FULL FAITH AND CREDIT:
PASSPORT TO SAFETY

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This collection of chapters represents work in-progress and clearly should not be interpreted as definitive with regard to the many issues surrounding full faith and credit. The goal of the monograph is to engage readers and conference participants in an open dialogue aimed at finding effective and appropriate solutions that will facilitate the protection of victims of domestic violence.

Points of view, opinions, and conclusions expressed in this report are those of the authors and do not necessarily represent the official position or policies of the National Council of Juvenile and Family Court Judges, U.S. Department of Justice, Battered Women’s Justice Project, State Justice Institute, National Center for State Courts, Conference of Chief Justices, Conference of State Court Administrators, or any other agency of the state, tribal land, or federal government.

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Chapter 8

Child Custody and Full Faith and Credit

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Interstate custody issues\(^1\) are complex and problematic under the best of circumstances. Ours is an increasingly mobile society, and more and more frequently, parents whose relationships have been severed are moving to separate states because of remarriage or employment. Managing child custody and visitation in ways that allow the children to maintain healthy relationships with both parents presents a challenge, even when both are committed to placing their children’s needs ahead of their own.

These issues become much more complex when one parent is forced to take the children and flee across state lines to escape the violence of the other. Or, conversely, when one parent absconds with the children as a means of coercing the other back into an abusive relationship. In cases of domestic abuse, it is crucially important for the safety of adult victims and children that the abuser’s access be sharply curtailed or eliminated.\(^2\) For many victims, the greatest risk of harm or death at the hands of their abusers is likely to come after they leave the relationship.\(^3\) The surest protection for a battered parent is to have no contact with her abuser; therefore, joint custody or visitation arrangements requiring contact between the parties is inappropriate.

Even when batterers do not employ physical violence to punish the victim for leaving, the abuser typically seeks to continue his pattern of power and control over the victim.\(^4\) If custody arrangements permit, he is likely to monitor the victim through the children or abuse or harass the victim during visitation exchanges. Common tactics include controlling the victim’s schedule by being habitually early or late for visitation exchanges, changing plans at the last minute, calling the victim frequently, verbally abusing the victim in front of the children, and pumping the children for information about the victim’s activities.

It is crucial to children’s welfare not to be placed in the custody or control of the abuser. More than half of men who batter their female partners also abuse their children.\(^5\) According to one study, 8 out of 10 boys who observed inter-parental violence also suffered physical abuse.\(^6\) Such abuse is likely to be serious: 70 percent of such injuries are severe, and 80 percent of child fatalities within the family are the result of abuse by fathers or father-surrogates.\(^7\) Some studies have shown that girls may be at special risk of injury and sexual abuse when their mothers are being abused by intimate partners or spouses.\(^8\)
Aside from the risk of physical injury, children who witness domestic violence suffer emotional and cognitive impairments. They are likely to experience nightmares, insomnia, bedwetting, anxiety, and depression, and often perform poorly in school. In addition, such children are likely to exhibit both short-term and long-term behavioral problems. Preschool children may react by screaming and resisting going to bed, because they identify nighttime with the occurrence of violence. As children grow older, they may feel guilty about their inability to prevent the violence, or they may transfer their anger toward the non-abusive parent, who is unable to stop the violence. Both boys and girls may use aggression as their predominant form of problem solving. One study indicated that in families with a low level of violence, boys may exhibit aggressive behavior and girls may be withdrawn and passive; in families with a high level of violence, however, girls exhibited aggressive behavior. Other studies demonstrate that exposure to domestic violence as a child may be a causative factor in perpetrating violent behavior as an adult male. Children who witness violence in their homes do not necessarily grow up to be batterers or victims. However, the majority of batterers witnessed or experienced violence in their homes as children.

In fact, the risk of harm to children from exposure to domestic violence is so great that Congress took official notice of the issue and passed a Resolution stating that credible evidence of physical spousal abuse should create a statutory presumption that granting custody to batterers is detrimental to children. In its Model State Code on Domestic and Family Violence (Model Code), the National Council of Juvenile and Family Court Judges created a rebuttable presumption that it is detrimental to the child to be placed in the sole or joint custody of the perpetrator. By the end of the 1996 legislative session, 11 states had adopted the Model Code’s statutory presumption scheme; in a large majority of the remaining states, courts are at least required to consider domestic violence as a factor in custody determinations.

The response from state legislatures represents a growing acknowledgment of the national scope and severity of domestic violence and its detrimental effects on children. Domestic violence lies at the root of many parental kidnapping cases. Of the more than 350,000 children abducted by one of their parents every year, 46 percent involve concealing the whereabouts of the child or taking the child out of state. In 41 percent of the cases, the abduction occurs after the parties have been separated or divorced for 2 or more years. Clearly, a thorough grasp of the dynamics of family violence is as important for judges and attorneys dealing with these cases as is an understanding of the legislation pertaining to interstate custody.

How might a judge go about ascertaining whether these dynamics are present in a given interstate custody case pending in his or her court? Courts should allow significant latitude when eliciting information about the history, scope and impact of domestic violence. In many instances, the parties cases have no legal representation. In order to fulfill the high fiduciary duty vested in the court in custody cases, judges must make inquiries about domestic violence when the parties are not represented. Knowing the behaviors to look for, the questions to ask, and the

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manner in which to ask them will assist the court in screening for these cases and applying the custody statutes appropriately.

Neither abusers nor victims exhibit predictable, consistent profiles. Abusers may appear charming and considerate, or they may be visibly explosive and angry. Victims may seem frightened and passive, or they may be quite angry about what is happening. Instead of looking for a type of personality, the court might more productively look for a pattern of coercive behavior, for signs that one partner has intimidated, threatened or exerted control over the other. Battering comprises one means of exerting control over a partner, but is by no means the only method. The court should also screen for manipulative and terrorizing behaviors. Symptoms that should alert the court include: overly litigious behavior; multiple problems around visitation transfers; inordinately numerous phone contacts initiated or requested by one of the parties. Another warning sign is an abuser who tries to minimize his actions or to shift blame for his behavior onto the victim.

However, the absence of all of these behaviors does not mean the case is free of domestic violence; even seemingly straightforward cases may be harboring hidden factors indicative of domestic abuse. Therefore, the court may find it helpful to develop a checklist of questions to use in all cases involving interstate custody. The questions should be designed to probe various aspects of domestic violence, including physical abuse, sexual abuse, psychological abuse and economic abuse. Sample questions might include:

I. Everyone argues or fights with a partner or spouse now and then. When you argue or fight with each other what happens? Do you ever change your behavior because you are afraid of the consequences of a fight?

II. Is there anything that goes on between you that makes you feel afraid?

III. Has your partner or spouse ever hurt or threatened you or your children? Has your partner or spouse ever put hands on you against your will? Has your partner or spouse ever forced you to do something you did not want to do? Has your partner or spouse frequently criticized you or your children?

IV. Has your partner or spouse ever tried to keep you from taking medication you needed, from seeking medical help, or from sleeping at night?

V. Has your partner or spouse ever hurt your pets or destroyed your clothing, objects in your home, or something that you especially cared about? Has your partner or spouse thrown or broken objects or damaged property during arguments?

VI. Has your partner or spouse acted jealously, calling frequently to check up on you? Has it been hard for you to maintain relationships with your friends, relatives, neighbors, or co-workers because your partner or spouse has disapproved of, argued with, or
criticized then? Has your partner or spouce accused you unjustly of flirting wih others or having affairs? Has your partner or spouce ever tried to keep you from leaving the house?

VII. Has your partner or spouce made it hard for you to find or keep a job or go to school?

VII. Has your partner or spouce withheld money from you when you needed it? Has your partner or spouce kept information from you about what the household assets and finances are or kept documents such as bank books, check books, financial statements, birth certificates, and passports for you and members of your family where you have not had access to them? Has your partner or spouce ever spent large sums of money and refused to tell you why or what the money was spent on?

VIII. Has your partner or spouce ever forced you to have sex or made you do things during sex that made you feel uncomfortable, or demanded sex when you are sick, tired, or sleeping?

IX. Has your partner or spouce ever used or threatened to use a weapon against you? Are there guns in your home or your partner’s or spouce’s possession?

X. Does your partner or spouce abuse drugs or alcohol? What happens when he or she consumes drugs or alcohol?

The court’s tone and choice of language is equally as important as the questions it asks. It is of course essential to create an atmosphere where parties feel safe and respected. Victims need to feel sure that they are not being blamed for bringing the abuse upon themselves. Abusers may respond best to concrete, candid questions that allow no room for ambiguous or evasive responses. In addition, courts should recognize that victims may not feel safe responding to such questions in the presence of their abusers. Screening questions may be most appropriate for courts to utilize, for example, when assessing ex parte protection orders. In addition, attorneys, victim advocates, or court personnel may use these questions to screen for domestic violence. Use of everyday language, seeking factual descriptions, rather than legal terms, is likely to elicit a greater number of accurate responses.24

If the court identifies domestic violence as an underlying issue in a custody case, conducting a lethality assessment as the next step can assist in entering orders designed to protect victims and children adequately. The lethality assessment should include the following inquiries:25

* Have there been threats of homicide or suicide?
* Does the perpetrator believe he is entitled to exert control over her decision-making?

* Does the perpetrator have access to weapons?

* Has the perpetrator stalked the victim?

* What level of violence previously existed in the relationship?

* Has the violence escalated?

* Have the parties recently separated?

* Does the perpetrator have a criminal record?

* Does the perpetrator have a substance abuse problem?

Information ascertained through screening and lethality assessments becomes a vitally important and powerful tool that, used in combination with relevant statutes, enables the court to fashion remedies designed to protect family members who have been targets, directly or indirectly, of family violence and to design those custody arrangements that will most effectively shield children from further exposure to that violence and other danger such as abduction. Effective use of this tool presupposes a thorough understanding of how the various federal and state statutes triggered by domestic violence and custody issues interact with one another.

PART II: THE RELEVANT STATUTES

The Uniform Child Custody Jurisdiction Act (UCCJA)

To promote interstate cooperation in custody cases, the National Conference of Commissioners on Uniform State Laws (NCCUSL) drafted the Uniform Child Custody Jurisdiction Act (UCCJA) in 1968. The UCCJA was designed to reduce the issuance of conflicting custody orders by courts in various states and to deter parental abduction. Toward that end, the UCCJA sets forth jurisdictional standards for initial custody determinations. Every state has adopted its own version of the UCCJA.

The UCCJA establishes four bases for exercising jurisdiction in custody matters. These include home state, significant connection, emergency, and last resort jurisdiction. Roughly, a court may exercise home state jurisdiction if the child has lived in the state for 6 months before the commencement of the proceeding. A court may assume significant connection jurisdiction if the child and a party have a significant connection to the state, and the state has substantial
evidence concerning the child's care and protection. Emergency jurisdiction exists if the child has been abandoned, mistreated, or abused (or threatened with mistreatment or abuse), and it is necessary for the state to assume jurisdiction. In addition, the child must be present in the state exercising emergency jurisdiction. Last resort jurisdiction is available when no other state has jurisdiction.

The UCCJA does not explicitly mention interstate custody cases involving domestic violence. As a result, courts have sometimes denied relief to victims who have fled across state lines by applying the UCCJA in harmful ways. Despite the lack of explicit reference to domestic violence cases, however, the UCCJA jurisdictional rules can be utilized to protect victims of violence and their children (see Scenarios).

Because the UCCJA does not prioritize these jurisdictional bases, more than one court may have jurisdiction at the same time. The UCCJA prescribes actions to take in these cases; for example, issuing a stay of proceedings and communicating with the other tribunal. Despite these rules, the UCCJA framework of alternative jurisdictional bases has on occasion failed to prevent courts from issuing conflicting custody orders. Therefore, Congress enacted the federal Parental Kidnapping Prevention Act of 1980 to resolve these jurisdictional conflicts.

*The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)*

The UCCJA is currently being revised by the NCCUSL. Its successor, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) was scheduled to be completed in August 1997. Unlike the UCCJA, the UCCJEA will acknowledge explicitly that domestic violence plays an underlying role in many interstate custody cases, particularly those involving parental abduction.

The UCCJEA will include revisions aimed at improving the judicial response to interstate custody cases involving domestic abuse. For instance, the UCCJA currently requires litigants to file custody pleadings listing the child's addresses for the past 5 years, a requirement that can endanger abused parents and their children. The UCCJEA, in contrast, includes an exception for victims of domestic violence who would be harmed by providing this type of identifying information in custody pleadings.

Similarly, courts with preferred jurisdiction are currently entitled to decline jurisdiction based on an inconvenient forum analysis. The UCCJEA provides explicitly that an inconvenient forum determination must consider which state would be a safer forum in cases in which one party has abused another. In addition, some courts already exercise emergency jurisdiction in domestic violence cases, although the UCCJA currently defines emergencies as mistreatment or abuse affecting the child. The UCCJEA will specifically include abuse against the child’s parent as a basis for exercising emergency jurisdiction.
The Parental Kidnapping Prevention Act (PKPA)

Like the UCCJA, the Parental Kidnapping Prevention Act (PKPA) was designed to deter parental abduction and to reduce jurisdictional conflict. The PKPA establishes the same jurisdictional bases as the UCCJA, however, it prioritizes home state jurisdiction. Thus, if a home state exists, no other forum may exercise jurisdiction over a custody case unless the home state declines jurisdiction. As federal law, the PKPA preempts a state’s UCCJA statute if the two conflict.

The PKPA’s elevation of home state jurisdiction can create special problems for victims of domestic violence. If a victim flees across state lines with her children to escape the abuse, the state in which the abuser continues to reside may qualify as the home state, so long as the children resided there for 6 months prior to flight. The abuser may then file for custody in the home state. Since the home state has preferred jurisdiction under the PKPA, the victim may be forced to return to the home state to litigate the jurisdictional issue, and ultimately, the custody case itself (see Scenarios).

The Violence Against Women Act (VAWA)

Congress enacted the Violence Against Women Act (VAWA) in 1994 to address the national epidemic of violence against women and to improve state and federal responses to domestic violence and sexual assault crimes. Several provisions in the VAWA recognize that domestic violence frequently involves interstate flight. For instance, the VAWA’s full faith and credit mandate requires states, tribes, and territories to enforce valid protection orders issued by courts in other jurisdictions. This mandate ensures that victims who are forced to flee across state lines can retain the legal protections of preexisting court orders. The VAWA also creates federal penalties for interstate domestic violence crimes, such as crossing state lines to commit domestic violence or to violate a protection order.

CRITICAL ISSUES IN INTERSTATE CUSTODY CASES INVOLVING DOMESTIC VIOLENCE

Ongoing abuse by perpetrators may leave victims little choice but to flee with the children to another state, tribal land or territory for refuge. Victims may run for their lives because abusers have threatened or attempted to kill them or the children. Alternately, they may relocate to be free from their abusers’ constant harassment or monitoring, or to rebuild their lives in more tranquil environments. Crossing state or tribal lines may offer victims greater support from family members, increased economic opportunities, or improved social services. When victims escape to other states, tribal lands or territories custody litigation may become the abuser’s next battleground for power and control. Custody laws begin with a presumption that both parents should maintain relationships with their children, binding abusers and victims together when they have children in common. Although emerging custody laws have begun to

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acknowledge the impact of domestic violence on children, custody cases may nonetheless be ferociously litigated when one parent has abused the other parent. The UCCJA, PKPA, and VAWA intersect with state custody and domestic abuse statutes when one parent crosses state lines with the children because of domestic violence. The following scenarios present several of the most common variations of fact patterns involving interstate custody and domestic violence. In such cases, jurisdictional laws and the VAWA should be applied in ways that prioritize victim and child safety.

Scenario 1

Victim of domestic violence flees across state lines with a child for safety purposes before a custody order has been issued.

Jurisdictional laws may unintentionally jeopardize victim safety. Because the PKPA prioritizes home state jurisdiction, if a victim flees across state lines, the state from which the victim fled retains jurisdiction when it is the child’s home state. Practically speaking, this means that the abuser can file for custody in his own state, litigate the case there, and possibly obtain custody while the victim is hiding in another state, tribal land or any territory of the United States.

This situation might arise in several ways. If the abuser cannot locate the victim, the home state court may permit the abuser to serve notice by publication for the pending custody case. If the victim is unaware that the case is pending, she will be unable to participate. Hearing only the abuser’s version of events, the presiding forum may be likely to grant custody to the abuser.

Even if the victim receives actual notice that the case is proceeding, she may face difficult choices. She may be afraid to return to the home state to litigate the custody case because of the danger to herself or the children. She may not have the funds to hire counsel in the home state to represent her in the proceeding. And she may be unable, from the refuge jurisdiction, to secure legal aid services in the home state. Thus, the PKPA’s home state prioritization may force victims to sacrifice their own safety needs in order to participate in custody litigation.

Despite this dangerous underlying framework, interstate jurisdictional laws contain provisions that may be used to protect victims of domestic violence in interstate custody cases. Courts may use emergency jurisdiction, inconvenient forum determinations, judicial communication, and interstate discovery to ensure that jurisdictional rules do not expose victims to further violence.
Emergency Jurisdiction

Courts may exercise emergency jurisdiction if the child is present in the state and it is necessary to protect a child who has been threatened with, or subjected to, mistreatment or abuse.\(^{31}\) Perpetrators who abuse their intimate partners or spouses often abuse their children.\(^{32}\) Thus, when the children have been physically abused or mistreated by perpetrators, emergency jurisdiction may be exercised by the refuge state. This allows victims to obtain temporary custody of the children without leaving the refuge state.

Some states have begun to include domestic violence against a parent as a formal basis for exercising emergency jurisdiction. In California, for example, a child has been "subjected to or threatened with mistreatment or abuse" if the child's parent is a victim of domestic violence.\(^{13}\) Likewise, the revised UCCJEA is expected to expand emergency jurisdiction to explicitly include cases in which a child's parent has been mistreated or abused. This will allow an abused parent who has fled with the child to seek custody under an emergency jurisdiction basis even if the child has not been physically abused by the perpetrator.

Emerging case law in other states demonstrates that courts frequently find violence against a parent to be relevant to emergency jurisdiction, especially when the children have been affected by the violence. For instance, courts have exercised emergency jurisdiction when one parent has assaulted or terrorized the other in the child's presence.\(^{14}\) Courts should also consider whether simply being exposed to violence in the home subjects a child to "mistreatment or abuse," a proposition supported by a wealth of social science and psychological research demonstrating the harmful effects of domestic violence on children.\(^{35}\)

Inconvenient Forum

Even if the refuge state assumes emergency jurisdiction, the solution is temporary. The home state still retains the authority to determine jurisdiction over the final custody case. If a domestic violence victim has fled to a refuge state, however, the home state may decline jurisdiction based on inconvenient forum principles. The court may issue such a finding on its own motion, a party's motion, or a motion made by the child's representative.\(^{36}\) Because victims of domestic violence are frequently unrepresented in custody proceedings, and may be unfamiliar with jurisdictional rules, the court's willingness to consider an inconvenient forum ruling on its own motion is crucial.

An inconvenient forum analysis requires the court with preferred jurisdiction to decide whether declining jurisdiction would be in the child's interest. If a victim fled for safety reasons, the home state court might find it to be in the child's interest for the refuge state to assume jurisdiction. Such a finding would allow the abused parent and child to remain in the refuge state rather than risk physical harm by returning to the home state to litigate the custody case.
Case law suggests that some courts routinely consider domestic violence in making inconvenient forum decisions. In a recent case, for example, a mother and son left the child’s home state of New York and relocated to Maine to escape the father’s physical and emotional abuse. The court found the mother’s need to relocate to be particularly convincing because a protection order she obtained in New York had not stopped the abuse. The New York court declined jurisdiction, determining that the child’s interest required Maine to assume jurisdiction. In other inconvenient forum decisions, courts have recognized the need for victims and children to remain in safe havens. Judicial opinions have emphasized the child’s present safety and stability, rather than the child’s previous residency.

The UCCJEA will codify this practice by explicitly requiring courts to consider domestic violence as a factor in inconvenient forum determinations. Drafters agree that victims should not be required to physically return to dangerous home states to litigate jurisdictional matters.

Judicial Communication

The UCCJEA and PKPA require courts to communicate when custody proceedings are pending simultaneously in multiple states, and also recommend communication in other circumstances. Judicial communication is especially critical in interstate domestic violence cases. If the abuser files for custody in the home state after the victim has fled across state lines, the home state court is unlikely to receive accurate information about the victim’s motivation for flight. Without information about the abuser’s violence, courts may issue orders placing victims and children at risk, for example, by requiring them to return to potentially dangerous home states to litigate custody issues. Failure to communicate with other courts may also result in conflicting court orders.

Interstate Discovery

The UCCJEA and PKPA provide mechanisms for obtaining evidence in interstate custody matters. Procedures that minimize contact between abusers and victims, or permit victims to remain in refuge states, are most likely to prevent future violence. The forum court may request the following assistance from another court:

- the transfer of court records
- the taking of testimony from witnesses in the state
- the preparation of social studies or evaluations
- the issuance of orders to persons within the state to appear in another state
- the production of evidence
* the issuance of orders to the custodial party to appear in court with the child

Such procedures may permit the victim to remain in the refuge state, while providing the court in the home state with adequate information. Technological advances, such as videoconferencing, telephone depositions, and facsimile transmittals, might also allow a court to minimize a victim's appearances in an unsafe jurisdiction.

Scenario 2

Victim of domestic violence flees across state lines with a child for safety purposes, violating a preexisting custody order

Legal system responses to interstate flight should recognize the need for safety when abused parties decide to leave their home states. While carefully crafted custody and visitation provisions—which are designed to protect the safety of the victimized parent and children—are excellent measures for helping to prevent parental abduction, they are not always provided by the courts, and they may not be sufficient to stop further violence. Abusers who are determined to maintain control over their victims may challenge or manipulate custody or visitation arrangements, even when the victim has already obtained help from the courts in the form of protection orders, criminal proceedings, or child custody determinations. Victims who find themselves in this situation may feel that the justice system is unable to protect them or their children, and therefore may seek safety in another state, despite the potential consequences of violating the terms of a custody order. In seeking safety across state lines, a victim may be trying to put distance between herself and the actively harassing perpetrator, or she may be seeking support from her family members.

Courts may be tempted to treat harshly a non-custodial, abused parent who flees with the children after the abuser has been awarded sole custody. Even when the fleeing parent has custody of the children, the court is likely to be concerned that relocation will interfere with the other parent's visitation rights. In both instances, the court's focus is likely to be on whether the victim's primary motivation for flight is to challenge the authority of the court or to seek safety.

From the victim's point of view, however, flight is a manifestation of a sense of emergency or fear that remaining in proximity to the perpetrator severely threatens her safety or that of her children. Victims' fears in this respect are well founded: The likelihood of further physical abuse or homicide may increase once the courts have taken legal action to separate the parties and the children. To ensure that the court reaches the real motivation for interstate flight by victims, court action should focus on any issues or evidence that address how the perpetrator's acts of domestic violence may have created the need for flight. Once the victim has successfully established the safety reasons justifying her flight, she should be able to seek help from the court with preferred jurisdiction to modify the existing custody order so that she and her children will be safe from further violence by the perpetrator.

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Establishing Jurisdiction in the Refuge State

A victim of domestic violence who flees across state lines may seek modification of an existing custody order in the refuge state, but only if the state with continuing exclusive jurisdiction has declined to exercise jurisdiction. The PKPA prioritizes home state jurisdiction, but authorizes modification of a foreign custody order if the refuge court has jurisdiction and the issuing state no longer has jurisdiction or has declined jurisdiction to modify custody.47 For instance, if the issuing state was the child’s home state, it would have to decline jurisdiction under an inconvenient forum theory—essentially, on the grounds that it is inherently dangerous for the victim to return to the issuing state.

In cases where victim safety would be compromised by returning to the issuing jurisdiction, modification jurisdiction in the refuge state may be assumed only after the state with continuing exclusive jurisdiction has declined to exercise jurisdiction. Then the refuge state may establish jurisdiction, for example, through a significant connection or as emergency jurisdiction theory.48 In this scenario, a victim may have been forced to return home to her family to fend off the perpetrator’s attacks or threats. The fact that the child’s grandparents reside in the refuge state, therefore, could establish a significant connection. Alternatively, if the victim fled to the refuge state precipitously, because of a particularly violent act or threat on the part of the perpetrator, a court might find emergency jurisdiction under either the PKPA or the UCCJA if the child has been threatened with mistreatment or abuse.49

Maintaining Jurisdiction in the Issuing State

As an alternative to declining jurisdiction, the court with continuing exclusive jurisdiction may invoke UCCJA procedural mechanisms to request assistance from the refuge state (e.g., conducting a social study, evaluating a child’s current home, or taping the testimony of the victim, child, or other witnesses).49 Thus, the issuing court can retain jurisdiction, obtain needed information or evidence with the help of the refuge court, but refrain from jeopardizing victim safety by allowing her to remain in the refuge state. In addition, both the issuing court and the refuge court can further protect the victim and her children by keeping her current location confidential; otherwise, the abuser may learn where the victim presently resides.

No matter which state ends up with jurisdiction over the case, victim safety will best be served if the relevant tribunals maintain communication with each other. The UCCJA requires judicial communication where proceedings are pending in two or more jurisdictions.49 Thus, if the court in the refuge state has exercised emergency jurisdiction and the court in the home state has commenced modification proceedings, communication between the courts can guarantee the exchange of information crucial to the award of consistent, rather than conflicting, orders.

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Judicial communication can be especially important in cases where a perpetrator seeking modification fails to reveal or acknowledge the history of abuse. If the courts are communicating, a victim will be able to make such information known to the issuing court through the refuge court, without jeopardizing her safety by returning to the issuing state.

Domestic Violence as a Defense to Charges Arising From Interstate Flight

If the victim of domestic violence flees in violation of an existing custody order, she may be charged with custodial interference, parental abduction, kidnapping, or contempt of court, depending on state law. Such court action may serve the perpetrator’s purposes, by helping him to locate the victim through court proceedings or by allowing him to use litigation to further harass and intimidate the victim. The victim’s safety must be secured before such proceedings occur. If the abuser is unaware of the victim’s new location, the victim should ask the court—or the court should act sua sponte—to take steps to keep her whereabouts confidential. These steps can include court orders that prohibit agencies from revealing the victim’s address.

When charges such as parental kidnapping arise, the victim may point to the perpetrator’s acts of domestic violence as a defense. Federal law permits flight from domestic violence to be raised as an affirmative defense in international kidnapping prosecutions, an approach that may serve to guide judges handling interstate custody cases. And if the victim is charged with parental kidnapping or child concealment under state law, some jurisdictions will allow a victim to raise domestic violence as an affirmative defense. In other states, where domestic violence is not specifically recognized as a defense, a victimized parent may raise a good cause defense if she can show that flight was necessary to protect the children. Where no statutory defenses apply, a victim may raise traditional legal defenses such as necessity or self-defense.

When Charges of Contempt Are Inappropriate

Courts generally use contempt to punish parties who have intentionally violated their orders. A victim of domestic violence who violates the terms of a custody order by fleeing to another state for safety reasons—to protect either herself or her children—may be able to argue successfully that contempt sanctions are inappropriate when the abusive actions of the perpetrator triggered the victim’s need for flight.

Jurisdiction Should Not Be Declined Under the Unclean Hands Doctrine

Under the UCCJIA, a party seeking court assistance may be turned away if that party’s wrongful conduct triggers the application of the unclean hands doctrine. The unclean hands doctrine was designed to punish objectionable conduct; it was not meant to be used against a victim of domestic violence fleeing from abuse. Victims who seek modification of
jurisdiction in a refuge state should offer evidence of the domestic violence that caused them to flee the issuing state in order to ensure that the unclean hands doctrine is not used against them.\textsuperscript{38}

Scenario 3

Perpetrator of domestic violence takes the child across state lines and conceals the child.

When victims separate from their abusers, some abusers may harm or seize the children to punish victims for leaving. Others may use the court system to harass victims, for example, by filing repeated motions to modify custody or visitation orders simply to force victims to return to court.\textsuperscript{39} Still other perpetrators may simply disappear with the children to exert control over their victims.\textsuperscript{40}

A large percentage of the nation's estimated 354,000 annual family abductions are committed by domestic violence perpetrators.\textsuperscript{41} At least 34 percent of abusers threaten to kidnap their children, and 11 percent actually abduct them.\textsuperscript{42} Abusers abduct their children to punish victims for leaving the relationship or to coerce victims to return. Such threats are effective. Approximately 20 percent of battered women return to their abusers at least once because of threats to take or hurt the children.\textsuperscript{43}

In view of such statistics, courts should respond promptly to an abuser's threats to abduct the child. In the D'Attomo case, for example, the court found that the husband physically abused the wife, and issued a protection order preventing the child's removal by the husband.\textsuperscript{44} The husband threatened to flee with the child unless the wife withdrew her request for permanent custody. The court took no further action. The husband then left the country with the child and remained hidden in Italy for 2 years, depriving his wife of all contact with the child.

When perpetrators abscond with the children, both victims and courts should respond immediately. If the victim remains in the child's home state, she may file for custody. The home state may exercise jurisdiction even if the child is not present. In addition, the court may utilize the Federal Parent Locator Service (FPLS) to locate abusers in custody, visitation, and child support cases.\textsuperscript{45}

If the victim does not file for custody quickly enough, the state in which the child resides may become the child's new home state.\textsuperscript{46} If the perpetrator files for custody in that state, the court may legitimately exercise jurisdiction over a custody case. Thus, an abuser could file for custody in the new state, which would have preferred jurisdiction, after 6 months.\textsuperscript{47}

If the abuser files for custody in the new home state, that court may decline jurisdiction based on the abuser's conduct. The UCCJA unclean hands doctrine states that:

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If the petitioner for an initial decree has wrongfully taken the child from another state or has engaged in similar reprehensible conduct, the court may decline to exercise jurisdiction if this is just and proper under the circumstances.43

The UCCJA comment suggests that a wrongful taking refers to conduct that is so objectionable that the party should lose access to the court’s jurisdiction. A perpetrator’s seizure of children, flight across state lines, and concealment of the child constitutes precisely the type of behavior contemplated by the uncleon hands doctrine. In such a case, the court can show its disapproval of the perpetrator’s conduct by declining jurisdiction.

In addition, courts can sanction perpetrators who abduct their children by imposing criminal sanctions against them for parental kidnapping, custodial interference, or child concealment. Some states authorize increased penalties in parental abduction cases involving domestic violence.44 For instance, Illinois imposes increased penalties against abductors who inflict or threaten to harm the child’s parent or cause serious bodily injury to another during the abduction.45 Such sanctions may deter perpetrators from re-abducting their children. In addition, courts may need to suspend visitation in some cases to prevent future abduction. International abduction may be deterred by contacting the State Department’s Office of Passport Services to prevent the abuser from securing a passport for the child.46

Scenario 4

Victim of domestic violence seeks to enforce custody provisions within a valid protection order in a non-issuing state.

Protection order statutes or case law typically permit courts to issue temporary custody orders as part of ex parte or long-term civil protection orders. Custody is available under many of these statutes because of the strong link between victim safety and court orders regarding the children. Without tightly crafted custody and visitation orders, for example, abusers are likely to use visitation to gain access to victims, and to further assault and harass them.47 Custody and visitation provisions within protection orders can minimize contact between abusers and victims, and may reduce the likelihood of violence by including safeguards to protect victims and children.48

Enforcing custody provisions within protection orders can therefore be critical to ensuring victim and child safety. Because victims often flee across state lines, courts may be required to enforce out-of-state protection orders containing custody provisions. Interstate enforcement of these orders is governed by the PKPA, UCCJA, and VAWA. The VAWA requires courts to enforce valid protection orders issued by courts in other tribes, territories, and states.49 For example, if a protection order prohibits a respondent from contacting a petitioner, and the respondent stalks the petitioner across state lines, the respondent has violated the order’s no contact provision. The VAWA’s full faith and credit mandate requires the second state to enforce the first state’s protection order.
Ex parte orders are also entitled to full faith and credit. The respondent must receive notice and an opportunity to be heard, however, within the time required by the issuing state's law, or within a reasonable time after the order's issuance, sufficient to protect the respondent's due process rights.  

The VAWA's authority over custody provisions within protection orders is unresolved at present. Interstate enforcement of custody provisions may be limited under the VAWA, which defines protection orders as follows:

[A]ny injunction or other order issued for the purpose of preventing violent or threatening acts or harassment against, or contact or communication with or physical proximity to, another person, including temporary and final orders issued by civil and criminal courts (other than support or child custody orders) whether obtained by filing an independent action or as a pendente lite order in another proceeding so long as any civil order was issued in response to a complaint, petition or motion filed by or on behalf of a person seeking protection.[65] [emphasis added]  

On its face, this definition seems to exclude child custody orders from enforcement under the VAWA's full faith and credit mandate. The issue of whether custody provisions within civil protection orders are entitled to enforcement, however, has not been resolved definitively. The Act's legislative history does not provide clarification, and no written judicial decisions have addressed this issue since the VAWA's enactment.  

Some experts conclude that legislators did not intend to address interstate enforcement of custody provisions in protection orders under the VAWA because the PKPA and UCCJA cover interstate enforcement of all custody orders.  

Others find that custody provisions are entitled to full faith and credit under the VAWA when issued for safety purposes in protection orders, but not when issued in long-term domestic relations cases. Courts should not hesitate to enforce custody provisions within out-of-state protection orders. However, until enforcement under the VAWA is resolved, courts should enforce such custody provisions in a manner consistent with the requirements of the UCCJA and PKPA.  

Custody and visitation provisions within civil protection orders, like other custody and visitation orders, are clearly enforceable across state lines if they meet the standards in the PKPA and UCCJA. In particular, custody provisions must satisfy the jurisdictional and notice requirements of these laws. To facilitate interstate enforcement of custody provisions, issuing courts should also note on the face of protection orders that they have complied with the UCCJA and PKPA.  

The PKPA and UCCJA require courts to give the parties reasonable notice and an opportunity to be heard. Full protection orders are generally issued only after the respondent has received notice, so they meet this criteria. Ex parte orders, however, are issued when a
petitioner or child is in immediate danger, so the respondent receives notice only after the order is issued. Therefore ex parte protection orders fail to comply with the PKPA and UCCJA notice requirements and pose potential problems for enforcement.  

To be enforceable under the UCCJA and PKPA, custody provisions within protection orders must also be issued by courts with preferred jurisdiction. Thus, if a home state exists, the court issuing the protection order must have home state or emergency jurisdiction (see Scenario 1) for the custody order to be enforceable. If no home state exists, the court must have significant connection jurisdiction, or if there is no other alternative, last resort jurisdiction. If a protection order contains a custody provision but has not complied with the interstate jurisdictional laws, the provision may be difficult to enforce across state lines.

Scenario 5

Victim of domestic violence seeks to relocate to another state because of the abuse.

Victims of domestic violence frequently seek to relocate to another state to escape from their abuser's partners or spouses. Relocation can allow victims to rebuild their lives and their children's lives in safer locations, where extended family support, new job or educational opportunities, or improved services, are available. Relocation may be crucial to preserve the emotional and physical health of the abused parent and the child.

The Model Code supports relocation in domestic violence cases, and creates a rebuttable presumption that a child should remain with the non-abusive parent in the location of that parent's choice. The Code presumes that a parent who has been abused by the other parent may be safer, or may have greater social support or economic choices, in a jurisdiction other than the marital domicile. Drafters of the Model Code concluded that these enhanced options were likely to benefit the child as well as the abused parent.

Relocation laws vary by state. In some states, there is a legislative presumption favoring frequent and continuous contact between each parent and the child, weighing against relocation requests. Other states emphasize custodial stability, suggesting that relocation may be permissible. In a few states, relocation laws have begun to incorporate protections for victims of domestic violence. Alabama's statute, for example, provides a rebuttable presumption that it is in the child's best interest to reside with the abused parent in the location of that parent's choice, whether within or outside the state.

Relocation laws may also provide notice exceptions in domestic violence cases. In Ohio, for example, a party is generally required to file a notice of intent to relocate, which the court provides to the other parent. Such a notice could endanger an abused parent and hinder her attempts to escape. In domestic violence cases, therefore, a statutory exception provides
that the abusive parent may not receive the relocation notice unless the court determines that it is in the best interest of the child and issues written findings of fact to support this determination.\textsuperscript{73}

Courts increasingly permit abused parents to relocate to other states without losing custody of their children. In Desmond v. Desmond, for example, the court permitted relocation because the father abused the mother physically, sexually, and emotionally, often in the presence of the children.\textsuperscript{74} The court held that the mother’s move did not entitle the father to custody because the mother was the better custodian, and relocation would create a new and tranquil environment for the children.\textsuperscript{75}

Other courts have found similarly that domestic violence is an exceptional circumstance justifying relocation.\textsuperscript{76} In Jacoby v. Career, for instance, the court denied the father’s request for custody when the mother relocated with the child because of domestic abuse.\textsuperscript{77} The court found that the mother had supportive family members and employment options in the refuge state that would benefit the child.\textsuperscript{78} Despite the judiciary’s general disapproval of relocation requests, the need for domestic violence victims to become safe has justified relocation in such cases.

Courts have also begun to find that the child’s best interest is often linked closely to the interest of the custodial parent.\textsuperscript{79} The California Supreme Court recently held that a parent seeking to relocate does not have to show that the move is necessary.\textsuperscript{80} Rather, the custodial parent may determine the child’s residence, but the court can prevent a move that would prejudice the child’s welfare. The Burgess case is illustrative of recent cases emphasizing the link between the child’s best interest and the custodial parent’s ability to improve his or her lifestyle.

In domestic violence cases, it may be particularly important to a child’s welfare to permit the abused parent to relocate without losing custody. Relocation may enhance a parent’s ability to recover from the abuse and to provide stable care for the child. If the abused parent is not permitted to relocate, continued abuse or harassment by the batterer is likely to affect both the victim’s ability to care for the child and the child’s emotional or physical well-being.

Interstate custody issues, made all the more complex by the safety needs of victims and the interplay between the PKPA, the VAWA, and the state versions of the UCCJA, place interstate custody cases involving domestic violence squarely among the most difficult cases facing today’s judiciary. Protecting victims and their children from ongoing violence must be the courts’ primary concern. Success in that endeavor requires a constant awareness of the scope of the problem; a sensitivity to the dynamics of domestic violence; a thorough understanding of how the federal and state laws interact; and a resolve to employ these laws in every case so that abusers cannot succeed in using the legal system as means to continue their abuse.
Acknowledgment

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Recommended Resources


1. This chapter deals with interstate custody cases. For information about international custody cases, consult the Hague Convention. See also, Patricia K. Hof et al., JURISDICTION IN CHILD CUSTODY CASES: A JUDGE'S GUIDE TO THE PKPA, and THE HAGUE CHILD ABDUCTION CONVENTION (ABA Center on Children and the Law, 1997), available in 48(2) JUVENTINE AND FAMILY COURT JOURNAL. (National Council of Juvenile and Family Court Judges), Spring 1997, at 10-1.10.15, app. IIIA, IIIB, IV.


7. Abraham Bergman et al., Changing Spectrum of Serious Child Abuse, 77(1) PEDIATRICS 113 (1986).


10. Hilberman & Munson, supra note 7, at 463; Rosenblum & O'Leary, supra note 5, at 693.

11. Id. at 463.


13. Jaffe, supra note 8, at 41.

14. Id.


18. MODEL CODE, supra note 1.

19. NATIONAL COUNCIL OF JUVENILE & FAMILY COURT JUDGES, 2 FAMILY VIOLENCE: LEGISLATIVE UPDATE 8 (summary of legislation through 1996). Reports indicate that 14 states currently include such a provision.

20. David Finkelhor et al., U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, MISSING, ABducted, RUNAWAY, AND THROWNAWAY CHILDREN IN AMERICA 7, 8 (1990); Marsia B. Lisa & Geraldine Burn Shahly, Domestic Violence and Child Custody, in BATTERING AND FAMILY THERAPY: A FEMINIST PERSPECTIVE 175, 183 (Marsali Hansen & Michele Harway, ed., 1993) (finding that at least 34% of abusers threaten to kidnap their children and 11% abduct them).

22. Adapted from Frederic L. Lehman, Client Interview, in THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE: A LAWYER’S HANDBOOK 2-7 (ABA, Goebl et al., eds., 1996).


26. Home state jurisdiction also exists if the state had been the child’s home state within the preceding 6 months before commencement of the action, and the child was removed from the state by a person claiming custody.

27. A number of states have statutes or regulations that provide the child’s address or address of domestic violence shelters when it would endanger victims. See, e.g., AK, REV. STAT. ANN. § 25.430(9) (West Supp. 1996) (waiving disclosure of address or shelter address, but requiring a party to provide the court with an alternate means of communication); CAL. FAM. CODE § 3049 (a) (West 1994 & Supp. 1997) (prohibiting disclosure of child’s previous addresses in domestic violence cases); MASS. GEN. LAWS ANN., ch. 209B, § 3(3)(b) (West 1987 & Supp. 1997) (waiving disclosure if necessary to protect safety); N.Y. DOM. REL. LAW § 75-j(4)c (McKinney 1998) (waiving disclosure when necessary to protect the safety of a party or a child).


32. Murray A. Strauss & Richard J. Gelles, PHYSICAL VIOLENCE IN AMERICAN FAMILIES 254, 261 (1985) (finding that the incidence of child abuse is 150% greater when marital violence exists); Bowker, supra note 4.


34. See, e.g., Cole v. Superior Ct., 218 Cal. Rptr. 905 (Cal. Ct. App. 1985) (finding that emergency jurisdiction can exist where father abused mother and one child, even when the children were the subject of the custody case had not been abused); Crippen v. Crippen, 610 So.2d 696 (Fla. Dist. Ct. App. 1992) (finding that temporary custody provision within protection order issued to protect mother in refuge state did not conflict with the UCCLA); Farrell v. Farrell, 351 N.W.2d 219 (Minn. Ct. App. 1984) (finding that emergency jurisdiction was available where husband abused alcohol and physically and verbally abused wife); Coleman v. Coleman, 493 N.W.2d 173 (Minn. Ct. App. 1992) (finding that husband’s emotional and physical abuse of the family and victim’s fear for children’s safety permitted refuge state court to exercise emergency jurisdiction); Quill v. Quill, 99 A.D.2d 543 (N.Y. App. Div., 1984) (finding that emergency jurisdiction was appropriate when husband hit wife in front of child and threatened to take child if wife commenced court proceedings). But see, Hanna v. Hanna, 364 S.E.2d 694 (N.C. Ct. App. 1988) (finding that there was not enough evidence of sexual abuse or potential threat to children to justify emergency jurisdiction).

38. Id. at 705.
39. Id.
40. See, e.g., Cline v. Cline, 433 N.E.2d 51 (Ind. Ct. App. 1982) (allowing battered spouse to proceed in state where she had the support of her parents); Coleman v. Coleman, 493 N.W.2d 133 (Minn. Ct. App. 1992) (finding that Minnesota should decline jurisdiction where battered wife sought haven in Nebraska to be near her relatives); Marlow v. Marlow, 471 N.Y.S.2d 901 (N.Y. Sup. Ct. 1983) (finding that where father threatened family with a gun, mother’s refuge state could exercise jurisdiction because it provided a stable environment for the children);
43. In these cases, the perpetrator may challenge the victim’s act of flight by filing criminal or civil charges, such as custodial interference, child abduction, parental kidnapping, child concealment, or contempt of court, as well as seeking custody-related penalties.
44. Nearly 50% of all female homicide victims were known to have been killed by their current or former husbands or boyfriends, and the rate of intimate partner violence against women separated from their husbands was 33 times higher than that against married women (Bachman et al., supra note 2, at 4).
45. For example, California’s statute establishes that domestic violence is a defense to parental kidnapping even where there is a pre-existing custody order. CAL. PENAL CODE § 278.7(b) (West 1994 & Supp. 1997).
48. See Scenario 1 for examples of how abuse or mistreatment of a child might include having a parent who is abused.
52. CAL. PENAL CODE § 278.7(b) (West Supp. 1997); FLA. STAT. ANN. § 787.03(6) (West 1992 & Supp. 1996); 720 ILL. COMP. STAT. 5/11-5(c)(3) (West 1997); KIA. REV. STAT. ANN. § 503.05(3) (Banks-Baldwin 1996).
53. See, e.g., MT. CODE ANN. § 45-5-633 (1)(c) (stating that defense to visitation interference exists when action is taken with reasonable cause); N.M. STAT. ANN. § 10-4-4(B) (Michie 1978 & Supp. 1994) (defining custodial interference as removal of child without good cause). Some states’ custodial interference statutes require the abused party to take certain procedural steps to collate the statutory defense. See, e.g., CAL. PENAL CODE § 278.7(c)(3) (Supp. 1997); NEV. REV. STAT. § 200.2562(3) (1995).
54. Joanne Zorza, GUIDE TO INTERSTATE CUSTODY 75 (1993). To raise a successful necessity defense, the defendant must show a legal justification for the crime and prove necessity. If a reasonable, legal alternative existed, however, the defendant will not prevail. See United States v. Bailey, 444 U.S. 394, 410 (1980).
55. See e.g., A.F. v. N.F., 549 N.Y.S.2d 511 (N.Y. App. Div. 1989) (court refused against contempt sanctions where mother had violated court order by fleeting to Massachusetts, on the grounds that the mother had acted to protect the child from sexual abuse by the father).
57. CAL. FAM. CODE § 3488(f) (West 1994 & Supp. 1997) (prohibiting courts from punishing petitioner for taking the child from the person having legal custody when there is evidence that the taking of the child was a result of domestic violence against the petitioner). See also Marlow v. Marlow, 471 N.Y.S.2d 201, 228 (N.Y. Sup. Ct. 1983) (finding that the child’s protection was of paramount concern, despite the mother’s violation of a custody agreement); Swain v. Vogt, 206 A.2d 703, 705 (N.Y. App. Div. 1994) (finding that removal of child was not justified because of husband’s physical abuse); In re Thoretson, 730 P.2d 1380, 1387 (Wash. Ct. App. 1987) (finding that the mother’s flight to protect herself and the child counterbalanced the uncleared hands rule).
58. Dunn v. Danna, 364 S.E.2d 694 (N.C. Ct. App. 1988) (finding that, where wife fled with child from Florida in violation of a court order and no evidence of abuse existed other than wife’s bare allegations, North Carolina did not abuse its discretion in declining to exercise jurisdiction).


60. Id. at 296.

61. Finkelhor et al., supra note 19, at 6.

62. Liss & Shabot, supra note 19, at 183.

63. Id. at 181.


66. If the perpetrator flees with the child, the victim has a full year, rather than 6 months, to file for custody in the original state based on the extended home state doctrine. UNIF. CHILD CUSTODY JURISDICTION ACT, § 3(1)(iii), 9 U.L.A. 145-145 (1988 & Supp. 1997).

67. Id.


69. See Eva J. Klein, American Prosecutors Research Institute, PARENTAL KIDNAPPING, DOMESTIC VIOLENCE AND CHILD ABUSE: CHANGING LEGAL RESPONSES TO RELATED VIOLENCE 20 (1995).

70. 720 ILL. COMP. STAT. § 5/10-505(2) (West 1997).

71. V the child already has a passport, the non-abusive parent may retain it.


73. See Catherine F. Klein & Lesly E. Erloff, Civil Protection Orders, in THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE 4-1 (ABA, Goelman et al., eds., 1996).


75. 18 U.S.C. § 2266(b) (1994).


78. Based on informal survey conducted by ABA Commission on Domestic Violence between January and March, 1997.

79. See BATTERED WOMEN’S JUSTICE PROJECT, FULL FAITH AND CREDIT PROVISION OF THE VIOLENCE AGAINST WOMEN ACT 4 (1996) (To obtain a copy, contact the Full Faith and Credit Project of the Pennsylvania Coalition Against Domestic Violence at (800) 903-0111, ext. 2). This issue is currently being considered by the United State Department of Justice.


81. Note, however, that the UCCJEA is expected to clarify the type of notice required when courts exercise emergency jurisdiction. These standards may also apply to custody orders within ex parte protection orders.

82. MODEL CODE, supra note 1, § 403.

83. Id. at 34.

84. ALA. CODE § 30-3-133 (Supp. 1996).

85. OHIO REV. CODE ANN. § 3109.051(G)(2) (Anderson 1996).


87. Id at 982.

Olimo, 140 A.D.2d 677 (N.Y. App. Div. 1988) (finding that the mother’s relocation was made in good faith, so that she could receive economic and emotional support after being beaten for years); Gruber v. Gruber, 583 A.2d 434 (Pa. Super. Ct. 1990) (finding that the abused parent could relocate to seek support from family members, safe housing, and potential employment). But see Congilio v. Congilio, 170 A.D.2d 477 (N.Y. App. Div. 1991) (denying relocation request because it would effectively cut off the other parent’s visitation rights).

90. Id. at 787.
91. See, e.g., Gruber v. Gruber, 583 A.2d 434, 440 (Pa. Super. Ct. 1990) (finding that relocation would benefit the mother and children by removing them from the father’s abuse and ending the mother’s isolation).