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Representing Battered Women During Welfare Reform

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You Can Run But Can You Hide? Relocation Rights and Domestic Violence

By Roberta Ikemi

Roberta Ikemi, an attorney, is in private practice and engaged in various volunteer projects. Previously, she worked for the California Women's Law Center and the Legal Aid Foundation of Los Angeles. She can be reached at (800) 292-8161.

I. Introduction

Generally the right to relocate means that a parent can legally retain custody of the child after moving to a new community or state. The right to relocate becomes a problem when the noncustodial parent protests the move. Although custody disputes can occur at any point in a relationship, the consequences of a custody dispute can be dangerous or even deadly when domestic violence is present. In an effort to continue to exert control over their victims, batterers often contest the efforts to relocate through protracted litigation and other forms of harassment and intimidation. For domestic violence victims and their children, the right to relocate can mean safety, peace of mind, reconnecting with support networks of family and friends, and the chance to reconstruct their lives. Whether the case involves domestic violence, the right to relocate is not always clear.

This article is intended to serve as a starting point for examining the many issues that converge in any discussion of domestic violence and child custody law, particularly the right to relocate or flee the batterer. Many of these issues could not be fitted into this article but nonetheless should be discussed in any dialogue about domestic violence and the right to relocate. For example, amendments to welfare law at the federal and state levels will affect the ability of some domestic violence victims to free themselves and their children effectively from the batterer. Or confidentiality laws and their implementation can mean literally life or death to some domestic violence victims. /1/ The various paradigms used to describe child custody should be discussed from the perspective of domestic violence.

II. Background

The relocation issue is a modern issue, the result of our increased mobility and changes in the economy and life-styles. An examination of the business page in any newspaper or magazine reveals companies moving, merging, and laying off employees. Since 1985, nearly half of all households in the United States have relocated. /2/ Each year 11.5 million children move with their families. /3/ Mobility in American society is evident not only in the geographical sense. Families form and reconfigure themselves through separation, divorce, and marriage. In 1992, the Knight-Ridder News Service reported that one in three Americans was a part of a stepfamily with the number growing to one in two by the year 2000.

In contrast to the modernity of the relocation issue, domestic violence may be as old as humankind itself. Domestic violence has been tolerated and even condoned since biblical times. Under early English common law, the "rule of thumb" allowed the husband the legal right to inflict moderate discipline upon his wife and children provided he used a stick no larger around than his thumb. /4/ This tradition was carried to the New World. In the American colonial period, divorces of bed and board for abuse or cruelty (legal separation) were granted in some colonies. In other colonies, women fled the violent home and became "runaway wives." /5/

While reformers worked to protect children from abuse and neglect, spousal abuse was, for the most part, ignored until the late 19th century when women began to demand that attention be given to the problem. /6/ Child abuse gained national attention in the 1960s when concerned physicians wrote articles about the problem. /7/ Domestic violence gained similar attention a decade later due to the work of domestic violence advocates. /8/ As a result of the increased attention, the states passed laws prohibiting and punishing domestic violence and protecting the victims with restraining or protection orders and shelters.

The history of child custody parallels the history of women and domestic violence. Fathers in colonial America had full control over children, who were viewed as important economic producers. The courts were called in to resolve issues of custody and control of children primarily in the area of contracts for indenture or conflicts regarding child labor. /9/ While mothers were to be accorded reverence and respect, they had few enforceable rights to the association and labor of their children. /10/

By the midnineteenth century, the courts employed the "tender years" principle in custody disputes. According to this principle, mothers, unless totally unfit as parents, were automatically given custody of younger children. Mothers were believed to be better suited to nurture and care for infants, especially girls. In practice, families would be split with custody of the young children going to the mother and older children to the father. /11/ Custody disputes became increasingly adversarial in order to show the mother to be unfit because she was at fault in the divorce. /12/

By the 1960s, custody laws became gender neutral in an effort to promote equality even though much of the underlying gender bias was still intact. The tender years and other custody rules were abandoned or modified in favor of the "best interest of the child" standard. /13/ Lawmakers and judges have been struggling with the standard ever since. Changes in family structures, social attitudes, gender roles, law, economics, and technology made the development and application of the standard difficult and sometimes dangerous particularly for domestic violence victims and their children.

Domestic violence remains a major social and medical problem affecting everyone in the violent household. According to Health and Human Services Secretary Donna Shalala, "In this country domestic violence is just about as common as giving birth -- about 4 million instances [annually] of each." /14/ Between 3.3 million and 11 million children in the United States are at risk of witnessing woman abuse each year. /15/ Children who witness violence experience various psychological, emotional, and social problems. Boys who witness domestic violence have an increased probability of becoming batterers while girls have an increased chance of becoming

victims. /16/ In addition to the trauma of viewing violence, researchers have found that 50 percent of men who frequently assaulted their wives also frequently abused their children. The same researchers also reported that women who were beaten had a rate of child abuse twice as high as that of women who were not abused. /17/ In spite of these large numbers of women and children at risk of serious physical and emotional injury, our legal responses to the needs of domestic violence victims and their children who need to relocate are confused and sometimes nonexistent.

III. The Decision to Leave the Batterer

The decision to leave the violent household and the abuser is a difficult one. Women who end their relationships through separation or divorce often find their husbands escalating the threats and violence. Divorced and separated women experience domestic violence at a rate much higher than that of married or never-married women. Women who were separated from their husbands were victimized by an intimate at a rate three times higher than that of divorced women and twenty-five times higher than that of married women. /18/ Several studies show the strong connection between separation and domestic violence and that violence is a factor in ending relationships. /19/ In one study, 60 percent of women who had left their abusers reported continued ongoing psychological abuse in the forms of threats and intimidation often involving the children. /20/

The decision to relocate may depend in part on whether the victim lives in an urban or rural area. Women who live in rural areas may be reluctant to seek help or leave a battering situation because they fear the lack of privacy at agencies where they know the personnel. Their problems might become the subject of gossip, and local social pressures to remain in the home may intrude into their lives. /21/ Calling the police is not always an option since in small communities the effectiveness of local police is often compromised by their relationships with the batterers. /22/ Geographic and social isolation and lack of transportation make fleeing even more difficult. /23/

For many women the decision to leave depends heavily upon what they perceive to be the better option for their children. Studies of battered women reveal that they are deeply concerned about the welfare of their children and often decide to leave the home in order to protect the children. Batterers intimidate the women by threatening to harm the children and wage long custody battles. /24/

Threats to obtain custody are a part of a general pattern of male control during separation and divorce. The threats and harassment do not end with divorce. /25/ Batterers are acutely aware of using mothers' concerns and attachment to their children as a way of taking control of the women. In her testimony before Congress in 1992, Judge Rosalyn Bell eloquently summarized the importance of child custody in the context of the violent relationship:

[T]he victims [of domestic violence] have very low self-esteem and the abusers are motivated by the need to control. One of the ways this comes out is when the woman wants to leave. . . . [W]hile men may want to have custody of children frequently, the loss doesn't bear the same stigma to men that it does to women. So, when the women are told, "If you leave I will kill you," that isn't as

frightening to them as when they are told, "You will never see the children again if you leave," and that many times makes them stay. /26/

Courts, policymakers, and researchers fail to recognize violence during separation since they tend to compartmentalize violence as taking place during relationships while divorce and separation are considered separately. /27/ The result of the compartmentalized view is that women may be negotiating away support, custody, and visitation rights due to fear of violence and loss of custody without the courts and others recognizing the power imbalance. Affecting women's ability to live independently, the violence and intimidation contribute to poverty. /28/

Even when women have protective orders, they may find it necessary to flee the abusive situation. I received a letter from a woman who sums up the reasons for relocating with her child. She was physically and verbally abused by her ex-husband, who continually violated restraining orders. She wrote that she could not get any help from law enforcement or district attorneys: "I HAVE MOVED AWAY BECAUSE HE MOVED AROUND THE CORNER FROM MY RESIDENCE, AND I HAVE GIVEN HIM MY PARENTS ADDRESS SO THAT HE DOES NOT KNOW WHERE I LIVE. This is the best thing that I could do for me and my daughter since I left him. We have much more peace and quiet in our life." /29/

Some domestic violence victims remain in the violent home because they are terrified by the prospect of homelessness for themselves and their children. While the fear of homelessness may seem unreasonable in relation to the potential for continued abuse, fears of homelessness are not entirely unfounded. Survey statistics show that approximately 40 percent of the women and children in homeless shelters were fleeing domestic violence. /30/ In Oregon domestic violence was the main reason children and their families were homeless in 1988. /31/ Other states show similar statistical relationships between domestic violence and homelessness. /32/

Domestic violence shelters often lack the space to accommodate everyone who needs their help. In Los Angeles County 18 shelters have 430 beds in an area with a population of 11 million. Four out of five families seeking shelter are turned away because of lack of space, family size exceeding available space, and sometimes an unwillingness to abide by shelter rules. Because of dormitory style arrangements in some facilities, families with teenage sons may have difficulty finding shelter accommodations. /33/ Smaller counties or towns might not have their own shelters. Moreover, shelters are not a solution to the housing problems of domestic violence victims because usually length of stay is limited.

For battered immigrant women, immigration status can be an important part of the decision to flee the abuser. Prior to the Violence Against Women Act (VAWA) and the its Safe Homes for Immigrant Women section, /34/ only the citizen or lawful permanent resident spouse could file for an immigration visa for their alien spouses and children. Abusive spouses would use the promise of filing for the visa and the threat of deportation to assert control over their wives and children. The fear of losing their children and being deported kept many immigrant women from taking action against their abusers. To remedy the injustice, the VAWA enables abused spouses and children to self-petition for an immigration visa or suspension of deportation if they meet the requirements. The VAWA was intended to help the abused spouses and children leave abusive relationships and

yet remain in the United States by distinguishing the decision to leave, separate from, or divorce an abusive spouse from immigration status. /35/

Although the VAWA was signed into law in 1994, the Immigration and Naturalization Service released its interim proposed regulations on March 26, 1996, which became final on May 28, 1996. /36/ Advocates for immigrant domestic violence victims were awaiting the promulgation of these regulations before advising their clients on their eligibility and the process for applying for VAWA protection. /37/

Any immigrant woman, or her domestic violence advocate, should contact an immigration attorney or legal aid office in order to obtain assistance in making an application for self-petition or suspension of deportation and meeting the evidence and documentation needs for the various requirements. The legal aid office or domestic violence advocate can also help the immigrant woman with other forms of legal relief for domestic violence victims. /38/

IV. Fleeing the Abuser and Parental Kidnapping

Although the statutes reviewed in this section do not answer directly the question whether the domestic violence victim has a right to relocate, they can influence her ability to relocate with the children successfully. On a public policy level, criminal consequences of the victim's flight with the children from a batterer and the defenses available to the victim illustrate the relative values assigned to the mother's safety, the child's safety, and the other parent's right to custody. A similar tension can also be seen in family laws about custody.

While common sense seems to dictate leaving the violent home with the child during a domestic violence emergency, fleeing with the child may lead to charges of child abduction or parental kidnapping or interference with custody or visitation. The penalties for parental kidnapping are severe. For example, parental kidnapping or child concealment prosecuted as a felony in California carries the penalty of a 16-month, two-year or three-year term in state prison, a \$10,000 fine, or both. /39/

Parental kidnapping is a crime in all states, but 28 states allow a good-cause defense to the charge. Ten states allow the fleeing parent a defense to the charge of child abduction or concealment when she is fleeing domestic violence or other imminent danger. /40/ Eighteen states allow a defense for the parent who has taken the child in the good-faith belief that the action was necessary to protect the child from danger. Two states, New Hampshire and Vermont, limit the good-cause defense to fleeing parents who remain in the state with the child -- the defense is not available if the person has left the state with the child. /41/ Several of these states have procedural requirements for utilizing the good-cause defense against child abduction. For example, Maryland requires the fleeing parent to file with the court within 96 hours of such flight a petition justifying the taking of the child and requesting a change of custody in order to use the good-cause defense. /42/ New Jersey law requires the parent fleeing with the child to notify the police or county prosecutor in the child's county of residence or Department of Youth and Family Services within 24 hours of the escape. /43/ Some of the states require the fleeing parent to notify law enforcement or judicial authorities that the child has been taken in order to protect him while others require filing a petition

in court for custody or justifying the move. /44/ The reporting requirements may also have time limits in which notification must be made.

California's child concealment law illustrates the types of conditions that can be imposed on the good-cause defense. California allows a good-cause defense against child concealment to be used by a person who has a custody right when there is no court order determining custody or visitation rights. A parent can be charged with child concealment in the absence of an order for custody or visitation when she "maliciously takes, detains, conceals, or entices away that child within or without the state, without good cause, and with the intent to deprive the custody right of another person or a public agency also having a custody right to that child." /45/ Good cause includes (1) "a good faith and reasonable belief" that taking the child is necessary to protect the child from "immediate bodily injury or emotional harm" or (2) a "good faith and reasonable belief" by a domestic violence victim who has a right of custody to the child that the child will suffer "immediate bodily injury or emotional harm" if left with the batterer parent. /46/ "Emotional harm includes having a parent who has committed domestic violence against the parent who is taking and concealing the child." /47/ The fleeing parent must file a report with the district attorney and a request for custody within a reasonable period of time. To protect the fleeing parent and child, their address is kept confidential until ordered disclosed by the courts. /48/ A similar good-cause defense is not available to California parents who have custody and/or visitation rights under a court order. /49/

Because the fleeing parent must show good cause in order to avoid criminal penalties, evidence of domestic violence and the need to take the child becomes critical. Medical records, police reports, photographs of injuries, diary, and the declarations of witnesses are examples of the types of documentation that can be used. This documentation will also be important later in custody proceedings in which the battered parent must show that physical custody or unsupervised visitation by the abuser is not in the child's best interests and that her efforts to block contact with the batterer were reasonable.

Ideally, a woman who is thinking of leaving or has fled with a child should be able to consult with a shelter, advocate, or attorney familiar with domestic violence matters because the good-cause defense has different requirements. Domestic violence advocates can help the domestic violence victim find and assemble the documentation that may be needed. More important, they can help her develop a safety plan and other strategies for surviving. Advocates can assist victims in obtaining restraining or protective orders which can include other orders for removing the batterer from the residence, for custody, and for support. An advocate's or an attorney's assistance ensures that the battered woman is not being harassed or intimidated into an unwanted or unwise compromise. Unfortunately, recent Legal Services Corporation funding cuts by Congress have reduced the number of advocates available.

Although fleeing a violent home may seem almost impossible at times, staying in the violent situation may expose the victim to loss of custody and criminal and civil liabilities for child endangerment, in addition to further danger to herself and her children. The victim parent can be held responsible for endangering or failing to protect the child whom she does not remove from the violent home. /50/ Civil liability may also be a problem particularly where the child was the victim of sexual abuse from the abuser. /51/ For example, a domestic violence victim in California could

be responsible for failing to protect her child from the batterer if they remain in the home. However, she could not be prosecuted for being homeless with the child if they run from the violent home. /52/

V. Right to Relocate and State Law

Most states added domestic violence statutes to their laws during the 1970s. /53/ These were usually laws punishing domestic violence and providing civil remedies such as restraining or protective orders. While bipartisan support can usually be garnered for domestic violence bills concerning punishment for batterers or increased funds for shelters, bills concerning custody and visitation including the problem of domestic violence have met with rancorous fighting. As a result, the move to integrate domestic violence concerns into family law, primarily in the area of child custody, has been slow and uneven.

The courts in most states are required to determine custody or a change of custody based on the "best interests of the child." Generally this standard requires looking at the health, welfare, and safety of the child in conjunction with any other relevant facts. Thirty-five states mandate that the courts consider domestic violence when determining the best interests of the child. The domestic violence factor is usually given a value equal to the other factors in the statutes. In two other states, the court may consider domestic violence but is not required to do so. /54/ In contrast, the Model Code on Domestic and Family Violence elevates the safety and well-being of the domestic violence victim and child above all other best-interests factors. The Model Code focuses attention on the violence factor by requiring an examination of the history of violence. /55/

For example, California employs the best-interests-of-the-child standard with a domestic violence factor for evaluating requests for custody. California law instructs the court to look at three factors and other relevant information when evaluating the best interests of the child: (1) health, safety, and welfare of the child; (2) any history of domestic violence or child abuse by either parent; and (3) the nature and amount of contact with each of the parents. /56/ The court can require substantial independent corroboration of the abuse before considering the allegations (i.e., documentation such as medical records, police reports, and information from child protective services or social services agencies). /57/ In contrast to the simplicity of the California statute, Colorado's statute instructs the court to consider all relevant factors including a list of 13 enumerated factors, including child abuse and spouse abuse. /58/

Other statutes that affect relocation include those that give the custodial parent the right to determine the residence of the child /59/ and those encouraging frequent and continuing contact with both parents. /60/ Although the statutes giving the custodial parent the right to determine the residence of the child seem to give the custodial parent the right to relocate, the courts have interpreted them as subordinate to the frequent-and-continuing-contact statutes. /61/

California law also encourages the court to make any custody and visitation orders consistent with any restraining orders, protective orders, or emergency protective orders. /62/ The same statute mandates that any transfers for custody or visitation be made without compromising the safety of the child and abused parent and the confidentiality of the location of the shelter or other

confidential location. The court is mandated to consider whether supervised visitation is necessary. /63/

Even when the courts are required to consider domestic violence in determining the best interests of the child, the courts continue to issue orders requiring continued contact with the violent parent. Gender bias and a lack of knowledge about domestic violence often obscure the importance of domestic violence in family law cases. A survey of a sample of California judges showed that a total of 99.3 percent strongly agreed that domestic violence is detrimental to children who are aware of it. Amazingly only 46.6 percent of the judges recognized a history of spousal abuse as a factor which would make a nearly equal division of physical custody inappropriate. In contrast, 49.5 percent of judges consider a high degree of conflict to be a reason not to grant an order for equal custody. /64/

In Massachusetts over a quarter of the family law attorneys reported that child custody awards rarely or never considered the father's violence against the mother. An additional 30 percent of attorneys reported that domestic violence was sometimes considered. Judges and family service officers shared the attitude that it was important to separate violence against the mother from that of the child since women would try to use domestic violence as a means of preventing visitation. /65/

These attitudes demonstrate the need for domestic violence training and sensitivity for all court personnel. A clear gap still exists between the theoretical understanding of domestic violence and its actual presence and impact in real lives.

VI. Right to Relocate and the Courts

While the states were making some progress statutorily toward the recognition and consideration of domestic violence in custody and visitation decisions, the relocation cases wandered about the legal map. The courts felt obligated to reconcile the best interests of the child with frequent and continuing contact while forgetting the custodial parent's right to determine the child's residence. /66/

Originally, the California Supreme Court discussed change of custody from one parent to the other on two occasions. First, the court held that custody was not to be changed unless a change in "material facts and circumstances" made it "essential or expedient for the welfare of the child." /67/ On the second occasion, it held that a change of custody was appropriate only where a significant change of circumstances indicated that a different custody arrangement would be in the best interests of the child. /68/ In both cases the court discussed the need for stability and continuity in the child's life.

The lower courts reinterpreted the two holdings to be a test for allowing relocation rather than a change in custodial parents. The lower courts nearly redefined "best interests of the child" to be equivalent to "frequent and continuing contact" with the noncustodial parent while creating confusion around the right to relocate. /69/ Family Code section 3020 declares that "it is public policy of this state to assure minor children frequent and continuing contact with both parents" after their relationship has ended and encourages the sharing of the rights and responsibilities of child

rearing. In time the legislative intent, which was focused on the child, was interpreted as the noncustodial parent's right to frequent and continuing contact. Some court decisions even used "frequent and continuing contact" as a threshold test limiting the best-interests-of-the-child determination. /70/ Similarly the stability and continuity discussed by the California Supreme Court was translated by some into a need to maintain the custody and visitation schedule without any deviation.

The courts were mildly concerned, when ordering a change of custody, with the child's loss of frequent and continuing contact with the custodial parent. While inconvenience to the noncustodial parent was often discussed at length, the opportunity costs for the custodial parent, usually the mother, and her family and the best interests of the child were dismissed with a few words. /71/ The courts also tended to neglect the custodial parent's right to determine the child's residence subject to court restraint where the child's rights or welfare are prejudiced. /72/ Some courts allowed interstate moves while others prohibited moves from one county to another. The confusion was reflected in unpublished trial court level cases as well. /73/ As a result, family law lawyers and parents lamented the unpredictability of relocation cases. /74/

On April 15, 1996, the California Supreme Court announced its decision in the relocation case *In re Marriage of Burgess*, which may end some of the relocation confusion. /75/ The court held that the custodial parent did not have a burden to show that the move was necessary in an initial custody determination or in the modification of an existing arrangement which was based on the "best interests" of the child. Instead, the custodial parent had a right to determine the residence of the child consistent with Family Code section 7501. /76/ In an extended discussion, the court stated that the legislative finding of "frequent and continuing contact" did not limit the trial court's discretion to determine the best interests of the child. The court emphasized the "paramount need for continuity and stability in custody arrangements -- and the harm that may result from disruption of established patterns of care and emotional bonds with the primary caretaker," /77/ which would argue against changing custody in relocation cases.

Initial reaction to the decision included predictions by lawyers on both sides of the case that the decision might put more pressure on fathers to fight for joint physical custody or full physical custody in order to avoid the possibility of the custodial parent and the children moving away. /78/ Other litigation efforts may increase in the area of showing that the custodial parent is moving in order to frustrate visitation. Efforts to reestablish joint custody preference through legislation will probably increase in number and intensity. Bills to reestablish joint custody as the preferred form of custody have been introduced in every session of the California legislature since joint custody was removed as the preference. In order to work, joint custody requires the parents to live in relatively close proximity to each other; /79/ thus, it can be used as a means of limiting the right to relocate. Joint custody works well only when the parents get along and live in close proximity to each other. Joint custody endangers domestic violence victims by allowing them increased contact with their abusers. /80/

Two weeks earlier, the New York Court of Appeals, the state's highest court, held that

each relocation request must be considered on its own merits with due consideration of all the relevant facts and circumstances and with predominant emphasis being

placed on what outcome is most likely to serve the best interests of the child. While the respective rights of the custodial and noncustodial parents are unquestionably significant factors that must be considered . . . , it is the rights and needs of children that must be accorded the greatest weights, since they are innocent victims of their parents' decision to divorce and are the least equipped to handle the stress of the changing family situation. /81/

By emphasizing the best interests of the child, the New York Court eliminated a three-step test used by the lower courts to determine whether a move should be allowed. The three-step test analysis required the trial court to consider whether the proposed relocation would deprive the custodial parent of "regular and meaningful access" to the child; if the deprivation was established, then it was presumed that the move was not in the best interests of the child unless exceptional circumstances justified the move; and if the presumption were rebutted, then the court went on to consider the best interests of the child. /82/

The court discussed two major problems with the three-step analysis. First, the lower courts could not agree on what constituted meaningful access. The attempted definitions involved measures of quality and quantity of contact and distance between the two parents. Second, the court found the three-step analysis erected an artificial barriers that prevented the consideration of all relevant factors because it was often applied mechanically.

Like California's frequent-and-continuing-contact tests, the earlier three-step analysis placed the rights of the noncustodial parent before the best interests of the child by looking first to the noncustodial parent's right to meaningful access to the child. The new standard gives greater discretion to the court to "be free to consider and give appropriate weight to all of the factors that may be relevant to the determination." /83/ Consideration of the parent's reasons for seeking or opposing the move is suggested as only one of the factors to be examined. The New York court abandoned the three-step rule in part because "such a rule overlooks the value for the children that strengthening and stabilizing the new, post-divorce family unit can have in a particular case." /84/

Both new decisions and their emphases on stability and continuity are in line with the current thinking of family preservation, child welfare, and battered women's programs who agree that preserving the mother-child unit in the aftermath of violence is a desired outcome. The period after leaving the violent household is filled with multiple life changes for the child that often includes moving, changing schools, and loss of belongings and pets compounded by the stress felt by the mother. For the child the social support involves the mother. For the mother, social support entails social, legal, financial, and informational support services. Domestic violence victims, adults and children, who have social supports have a better chance of adjusting to changes such as leaving the abuser or divorce with a reduced risk of emotional or physical illness than those who lack similar social supports. /85/

According to one commentator, the most important impact of the two cases may be that they are "big, bold steps into the real world, a place where it is senseless to pretend that divorce is anything other than a wrenching into pieces of something that used to be whole." /86/ If this is the case, then maybe we will begin to see a growing awareness of the impact of domestic violence upon families and the need to fashion custody arrangements that take them into consideration.

VII. Right to Relocate and Interstate Travel

State law in the form of the Uniform Child Custody Jurisdiction Act (UCCJA) and federal law, the Parental Kidnapping Prevention Act of 1980 (PKPA), govern jurisdiction of child custody cases that involve more than one state. These highly complex laws might limit the ability of the fleeing parent to obtain a custody order in another state; they are not a problem for the parent who already has an order that is favorable to the relocation.

Each state has adopted a version of the UCCJA, which was intended to provide predictable rules in interstate child custody disputes, thereby ensuring continuity and stability as much as possible in custody arrangements. The UCCJA was created in response to the growing numbers of interstate custody problems in an increasingly mobile society. Before the UCCJA, states did not give full faith and credit to custody orders from other states so a parent could shop around for a favorable custody decision by moving to another state. In contrast to the notion of custody arrangements being "fluid and temporary," the UCCJA favors the well-being of the child in the form of stability and continuity in custody arrangements. /87/ Because the UCCJA was designed before widespread attention was given to domestic violence, it did not contain any provisions regarding domestic violence. California added domestic violence to the list of emergency conditions under which the state could assert jurisdiction over an interstate custody dispute.

Congress enacted the PKPA /88/ in order to correct the problems created by states failing to adopt the UCCJA or modifying it to defeat its intended purpose. Like the UCCJA, the PKPA was enacted to ensure continuity and stability in custody arrangements as well as prevent parental kidnapping by strictly limiting the circumstances under which a new state, the destination of the fleeing parent and child, can assume jurisdiction of a custody matter. Unlike the UCCJA, the PKPA establishes a statutory preference for home-state jurisdiction with exceptions granted when no home state can be established. However, Congress failed to consider the interrelationship between the UCCJA and the PKPA. Where there is conflict, the federal law, the PKPA, preempts the UCCJA. /89/

The PKPA does not address the problem of domestic violence; thus the home-state preference and notice requirements for exercising jurisdiction can be major problems for the domestic violence victim who is seeking a custody order or modification in a new state.

While it does not address custody or relocation rights, the VAWA may provide some measure of safety for a parent who has fled to another state with the children. The VAWA makes protection orders "portable" so that they are given full faith and credit in other states but prevents honoring a mutual restraining order when there was no written request or pleading for the mutual restraining order or no specific findings were made by the issuing court. /90/ The VAWA also makes illegal interstate travel with the intent to commit domestic violence or to violate a protective order. These provisions have increased the value of having a valid domestic violence restraining order even when one is fleeing to another state. /91/

The VAWA requires the U.S. Postal Service to keep confidential the addresses of individuals protected by a valid restraining orders and of domestic violence shelters. /92/

VIII. Conclusion

The recent decisions from New York and California make the prospect for relocation far more optimistic for domestic violence victims and children. Other states may follow the lead of these two influential states. The emphasis on continuity and stability of custody arrangements combined with the current trend to consider the domestic violence victim and the children as a unit may lead the way toward a true best-interests-of-the-child standard. In any case, attorneys and advocates must remain vigilant and participate in the political process to ensure that family and domestic violence laws continue to develop toward keeping all domestic violence victims and their children truly safe.

Footnotes

/1/ See Joan Zorza, *Recognizing and Protecting the Privacy and Confidentiality Needs of Battered Women*, 29 *Fam. L. Q.* 273 (Summer 1995).

/2/ Janet Bowermaster, *Sympathizing with Solomon*, 31 *J. Fam. L.* 795 n.15 (Fall 1992), citing U.S. Census Bureau data.

/3/ *Id.* at n.16.

/4/ John Dewitt Gregory et al., *Understanding Family Law* 175 (1993).

/5/ Glenda Riley, *Divorce: An American Tradition* 11 (1991).

/6/ Linda Gordon, *Heroes of Their Own Lives* 252 (1988).

/7/ Gregory et al., *supra* note 4, at 177.

/8/ *Id.* at 175.

/9/ Mary Ann Mason, *From Father's Property to Children's Rights: The History of Child Custody in the United States* 3 (1994).

/10/ *Id.* at 14.

/11/ Riley, *supra* note 5, at 83.

/12/ Mason, *supra* note 9, at 63.

/13/ See *id.* at 121 -- 60.

/14/ Don Colburn, *When Violence Begins at Home*, *Wash. Post*, March 15, 1994.

/15/ Susan Schechter & Jeffrey L. Edleson, In the Best Interest of Women and Children: A Call for Collaboration Between Child Welfare and Domestic Violence Constituencies 3 (1994) (paper prepared for the conference on Domestic Violence and Child Welfare: Integrating Policy and Practice for Families sponsored by the University of Iowa School of Social Work and the Johnson Foundation, June 8 -- 10, 1994).

/16/ See *id.*; Kathryn Conroy, Child Witness to Domestic Violence (Jan. 1996) (paper available from author at Columbia Univ. Sch. of Soc. Work, 622 W. 113th St., Mail Code 4634, New York, NY 10025-7982.)

/17/ Schechter & Edleson, *supra* note 15, at 3.

/18/ Ronet Bachman & Linda E. Saltzman, Violence Against Women: Estimates from the Redesigned Survey August 1995 (U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics 1995). The survey authors caution the reader that the survey reflects the marital status of the respondent at the time of the survey interview so that whether a woman was separated or divorced at the time of violence or whether the change in marital status was a result of the violence cannot be determined.

/19/ Demie Kurz, Violence During Separation, 2 Violence Against Women 63, 67 (1996).

/20/ Conroy, *supra* note 16, at 2.

/21/ Neil Websdale, Rural Woman Abuse: The Voices of Kentucky Women 1 Violence Against Women 309, 333 (1995).

/22/ *Id.* at 332. This complaint is also voiced by women in urban areas.

/23/ *Id.* at 313, 319 -- 20.

/24/ Schechter & Edleson, *supra* note 15, at 11 -- 12.

/25/ Kurz, *supra* note 19, at 76.

/26/ Battered Women and Child Custody Litigation: Hearing Before the Subcomm. on Intellectual Property & Judicial Admin. of the House Comm. on the Judiciary on H.R. 1252, H.R. 1253, and H. Con. Res. 89, 102d Congress, 2d Sess. 160 (Aug. 6, 1992) (testimony by Judge Rosalyn B. Bell, Associate Judge, Maryland Court of Special Appeals).

/27/ *Id.* at 63 -- 64.

/28/ *Id.* at 79.

/29/ Anonymous typewritten letter postmarked Feb. 22, 1995.

/30/ Joan Zorza, *Woman Battering: A Major Cause of Homelessness*, 24 *Clearinghouse Rev.* 421 (1991); National Coalition for the Homeless, *NCH Fact Sheet: Domestic Violence and Homelessness* (Mar. 1994).

/31/ Zorza, *supra* note 30, at 421; National Coalition for the Homeless, *supra* note 30.

/32/ See *supra* note 30.

/33/ Los Angeles County Domestic Violence Council, *Domestic Violence Training Materials* (1996) (available from the Los Angeles County Domestic Violence Council, 3175 W. 6th St., Los Angeles, CA 90020; (213) 738-3192).

/34/ Violence Against Women Act, Pub. Law No. 103-322, Secs. 40701 et seq., 108 Stat. 1953 (Sept. 13, 1994).

/35/ See Leslye E. Orloff and Nancy Kelly, *A Look at the Violence Against Women Act and Gender-Related Political Asylum*, 1 *Violence Against Women* 380 (1995).

/36/ 61 Fed. Reg. 13061 (March 26, 1996). See also Charles Wheeler, *New Protections for Immigrant Women and Children Who Are Victims of Domestic Violence*, in this issue.

/37/ National Immigration Law Center, *INS Implements Battered Spouse and Child Self-Petition Law, Immigrants' Rights Update*, Apr. 17, 1996, at 4. This article is a concise summary of the Violence Against Women Act's Safe Homes for Immigrant Women section and the implementing regulations promulgated by the Immigration and Naturalization Service.

/38/ See Leslye E. Orloff et al., *With No Place to Turn: Improving Legal Advocacy for Battered Immigrant Women*, 29 *Fam. L. Q.* 313 (Summer 1995), for a discussion of the legal problems encountered by battered immigrant women and possible legal remedies. See also Deena L. Jang, *Caught in a Web: Immigrant Women and Domestic Violence*, 28 *Clearinghouse Rev.* 397 (Special Issue 1994).

/39/ Cal. Penal Code Secs. 277, 278.5.

/40/ California (Cal. Penal Code Sec. 277); Florida (Fla. Stat. Ann. Sec. 787.03); Illinois (Ill. Ann. Stat. ch. 38, para. 10-5); Kentucky (Ken. Rev. Stat. Ann. Sec. 403.420 (1992)); Minnesota (Minn. Stat. Ann. Sec. 609.26); Missouri (Mo. Ann. Stat. Sec. 565.160); New Jersey (N.J. Stat. Ann. Sec. 2C:13-4 (West 1991)); Rhode Island (R.I. Gen. Laws Sec. 11-26-1.1); Washington (Wash. Rev. Code. Sec. 9A.40.080); Wisconsin (Wis. Stat. Ann. Sec. 948.30). See also National Center on Women and Family Law, *Domestic Violence as a Statutory Defense Against Custodial Interference or Kidnapping Charges*, in this issue.

/41/ N.H. Rev. Stat. Ann. Sec. 633:4.IV; Vt. Stat. Ann. tit. 13, Sec. 2451.

/42/ Md. Code Ann., Fam. Law Sec. 9-306.

/43/ N.J. Stat. Ann. Sec. 2C:13-4 (West 1991).

/44/ The following states require the fleeing parent to notify law enforcement, county prosecutor, child protective services, or other designated agency: California (Cal. Penal Code Sec. 277); New Jersey (N.J. Stat. Ann. Sec. 2C:13-4 (West 1991); Ohio (Ohio Rev. Code Ann. Sec. 2919.23); and Washington (Wash. Rev. Code Sec. 9A.40.080). The following states require the filing of a petition for custody or justifying the taking of the child: Maryland (Md. Code Ann., Fam. Law Sec. 9-306); New Hampshire (N.H. Rev. Stat. Ann. Sec. 633.4); and Vermont (Vt. Stat. Ann. tit. 13, Sec. 2451).

/45/ Cal. Penal Code Sec. 277.

/46/ Id. Sec. 277.

/47/ Id. Sec. 277(b).

/48/ Id. Sec. 277.

/49/ Id. Sec. 278.5.

/50/ Nancy Hollander, *Modern Witch Hunt: Mothers Aren't to Blame for Spouses' Abuse of Children*, L.A. Daily J., July 29, 1993, at 6.

/51/ Mark Hansen, *Liability for Spouse's Abuse: New Theory Holds Mothers Accountable for Failing to Protect Children*, 79 A.B.A. J. 16 (Feb. 1993).

/52/ Cal. Welf. & Inst. Code Sec. 300.

/53/ Gregory et al., *supra* note 4, at 175.

/54/ The Family Violence Project, 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 -- 2 (1995).

/55/ Model Code On Domestic And Family Violence Sec. 402 (National Council of Juvenile & Fam. Court Judges 1994).

/56/ Cal. Fam. Code Sec. 3011.

/57/ Cal. Penal Code Sec. 3011.

/58/ Colo. Rev. Stat. Sec. 14-10-124.

/59/ E.g., Cal. Fam. Code Sec. 7501.

/60/ E.g., *id.* Sec. 3020; Colo. Rev. Stat. Sec. 14-10-124(1).

/61/ See discussion in sec. VI *infra*.

/62/ Cal. Fam. Code Sec. 3031.

/63/ *Id.* Sec. 3031.

/64/ Judicial Council Advisory Committee on Gender Bias in the Courts, *Achieving Equal Justice for Victims of Domestic Violence* at 37 in *Achieving Equal Justice for Women and Men in the Courts: The Draft Report of the Judicial Council Advisory Committee on Gender Bias in the Courts* (Mar. 23, 1990).

/65/ Mass. Sup. Jud. Ct., *Commw. of Mass.*, *Report of the Gender Bias Study of the Supreme Judicial Court* 69 (1989).

/66/ See Carol Bruch & Janet Bowermaster, *The Relocation of Children and Custodial Parents: Public Policy, Past and Present*, 30 *Fam. L. Q.* (forthcoming Summer 1996), for a detailed discussion and exhaustive survey of the various states' judicial attempts to incorporate frequent and continuing contact into the best-interests-of-the-child test in order to resolve the right-to-relocate problem.

/67/ *In re Marriage of Carney*, 24 Cal. 3d 725, 730 (1979).

/68/ *Burchard v. Garay*, 42 Cal. 3d 531, 534 (1986).

/69/ See, e.g., *In re Marriage of Carlson*, 229 Cal. App. 3d 1330 (1991).

/70/ See, e.g., *In re Marriage of Burgess*, 39 Cal. Rptr. 2d 213 (Cal. Ct. App.1995).

/71/ See, e.g., *In re Marriage of Fingert*, 221 Cal. App. 3d 1575 (1990), *In re Marriage of McGinnis*, 7 Cal. App. 4th 473 (1992); *Burgess*, 39 Cal. Rptr. at 213.

/72/ Cal. Fam. Code Sec. 7501. See *In re Marriage of Hoover & Shaw*, 46 Cal. Rptr.2d 737 (Cal. Ct. App. 1995).

/73/ The Coalition for Family Equity, a California group which has campaigned for the right to relocate, interviewed custodial parents who had sought court permission to relocate with their children. Most of the custodial parents are mothers who wanted to relocate due to employment or educational opportunities, remarriage, domestic violence, or a combination of factors. Their requests were denied usually after much litigation. A sampling of the experiences is contained in the amicus brief that Joan Zorza and I submitted on behalf of the Coalition for Family Equity in *In re Marriage of Burgess*, 913 P.2d 473 (Cal. 1996) (Clearinghouse No. 51,177).

/74/ Aurora Mackey, *Who Gets the Kids?*, *Cal. Law.*, Apr. 1993, at 24-25

/75/ *Burgess*, 913 P.2d at 473.

/76/ *Id.* at 476. Cal. Fam. Code Sec. 7501 states: "A parent entitled to the custody of a child has a right to change the residence of the child, subject to the power of the court to restrain a removal that would prejudice the rights or welfare of the child." See Bruch & Bowermaster, *supra* note 66, for an in-depth discussion of section 7501 and the relocation cases in California and the other states.

/77/ Burgess, 913 P.2d at 478.

/78/ Maura Dolan, Justices Ease Relocation of Children in Divorce Cases, L.A. Times (Internet ed.), Apr. 16, 1966.

/79/ Brigitte Bodenheimer, Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications, 65 Cal. L. Rev. 1009 (1977).

/80/ Judicial Council Advisory Committee on Gender Bias in the Courts, *supra* note 64, at 50. Although joint custody is not a preference or presumption in California, some judges continue to order it.

/81/ Tropea v. Tropea, 1996 WL 137476, *6 (Mar. 26, 1996) (Clearinghouse No. 51,081).

/82/ *Id.* at *4.

/83/ *Id.* at *7.

/84/ *Id.* at *6.

/85/ Schechter & Edleson, *supra* note 15, at 12 -- 13.

/86/ Robin Abcarian, Realistic Endings for Modern Fairy Tales, L.A. Times (Internet ed.), Apr. 17, 1996.

/87/ Bodenheimer, *supra* note 79, at 983.

/88/ Parental Kidnapping Prevention Act of 1980, 28 U.S.C. Sec. 1738A.

/89/ Gregory et al., *supra* note 4, at 366 -- 67.

/90/ Violence Against Women Act, Pub. Law No. 103-322, 108 Stat. 1931, 18 U.S.C. Secs. 2261 -- 62 (Sept. 13, 1994).

/91/ See Catherine F. Klein, Full Faith and Credit: Interstate Enforcement of Protection Orders Under the Violence Against Women Act of 1994, 29 Fam. L. Q. 253 (1995), for a survey of various states' interpretations and implementations of the full-faith-and-credit provision.

/92/ 42 U.S.C. Sec. 13951.