bars to returning to the United States;
- Having her VAWA immigration case discretionarily denied due to lack of good moral character; or
- Being deemed inadmissible and being denied lawful permanent residence despite approval of her VAWA self petition because she is found to lack good moral character.⁵⁹

Criminal convictions primarily affect immigration status because they are grounds of inadmissibility and grounds for deportability.⁶⁰ 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.⁶¹ Grounds of inadmissibility include criminal convictions.⁶² Thus, a battered immigrant could have her VAWA self-petition approved and, despite that approval, she can be denied legal permanent residency because she is inadmissible.⁶³ For battered immigrants in deportation proceedings before an immigration judge who otherwise qualify for VAWA cancellation of removal, criminal convictions could lead to denial. Grounds of inadmissibility generally apply to non-citizens in the following situations:

1. Undocumented non-citizens who entered the country illegally and have no legal status in the United States when immigration authorities initiate deportation/removal proceedings against them;
2. Any non-citizen who is seeking entry into the United States;
3. Any non-citizen who is applying for lawful permanent resident status; and
4. Lawful permanent residents who are applying for U.S. citizenship.⁶⁴

⁵⁸ 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.

⁵⁹ See ANN BENSON, WASHINGTON DEFENDER ASSOCIATION, IMMIGRATION CONSEQUENCES OF CRIMINAL CONDUCT: AN OVERVIEW FOR CRIMINAL DEFENDERS, PROSECUTORS AND JUDGES IN WASHINGTON STATE 1 (2001).

⁶⁰ See INA §§ 212(a)(2), 237(a)(2), 8 U.S.C.A. §§ 1182, 1227 (criminal grounds of inadmissibility; criminal grounds for deportability).

⁶¹ See INA § 212(a)(2) (criminal grounds of inadmissibility).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ BENSON, *supra* note 28, at 8.

Crimes of Moral Turpitude

Battered immigrants fleeing domestic violence with their children who are convicted of custodial interference could also suffer severe immigration consequences because they have a conviction for one “crime of moral turpitude.”⁶⁵ A conviction of a crime of moral turpitude may constitute grounds for inadmissibility or deportability.⁶⁶ 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].”⁶⁷ “In determining whether an offense involves moral turpitude, a fact-finder examines the crime as defined by the elements in the criminal statute, not the defendant’s actual conduct.” *Goldesthien v. INS*, 8 F. 3d 645 (9th Cir. 1993); *Matter of Short*, 20 I&N Dec. 136 (BIA 1989). The immigration consequences will depend upon the actions included in the language of the statute that the immigrant victims has violated, not the acts the immigrant victims actually committed.

While there is no definitive list of crimes which constitute moral turpitude, crimes of moral turpitude 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 have been found to involve moral turpitude.⁶⁸ 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, experts conclude that it is unlikely that an individual with custodial interference will be found to have committed a crime of moral turpitude.⁶⁹ Within the context of custodial interference statutes, only three states require malice as an element of their custodial interference statutes.⁷⁰ However, an intent of 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. 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 by invoking the Petty Offense Exception waiver.⁷¹ This exception is *only* available if the maximum penalty possible for the crime convicted or committed of does not exceed one year, and the immigrant was not *sentenced* to a term of imprisonment for more than 6 months (note: sentence only, not actual time served). Unfortunately, this exception is generally unavailable for battered immigrants fleeing abuse with their children across state lines. Almost every state makes interstate custodial interference a felony punishable by a sentence of over one year.

Grounds for Deportation

Any non-citizen lawfully admitted to the United States may be subject to criminal grounds for deportation.⁷² 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 face the following grounds for removal:

1. Crime of Moral Turpitude

- INA § 237(a)(2)(A)(i): Conviction for one crime involving moral turpitude committed within 5 years of admission to the United States, for which a sentence of one year or longer *may be imposed*.

⁶⁵ INA § 212 (a)(2)(A)(i).

⁶⁶ See INA § 212(a)(2)(A)(i)(I) (crime of moral turpitude as criminal ground for inadmissibility); INA § 237(a)(2)(A)(i) (crime of moral turpitude as basis for expedited removal).

⁶⁷ See *Jordan v. DeGeorge*, 341 U.S. 223, 235 n. 7 (1951).

⁶⁸ BENSON, *supra* note 28, at 60.

⁶⁹ *Id.*

⁷⁰ Including California, Florida, and New Mexico

⁷¹ See INA § 212(a)(2)(A)(ii)(II).

⁷² See INA § 237(a)(2), 8 U.S.C.A. § 1227(a)(2) (criminal offenses as grounds for deportation).

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Subject to waiver under § 237(a)(2)(A)(v) – if 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 within five years of her admission to the United States, 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.

2. Aggravated Felony

Under INA § 237(a)(2)(iii), another grounds for deportability is conviction of an “aggravated felony.”⁷³ The following provisions related to aggravated felonies may apply to a survivor of domestic violence fleeing across state lines with her children:

- 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 1 year.⁷⁴

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.

- 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.⁷⁵

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 would face conviction of an aggravated felony relating to obstruction of justice as another grounds for removal.

3. Crime of Domestic Violence

Finally, it is not uncommon for batterers to obtain retaliatory or mutual protection orders against their partners.⁷⁶ Batterers frequently use protection 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 protection provisions of civil protection order, she may be subject to INA § 237(A)(2)(E), a grounds of removal for perpetrators of domestic violence. However, if a battered immigrant is convicted of 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, generally, the alien was acting in self- defense; or *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 for flight in violation of her own civil protection order that confers visitation to the abusive parent.

⁷³ See INA § 101(a)(43).

⁷⁴ *Id.* § 101 (a)(43)(F).

⁷⁵ *Id.* § 101 (a)(43)(S).

⁷⁶ See ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING (2000).

A survivor convicted of custodial interference also risks being determined to lack good moral character. Good moral character is a factor in:

- VAWA self-petitions
- VAWA cancellation of removal/suspension of deportation
- Lawful permanent residency
- Naturalization

In each instance, 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 material against state and national criminal records data. Convictions for custodial interference could make proving good moral character much more difficult. In order to obtain permanent residence or another benefit, victims will have to prove they qualify for a VAWA waiver.

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 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,⁷⁷ 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 options and prospects for battered women who plan to petition the court to relocate prior to leaving the state with their children.⁷⁸

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.⁷⁹ This rationale is accepted despite research findings that severely limit this proposition in families where domestic abuse is present. Published studies by Dr. Janet Johnston show that, when domestic violence or severe conflict is present between parents, children deteriorate markedly when subjected to frequent visitation transfers.⁸⁰

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. Some states accomplish this by including in their custody statute a public policy statement concerning a parent's abilities to allow an open, loving, and frequent relationship between the child and the other parent. Other states

⁷⁷ See Merry Hofford et al., *Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice*, 29 FAM. L.Q. 197, 217 (1995).

⁷⁸ See also Janet M. Bowermaster, *Relocation Custody Disputes Involving Domestic Violence*, 46 KAN. L. REV. 433 (1998).

⁷⁹ *Id.* at 446.

⁸⁰ *Id.* at 447.

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include such provisions in their list of factors that a court is required to consider when determining the best interest of the child.⁸¹ These provisions can be harmful to battered parents seeking custody.

In jurisdictions that have “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 non-cooperativeness in custody proceedings. Battered women’s advocates 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.⁸² 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.⁸³ 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.⁸⁴

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 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.⁸⁵ Protection orders can award an/the immigrant victim custody without regard to her immigration status,⁸⁶ and can provide the immigrant victim important evidence that can help her immigration case.⁸⁷ 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.⁸⁸

FLEEING THE STATE WITHOUT THE CHILDREN

As discussed throughout this chapter, 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 situation due to lack of resources to support themselves and their children, or out of fear that flight with their children may result in their batterers’ 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.

The Model Code on Domestic Violence, drafted in 1994 by a multidisciplinary advisory committee comprised of judges, battered women’s advocates, attorneys, law enforcement officers, defense attorneys and other professionals, addresses topics including criminal penalties and procedures, civil protection orders, and family and children. 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-

⁸¹ 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).

⁸² *Id.*

⁸³ *Id.* at 202. See HOWARD A. DAVIDSON, A REPORT TO THE PRESIDENT OF THE AMERICAN BAR ASSOCIATION, THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN 1 (1994) (Children are harmed “cognitively, psychologically, and in their social development” by witnessing domestic violence against a parent at home.).

⁸⁴ NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, CUSTODY AND VISITATION DECISION-MAKING: WHEN THERE ARE ALLEGATIONS OF DOMESTIC VIOLENCE (1995).

⁸⁵ See generally Mary Ann Dutton, Leslye E. Orloff, & Giselle Aguilar Hass, *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).

⁸⁶ For a fuller discussion see Breaking Barriers Battered Immigrants and Civil Protection Orders and Ensuring Access to Protection Orders for Immigrant Victims of Family Violence Chapters.

⁸⁷ See Breaking Barriers Self-petitioning and Alternative Forms of Relief – U visas and Gender Asylum Chapter 3.

⁸⁸ See Leslye E. Orloff, et al., *Recent Development: Battered 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.)

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.⁸⁹ 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.⁹⁰ 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 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.

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. The survivor may also risk offending a court's authority over the custody matter. A battered parent's act of leaving the state with her children prior to or in violation of a custody order may be viewed by a court as an attempt to deprive the other parent of contact with his children. 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 in granting custody to a mother who had fled the state with her children only on the condition that she return 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.⁹¹ 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. Walker and Edwall 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:⁹²

"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."⁹³

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 abused parents if they suddenly move away in violation of a court order or if they temporarily conceal the

⁸⁹ See MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE § 402 (Nat'l Council of Juv. and Fam. Ct. Judges 1994). [hereinafter "MODEL CODE"], available at http://www.ncjfcj.org/dept/fvd/publications/main.cfm?Action=PUBGET&Filename=new_modelcode.pdf.

⁹⁰ See *id.* § 402(1)(a)

⁹¹ See, e.g., *DeCamp v. Hein*, 541 So. 2d 708 (Fla. Dist. Ct. App. 1989).

⁹² 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).

⁹³ *Id.*

whereabouts of the children while they are fleeing domestic violence. In some states, family courts take into account flight from harm in custody proceedings either under state statutes or case law that require consideration of domestic violence in custody cases.⁹⁴

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 wisdom in child abuse and domestic violence circles. 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.

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 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.⁹⁵

Section 403 of the Model Code articulates a rebuttable presumption that non-abusive parents should be the custodial parents, and that they should be free to move with the children to the location of their choice.⁹⁶ 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.⁹⁷ The test of the Model Code and 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.

While most states include domestic violence as a statutory factor that courts must consider when making custody determinations,⁹⁸ far fewer have mandated that courts consider evidence of domestic violence as contrary to the best interests of the child or to a stated preference for joint custody, or prohibit an award of joint custody when a court makes a finding that domestic violence has occurred.⁹⁹ While some jurisdictions have established a presumption against awarding sole or joint custody to an abusive parent, no state has followed the Model Code by adopting a special statutory provision for relocation cases involving domestic

⁹⁴ See generally Hoffard, *supra* note 197, 199

⁹⁵ See Bowermaster, *supra* note 76, 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 (App. Div. 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).

⁹⁶ MODEL CODE § 403.

⁹⁷ Bowermaster, *supra* note 76, at 459.

⁹⁸ *Id.*

⁹⁹ See The Family Violence Project of the National Council of Juvenile and Family Court Judges, *supra* note 65 at 217.

violence.¹⁰⁰ Despite the distinct historical tendency to preserve the visitation rights of the non-custodial 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.¹⁰¹

The model that attorneys representing battered women should urge courts to follow includes: not awarding custody, in whole or in part,¹⁰² 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.¹⁰³ Family court judges across the country who have received training on, and understand, domestic violence make custody awards to non-abusive parents using this approach.¹⁰⁴

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.¹⁰⁵ Since appellate relief can only be granted if the issues have been raised below, any battered woman seeking to relocate with her children should raise every constitutional argument to support her move.¹⁰⁶ Joan Zorza suggests that a battered woman make the following constitutional arguments supporting her position that she should be allowed to relocate:¹⁰⁷

1. 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.
2. A denial of the relocation would impermissibly discriminate against her on gender bias grounds, on the basis of her marital status, on the basis of her being a parent of minor children, and on the basis of her being an abused person who is being denied the ability to protect herself and/or her children, all based on Equal Protection grounds.
3. 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.
4. A denial of the relocation would deny the mother her fundamental rights to (re)marry (if she does intend to remarry), to create a new family, and to enjoy the privacy of the familial association.
5. If she is not relocating to flee the father, the 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).

¹⁰⁰ *Id.* at 209.

¹⁰¹ See Bowermaster, *supra* note 76; See, e.g., Vachon v. Pugliese, 931 P.2d 371 (Alaska 1996); *In re* Marriage of Burgess, 913 P.2d 473 (Cal. 1996); *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).

¹⁰² Joan Zorza, *Recognizing and Protecting the Privacy and Confidentiality Needs of Battered Women*, 29 FAM. L.Q. 274, 305 (1995).

¹⁰³ *Id.*

¹⁰⁴ 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 National Immigrant Women's Advocacy Project (NIWAP) at 202-274-4457 or info@niwap.org.

¹⁰⁵ Zorza, *supra* note 100, at 306.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 307.

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6. The denial of the relocation also 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, the abused woman needs to raise her best factual arguments. These are likely to include the following:

1. That the court should take domestic violence and safety concerns into account when adjudicating any custody, including relocation, case.
2. Why other solutions are not possible or will only aggravate the situation, 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 help, but actually further aggravates the situation and endangers battered women.
3. Anything that the abuser has done (e.g., abusing or harassing her, not paying support, etc.) that makes it difficult 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).
4. 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 therefore has no legally permissible reason to prevent the relocation.
5. All the reasons why the 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.
6. 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.
7. Any reasons why the move will be desirable/necessary for her, including what definite plans she has for herself and her child(ren).

ETHICS ISSUES

Numerous ethical issues arise when a client's need to find safety for herself and her children intersects with state criminal custodial interference laws. The American Bar Association's Model Rules of Professional Conduct (Model Rules) have been adopted in some manner by approximately 41 states.¹⁰⁸ 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.¹⁰⁹

Rule 1.2(d) states that a lawyer may not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent. 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. In jurisdictions that exempt survivors of domestic violence from their criminal custodial interference statutes, a lawyer's assistance and representation of a client who wishes to flee the state is not likely to violate the Code of Professional Responsibility. Arguably, in jurisdictions where flight from domestic violence is a defense to charges of parental kidnapping, an attorney's advice to a client on the legal implications of her decision will not violate Rule 1.2(d).

¹⁰⁸ 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, 33-34 (1998).

¹⁰⁹ *Id.*

Determination of what constitutes “assisting” a client can be murky. In *People v. Chappell*, an attorney represented a client in a dissolution proceeding. The 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 an attorney to stay, but as a mother to run.”¹¹⁰ 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. Chappell’s conduct was found to violate:

1. 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);
2. 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);
3. R.P.C. 8.4(b) (it is professional misconduct for a lawyer to commit a criminal act by aiding the lawyer's client to commit a crime); and
4. R.P.C. 8.4(c) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation).¹¹¹

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. While Chappell’s attorney knowingly assisted her client in illegal conduct, an 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 potentially rely on her good faith belief that her client’s conduct may be found to be legal under the statutory and common-law defenses available to victims of domestic violence in that jurisdiction. In advising a client, attorneys must be mindful of their ethical obligations and should research any possible defenses for clients fleeing domestic violence with their children.

Strategies for Advising Survivors Who Wish to Flee the State with Children¹¹²

An attorney 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 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. 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, and services to assist domestic violence victims. 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.

The following list of questions and answers are designed to guide attorneys 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 attorneys 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.

¹¹⁰ *People v. Chappell*, 927 P.2d 829 (Colo. 1996).

¹¹¹ *Id.*

¹¹² Adapted from DEBORAH GOELMAN, FREQUENTLY ASKED QUESTIONS ABOUT LAWS GOVERNING INTERSTATE CHILD CUSTODY CASES 4

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

As discussed above, a survivor and her attorney should understand how 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 statutes¹¹³ or include flight from domestic violence as an affirmative defense under the state statute.¹¹⁴ 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.¹¹⁵ Others permit flight to protect the parent¹¹⁶ or the child from imminent harm.¹¹⁷ Others have a general “good cause” defense,¹¹⁸ or rely upon the criminal defense of necessity.¹¹⁹

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 VAWA¹²⁰ or U Visa¹²¹ immigration relief, and determine whether the abusive spouse or parent has filed immigration papers for her and/or her children. Many victims will qualify to file a VAWA self-petition, a U Visa application 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 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 based on that conviction.¹²²

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

¹¹³ See, e.g., FLA. STAT. Ch. 787.03(6).

¹¹⁴ See, e.g., 720 ILL. COMP. STAT. 5/10-5(C)(3).

¹¹⁵ See, e.g., CAL. PENAL CODE § 278.7(C).

¹¹⁶ See, e.g., IDAHO CODE § 18-4506(2)(b).

¹¹⁷ See, e.g., *id.* § 18-4506(2)(a).

¹¹⁸ See, e.g., HAW. REV. STAT. § 707-726(2).

¹¹⁹ See, e.g., *Gerlach v. State*, 699 P.2d 358 (Alaska Ct. App. 1985) (explains necessity defense to a criminal custodial interference matter).

¹²⁰ See *Breaking Barriers Self-Petitioning and Alternative Forms of Relief – U visas and Gender Asylum Chapter 3*.

¹²¹ See *Breaking Barriers Alternative Forms of Relief – U visas and Gender Asylum Chapter 3*.

¹²² See *Breaking Barriers Battered Immigrants and the Criminal Legal System Chapter 9*. For referrals to immigration attorneys, contact: questions@asistahelp.org or info@niwap.org.

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 attorneys who can advise you on family court practice in your area.

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.¹²³ 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.

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 PKPA gives continuing jurisdiction to the state that issued the initial custody determination. 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.¹²⁴

¹²³ Klein & Orloff, *supra* note 2.

¹²⁴ See, e.g., Stoneman v. Drollinger, 64 P.3d. 997 (Mont. 2003) (The 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.).

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