

CLEARINGHOUSE REVIEW

JOURNAL OF POVERTY LAW

INSIDE

Welfare Reform

Violence Against
Women Affecting
the Workplace

Unemployment
Compensation

New Protections for
Immigrant Women and
Children

Mutual Restraining
Orders

Mediation

Removal of Children
from Victims

Child Custody and
Visitation

Relocation Rights



Representing Battered Women During Welfare Reform

Copyright 1996 by the National Clearinghouse for Legal Services, Inc. All rights reserved.

Domestic Violence as a Statutory Defense to Custodial Interference or Kidnapping Charges

By Nechama Masliansky

Nechama Masliansky is executive director, National Center on Women and Family Law, Inc., 275 Seventh Ave., Suite 1206, New York, NY 10001; (212) 741-9480; fax (212) 741-6438, E-mail at HN1193@handsnet.org. The center acknowledges the research assistance of Erin K. O'Brien, a law student.

The battered person who relocates because of domestic violence is frequently subjected to retaliatory charges of custodial interference or kidnapping initiated by the abuser.

In some jurisdictions, such as New Jersey, /1/ one way to try to avert this outcome is as follows: Complete a form given to the county prosecutor identifying the location of the battered person and the child. The prosecutor contacts the town or county police in the area from which the battered person departed and tells them that she is in a safe location, although the location is not disclosed. Then the battered person files for an immediate restraining order. Since law enforcement personnel are not eager to bring criminal charges if they do not have to, this process may head off their bringing charges. Of course, this method does not prevent the abuser from going to the family or probate court in the jurisdiction from which the victim fled in order to get her to return to that jurisdiction.

If charges are brought, the following statutes make spousal abuse and/or child abuse a defense against custodial interference or kidnapping offenses. In addition, statutes which make "good faith," "just excuse," or "good cause" a defense are listed because a court may interpret them as covering spousal and/or child abuse. /2/

ALABAMA

Ala. Code Sec. 13A-6-45(b) (1995) (a person does not commit a crime under this section if the actor's sole purpose is to assume lawful control of the child). See also *Kennedy v. State*, 640 So. 2d 22 (Ala. Crim. App. 1993) (the statute requires proof of specific intent to assume unlawful control of the child).

ALASKA

Alaska Stat. Sec. 11.51.125 (1995) [Failure to permit visitation with a minor]: "(d)(3) 'just excuse' includes illness of the child which makes it dangerous to the health of the child for visitation to take place in conformance with the court order; 'just excuse' does not include the wish of the child not to have visitation with the person entitled to it."

CALIFORNIA

Cal. Penal Code Sec. 277 (West Supp. 1996) (it is a crime for any person with a right to custody or visitation (but no actual order) to take, detain, conceal or entice away a child 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): "As used in this section, good cause means a good faith and reasonable belief that the taking, detaining, concealing, or enticing away of the child is necessary to protect the child from immediate bodily injury or emotional harm. 'Good cause' also includes the good faith and reasonable belief by a person with a right of custody of the child who has been the victim of domestic violence by another person with a right of custody of the child, that the child, if left with the other person, will suffer immediate bodily injury or emotional harm. The person who takes, detains, or conceals the child shall file a report with the district attorney's office of his or her action, and shall file a request for custody, within a reasonable time in the jurisdiction where the child had been living, setting forth the basis for the immediate bodily injury or emotional harm to the child. The address of the parent, or a person who has been granted access to the minor child by a court order, who takes, detains, or conceals the child, with good cause, shall remain confidential until released by court order." (No similar defense is added once custody or visitation orders are issued.)

COLORADO

Colo. Rev. Stat. Sec. 18-3-304 (1986) [Violation of custody]: "(3) It shall be an affirmative defense either that the offender reasonably believed that his conduct was necessary to preserve the child from danger to his welfare, or that the child, being at the time more than fourteen years old, was taken away at his own instigation without enticement and without purpose to commit a criminal offense with or against the child."

DISTRICT OF COLUMBIA

D.C. Code Ann. Sec. 16-1023 (1989) [Defense to prosecution]: "(a) No person violates this act [custodial interference] if the action: (1) Is taken to protect the child from imminent physical harm; (2) Is taken by a parent fleeing from imminent physical harm to the parent."

FLORIDA

Fla. Stat. Ann. Sec. 787.03(6) (West 1992) [Interference with custody]: "(6) This section shall not apply in cases where a spouse who is the victim of any act of domestic violence or who has reasonable cause to believe he or she is about to become the victim of any act of domestic violence, as defined in Sec. 741.28, or believes that his or her action was necessary to preserve the child or the incompetent person from danger to his welfare, seeks shelter from such acts or possible acts and takes with him or her any child 17 years of age or younger." Fla. Stat. Ann. Sec. 787.04(5) (West 1992) [Felony custodial interference]: "(5) It is a defense under this section that a person who leads,

takes, entices or removes a minor beyond the limits of the state reasonably believes that his action was necessary to protect the minor from child abuse as defined in Sec. 827.04."

IDAHO

Idaho Code Sec. 18-4506 (Michie Supp. 1995) [Child custody interference defined -- Defenses]: "2. It shall be an affirmative defense to a violation of the provisions of subsection 1 of this section that: (a) The action is taken to protect the child from the imminent physical harm; (b) The action is taken by a parent fleeing from imminent physical harm to himself;"

ILLINOIS

Ill. Ann. Stat. ch.38, para. 10-5 (West Supp. 1992) [Child abduction]: "(c) It shall be an affirmative defense that: (3) The person was fleeing an incidence or pattern of domestic violence."

LOUISIANA

La. Rev. Stat. Ann. Sec. 14:45.1 (1986) [Interference with the custody of a child]: "A. . . . It shall be an affirmative defense that the offender reasonably believed his actions were necessary to protect the welfare of the child."

MARYLAND

Md. Code Ann., Fam. Law Sec. 9-306 (1991) [Clear and present danger to child]: "(a) Petition -- If an individual violates the provisions of Sec. 9-304 or Sec. 9-305 of this subtitle [custodial interference], the individual may file in an equity court a petition that: (1) states that, at the time the act was done, a failure to do the act would have resulted in a clear and present danger to the health, safety, or welfare of the child; and (2) seeks to revise, amend, or clarify the custody order. (b) Defense -- If a petition is filed as provided in subsection (a) of this section within 96 hours of the act, a finding by the court that, at the time the act was done, a failure to do the act would have resulted in a clear and present danger to the health, safety, or welfare of the child is a complete defense to any action brought for a violation of Sec. 9-304 or Sec. 9-305 of this subtitle."

MICHIGAN

Mich. Comp. Laws Ann. Sec. 750.350a (1991) [Detention or concealment by . . . parents]: /3/ "5. It is a complete defense under this subsection if a parent proves that his or her actions were taken for the purpose of protecting the child from an immediate and actual threat of physical or mental harm, abuse, or neglect."

MINNESOTA

Minn. Stat. Ann. Sec. 609.26 (West Supp. 1996) [Depriving another of custodial or parental rights]: "Subdivision 2. Defenses. It is an affirmative defense if a person charged under subdivision 1 proves that: (1) the person reasonably believed the action taken was necessary to protect the child from physical or sexual assault or substantial emotional harm; (2) the person reasonably believed the action taken was necessary to protect the person taking the action from physical or sexual assault."

MISSISSIPPI

Miss. Code Ann. Sec. 97-3-51 (Supp. 1995) (custodial interference requires intent to violate a court order).

MISSOURI

Mo. Ann. Stat. Sec. 565.153.1, 565.156.1(5) (West Supp. 1996) ("good cause" is a defense to parental kidnapping); Mo. Ann. Stat. Sec. 565.160 (West Supp. 1996) [Defenses to parental kidnapping and child abduction]: "It shall be an absolute defense to the crimes of parental kidnapping and child abduction that: (3) The person was fleeing an incident or pattern of domestic violence."

MONTANA

Mont. Code Ann. Sec. 45-5-633 (1995) [Defenses to visitation interference and aggravated visitation interference]: "(1) A person does not commit the offense of visitation interference or aggravated visitation interference if he acts: . . . (c) with reasonable cause."

NEVADA

Nev. Rev. Stat. Ann. Sec. 200.359 (Michie Supp. 1995) [Custodial interference]: "8. This section does not apply to a person who detains, conceals or removes a child to protect the child from the imminent danger of abuse or neglect or to protect himself from imminent physical harm, and reported the detention, concealment or removal to a law enforcement agency or an agency which provides protective services within 24 hours after detaining, concealing or removing the child, or as soon as the circumstances allowed. As used in this subsection: (a) 'Abuse or neglect' has the meaning ascribed to it in paragraph (a) of subsection 3 of NRS 200.508. (b) 'Agency which provides protective services' has the meaning ascribed to it in NRS 432B.030."

NEW HAMPSHIRE

N.H. Rev. Stat. Ann. Sec. 633:4 (1986) [Interference with custody]: "III. It shall be an affirmative defense to charge under paragraph I or II that the person so charged was acting in good faith to protect the child from real or imminent physical danger. Evidence of good faith shall include but shall not be limited to the filing of a nonfrivolous petition documenting such danger and seeking to modify the custody decree in a court of competent jurisdiction within this state. Such petition must be filed within 72 hours of termination of visitation rights. IV. The affirmative defense set forth in paragraph III shall not be available if the person charged with the offense has left the state with the child."

NEW JERSEY

N.J. Stat. Ann. Sec. 2C:13-4 (West 1991) [Interference with custody]: "c. It is an affirmative defense to a prosecution under subsection a. of this section, which must be proved by clear and convincing evidence, that: (1) The actor reasonably believed that the action was necessary to preserve the child from imminent danger to his welfare. However, no defense shall be available pursuant to this subsection if the actor does not, as soon as reasonably practicable but in no event more than 24 hours after taking a child under his protection, give notice of the child's location to the police department of the municipality where the child resided, the office of the county prosecutor in the county where the child resided, or the Division of Youth and Family Services in the Department of Human Services; . . . d. It is an affirmative defense to a prosecution under subsection a. of this section that a parent having the right of custody reasonably believed he was fleeing from imminent physical danger from the other parent, provided that the parent having custody, as soon as reasonably practicable: (1) Gives notice of the child's location to the police department of the municipality where the child resided, the office of the county prosecutor in the county where the child resided, or the Division of Youth and Family Services in the Department of Human Services; or (2) Commences an action affecting custody in an appropriate court. e. The offenses enumerated in this section are continuous in nature and continue for so long as the child is concealed or detained."

NEW MEXICO

N.M. Stat. Ann. Sec. 30-4-4 (1995) [Custodial/visitation interference] Section B ("good cause" is a defense for one person having the right to custody or visitation with a child interfering with the custody or visitation of another person who also has such a right).

NEW YORK

N.Y. Penal Law Sec. 135.50 (McKinney Supp. 1995) [Custodial interference in the first degree]: "It shall be an affirmative defense to a prosecution under subdivision one of this section that the victim

had been abandoned or that the taking was necessary in an emergency to protect the victim because he had been subjected to or threatened with mistreatment or abuse."

OHIO

Ohio Rev. Code Ann. Sec. 2905.04 (Baldwin 1996) [Child stealing]: "(B) It is an affirmative defense to a charge under this section that the actor reasonably believed that his conduct was necessary to preserve the minor's health or welfare."

Ohio Rev. Code Ann. Sec. 2919.23 (Baldwin 1996) [Interference with custody]: "(C) It is an affirmative defense to a charge of enticing or taking under division (A)(1) of this section that the actor reasonably believed that his conduct was necessary to preserve the child's health or safety. It is an affirmative defense to a charge of keeping or harboring under division (A) of this section that the actor in good faith gave notice to law enforcement or judicial authorities within a reasonable time after the child or committed person came under his shelter, protection or influence."

OKLAHOMA

Okla. Stat. Ann. tit. 43, Sec. 527 (West Supp. 1996) [Violations -- defenses]: "B. It shall be an affirmative defense either: 1. That the offender reasonably believes that the act was necessary to preserve the child from danger to his welfare; or 2. That the child, being at the time more than fourteen (14) years old, was taken away at his own instigation without enticement and without purpose to commit a criminal offense with or against the child and that the offender had a reasonable belief that if not taken, the child would run away to a location unknown to either the custodial or noncustodial parent or would otherwise cause serious harm to himself. Provided, however, that such defenses shall not apply if the offender committed said act within thirty (30) days of an order of the district court relating to custody of the minor or unless the offender, within seventy-two (72) hours of the taking of the child: a. notifies the Department of Human Services of such removal and of the location of the child, and b. files an action for modification of the custody order with the court having proper jurisdiction of the case. Upon receipt of such notification, the Department of Human Services shall immediately notify the local law enforcement agency nearest to the current location of the child of the taking and where the child is located."

PENNSYLVANIA

18 Pa. Cons. Stat. Ann. Sec. 2904 (1983) [Interference with custody of children]: "(b) Defenses -- It is a defense that: (1) the actor believed that his action was necessary to preserve the child from danger to its welfare." See also 23 Pa. Cons. Stat. Ann. Sec. 6108(a)(4) (West Supp. 1995).

PUERTO RICO

Although there is no statute providing for an affirmative defense to custodial interference based on domestic violence, see Rule 171 of Criminal Procedure (1963), appendix II of Title 34 [extenuating circumstances]: "[E]xtenuating circumstances which may be considered on sentencing include . . . (d) the defendant[s] conduct is partially excusable for some other reason which does not constitute a defense of those affirmatively alleged . . .[;] (h) the defendant was motivated by the desire to provide for the basic needs of his family or for himself. . . ."

RHODE ISLAND

R.I. Gen. Laws. Sec. 11-26-1.1 (1994) [Child snatching]: "It shall be an affirmative defense that: . . . (3) The person was fleeing an incidence or pattern of domestic violence."

SOUTH CAROLINA

S.C. Code Ann. Sec. 17-23-170 (Law. Co-op. Supp. 1995) [Admissibility of evidence concerning battered spouse syndrome; notice; lay testimony.]: "(A) Evidence that the actor was suffering from the battered spouse syndrome is admissible in a criminal action on the issue of whether the actor lawfully acted in self-defense, defense of another, defense of necessity, or defense of duress. This section does not preclude the admission of testimony on battered spouse syndrome in other criminal actions. This testimony is not admissible when offered against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge. (B) Expert opinion testimony on the battered spouse syndrome shall not be considered a new scientific technique the reliability of which is unproven. (C) Lay testimony as to the actions of the batterer and how those actions contributed to the facts underlying the basis of the criminal charge shall not be precluded as irrelevant or immaterial if it is used to establish the foundation for evidence on the battered spouse syndrome. (D) The foundation shall be sufficient for the admission of testimony on the battered spouse syndrome if the proponent of the evidence establishes its relevancy and the proper qualifications of the witness. (E) A defendant who proposes to offer evidence of the battered spouse syndrome shall file written notice with the court before trial."

SOUTH DAKOTA

The statute does not provide a defense, but defenses have been permitted by the courts. By case law, it can be reversible error for the trial court to prohibit the introduction of any evidence relating to the defendant's justification or necessity defense against a charge of "taking, enticing away or keeping of unmarried minor child by parent" (S.D. Codified Laws Ann. Sec. 22-19-9). See *State v. Rome*, 426 N.W.2d 19 (1988); see also 452 N.W.2d 790 (1990) (fear of harm to child from mother and her boyfriend).

UTAH

Utah Code Ann. Sec. 76-5-303 (1995) [Custodial interference] ("good cause" is a defense under section 1 -- taking, enticing, concealing, or detaining a child under age 16 from its lawful custodian).

VERMONT

Vt. Stat. Ann. tit. 13, Sec. 2451 (Michie Supp. 1995) [Custodial interference]: "(c) It shall be a defense to a charge of keeping a child from the child's lawful custodian that the person charged with the offense was acting in good faith to protect the child from real and imminent physical danger. Evidence of good faith shall include, but is not limited to, the filing of a non-frivolous petition documenting that danger and seeking to modify the custodial decree in a Vermont court of competent jurisdiction. This petition must be filed within 72 hours of the termination of visitation rights. This defense shall not be available if the person charged with the offense has left the state with the child."

WASHINGTON

1996 Wash. Legis. Serv. ch. 318, Substitute Senate Bill No. 6009 (RCW 9A.40.080) [Custodial interference; assessment of costs; defense; consent defense, restricted]: "(2) In any prosecution of custodial interference in the first or second degree, it is a complete defense, if established by the defendant by a preponderance of the evidence, that: (a) The defendant's purpose was to protect the child, incompetent person, or himself or herself from imminent physical harm, that the belief in the existence of the imminent physical harm was reasonable, and that the defendant sought the assistance of the police, sheriff's office, protective agencies, or other court of any state before committing the acts giving rise to the charges or within a reasonable time thereafter; . . . or (d) The offender, after providing or making a good faith effort to provide notice to the person entitled to access to the child, failed to provide access to the child due to reasons that a reasonable person would believe were directly related to the welfare of the child, and allowed access to the child in accordance with the court order within a reasonable period of time. The burden of proof that the denial of access was reasonable is upon the person denying access to the child."

WEST VIRGINIA

W.Va. Code Sec. 61-2-14d (1989) [Concealment or removal of minor child from custodian or from person entitled to visitation; penalties; defenses]: "(c) It shall be a defense under this section that the accused reasonably believed such action was necessary to preserve the welfare of the minor child."

WISCONSIN

Wis. Stat. Ann. Sec. 948.31 (1996) [Abduction of another's child; constructive custody]: "(4)(a) It is an affirmative defense to prosecution for violation of this section if the action: 1. Is taken by a parent or by a person authorized by a parent to protect his or her child in a situation in which the parent or authorized person reasonably believes that there is a threat of physical harm or sexual assault to the child; 2. Is taken by a parent fleeing in a situation in which the parent reasonably believes that there is a threat of physical harm or sexual assault to himself or herself; 3. Is consented to by the other parent or any other person or agency having legal custody of the child; or 4. Is otherwise authorized by law. (b) A defendant who raises an affirmative defense has the burden of proving the defense by a preponderance of the evidence."

WYOMING

Wyo. Stat. Sec. 6-2-204 (1995) [Interference with custody; presumption of knowledge of child's age; affirmative defenses; penalties]: "(c) It is an affirmative defense to a prosecution under this section that: (i) The action was necessary to preserve the child from an immediate danger to his welfare."

Footnotes

/1/ See, e.g., the New Jersey, Nevada, and Ohio statutes, below.

/2/ The National Center on Women and Family Law, Inc., publishes several resources that may be helpful in such cases, including *Guide to Interstate Custody: A Manual for Domestic Violence Advocates* (2d ed. 1995), *Defending a Battered Woman Accused of Parental Abduction* (1992), and earlier manuals on interstate child custody disputes and parental kidnapping. In international parental kidnapping cases, a federal statute makes the fleeing in an incident or pattern of domestic violence a complete defense. See 18 U.S.C. Sec. 1204 (1993).

/3/ As amended, effective June 1, 1996.