SHELTER FROM THE STORM: USING JURISDICTIONAL STATUTES TO PROTECT VICTIMS OF DOMESTIC VIOLENCE AFTER THE VIOLENCE AGAINST WOMEN ACT OF 2000

DEBORAH M. GOELMAN[*]

"[M]other has no lodging, no money and constant oppression. If [she] wants to try for a better life with the two children, the court gives her its blessings. Slavery was abolished 125 years ago and so was oppression. The mother's condition following her divorce has been analogous to that of a slave chained to false accusations, constant allegations and hatred. A human being deserves better."[1]

Domestic violence fuels many of the nation's bitterly contested interstate custody cases. It is an underlying issue in most parental abduction cases, which occur at an estimated rate of 203,900 per year.[2] Despite the role of domestic abuse in interstate custody cases, in the past, legislators enacted jurisdictional laws to prevent forum-shopping and parental abduction without considering their impact on domestic violence survivors. In recent years, jurisdictional laws such as the Parental Kidnapping Prevention Act[3] and the Uniform Child Custody Jurisdiction and Enforcement Act[4] have begun to incorporate safety provisions for victims

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[*] B.A., University of Michigan; J.D., New York University School of Law. The author has practiced domestic violence law since 1993 and served most recently as Deputy Director, Policy Team, Violence Against Women Office, U.S. Department of Justice, until the team was dismantled in March 2002. The author thanks Frances Cook, Billie Lee Dunford-Jackson, Barbara J. Hart, Patricia Hoff, Darren Mitchell, Marnie Shiels, and Joan Zorza for their review of this article.

[1] Schuyler v. Ashcraft, 680 A.2d 765, 774 (N.J. Super. Ct. App. Div. 1996).

[2] Heather Hammer et al., U.S. Dept. of Justice, Children Abducted by Family Members: National Estimates and Characteristics 4 (Oct. 2002), *available at* http://www.ncjrs.org/pdffiles1/ojjdp/196466.pdf (providing estimated number of children who were victims of family abduction in 1999).

[3] 28 U.S.C. § 1738A (2003).

[4] Drafted by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 1997.

of domestic violence. Full faith and credit laws, including provisions in the Violence Against Women Act[5] and the Violence Against Women Act of 2000,[6] have been drafted for the primary purpose of protecting victims who flee across state or tribal lines. This article will review the relevant state and federal laws and demonstrate that courts and family law attorneys may apply these jurisdictional statutes with a view to protecting domestic violence survivors[7] and children embroiled in interstate custody cases.

The article begins with an examination of how the United States legal system has historically addressed domestic violence and then discusses the current responses of the criminal and civil justice systems. Part I also provides readers with a contemporary overview of issues related to domestic violence survivors' flight across state lines. These include the dangers of separation violence when victims leave their abusers, the impact of domestic violence on children, and the potential protection that relocation offers many victims.

Part II of the article surveys custody litigation in domestic violence cases, first examining batterers' use of litigation to control victims. Part II also sets forth the procedural vehicles through which custody and visitation orders may be entered. In particular, the article summarizes how orders are issued under domestic relations and protection order statutes.

Part III of the article reviews the jurisdictional statutes that may be involved in such cases, providing specific examples of statutory provisions that could be used to assist domestic violence survivors. These laws include the Uniform Child Custody Jurisdiction Act,[8] the Uniform Child Custody Jurisdiction and Enforcement Act,[9] the Parental Kidnapping Prevention Act,[10] the Violence Against Women Act,[11] the Violence Against Women

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[5] Pub. L. No. 103-322, 108 Stat. 1902 (1994) (codified as amended in scattered sections of 8, 16, 18, 28, and 42 U.S.C.). The Violence Against Women Act was signed into law on September 13, 1994.

[6] Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (codified as amended in scattered sections of 8, 16, 18, 20, 28, and 42 U.S.C.). The Violence Against Women Act of 2000, signed into law on October 28, 2000, reauthorized many of the original programs created by the Violence Against Women Act of 1994 and strengthened the federal law.

[7] In this article, the terms "survivor" and "victim" are used interchangeably. While many individuals whose partners have perpetrated violence against them prefer the term "survivor," most statutes use the term "victim."

[8] Drafted by NCCUSL in 1968.

[9] Drafted by NCCUSL in 1997.

[10] 28 U.S.C. § 1738A (2003).

Act of 2000,[12] the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act,[13] and the Indian Child Welfare Act.[14] Because the determination that a particular state or tribe has jurisdiction in a custody case can have tremendous effects on victim safety and on the outcome of the case, these statutes are examined in detail. Part IV of the article then uses a hypothetical fact pattern to demonstrate how these jurisdictional laws may be applied in practice to safeguard victims.

Part V of the article concludes that courts and family law attorneys currently do not utilize these laws in ways that protect domestic violence survivors. Furthermore, it recommends that training on jurisdictional laws and education designed to correct misconceptions about domestic violence could lead to necessary cultural change. Such efforts would increase the application of jurisdictional laws to preserve the fundamental rights of domestic violence survivors.

I. INTRODUCTION

A. Historical Perspective

Domestic violence has been defined in various ways in the legal, social science, and psychology fields. Within the legal field alone, the term carries a different meaning depending on whether state or federal law governs and whether a case arises in the criminal or civil sphere. Under the Violence Against Women Act (VAWA), domestic violence includes the following:

> [F]elony or misdemeanor crimes of violence committed by a current or former spouse of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other adult person against a victim who is

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[11] Pub. L. No. 103-322, 108 Stat. 1902 (1994) (codified as amended in scattered sections of 8, 16, 18, 28, and 42 U.S.C.).

[12] Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (codified as amended in scattered sections of 8, 16, 18, 20, 28, and 42 U.S.C.).

[13] Drafted by NCCUSL in 2002.

[14] 25 U.S.C. §§ 1901-1963. (2003).

> protected from that person's acts under the domestic or family violence laws of the jurisdiction receiving grant monies.[15]

Even this seemingly dry legal definition is subject to differing interpretations.[16]

Debate over what precisely constitutes domestic violence stems from the uneven treatment of these matters in American social and legal systems. Historically, domestic violence was not viewed as a crime. Rather, English common law permitted a husband to corporally punish or chastise his wife.[17] William Blackstone summarized the historical response to spousal assault as follows:

> The husband also (by the old law) might give his wife moderate correction. For, as he is to answer for her misbehaviour, the law thought it reasonable to [e]ntrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his servants or children. . . .[18]

In subsequent years, the judicial system continued to accept physical restraint of women because the law gave husbands a legal right to control their wives physically and to own their property.

Certain early American courts condoned the right of chastisement.[19] In 1868, in State v. Rhodes, the North Carolina Supreme Court ruled that it would not "interfere with family government in trifling cases" and on this ground affirmed the lower court's decision, which had held that "the defendant had a right to whip his wife with a switch no larger than his thumb."[20] A Mississippi court voiced similar concerns about intervention by the criminal justice system, stating, "[L]et the husband be permitted to exercise the right of moderate chastisement, in cases of great emergency, and use salutary restraints in every case of misbehaviour, without being

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[15] 42 U.S.C. § 3796gg-2(1) (1994) (definition covering "Grants to Combat Violent Crimes Against Women").

[16] The phrases "cohabitated with the victim as a spouse" and "domestic or family violence laws" are not defined and have not been interpreted by the courts. *Id.*

[17] 1 William Blackstone, Commentaries on the Laws of England *444.

[18] *Id.*

[19] *See, e.g.*, State v. Rhodes, 61 N.C. 453 (1868); State v. Black, 60 N.C. (Win.) 266 (1864).

[20] 61 N.C. at 454. For a detailed history of related matters, *see* Henry Ansgar Kelly, Rule of Thumb and the Folklaw of the Husband's Stick, 44 J. Legal Educ. 341 (1994).

subjected to vexatious prosecutions, resulting in the mutual discredit and shame of all parties concerned."[21] These historical statements were echoed more than one hundred years later in the VAWA hearings when witnesses testified about the practice of prosecutors who failed to pursue domestic assault cases.[22]

When American courts began to repudiate the right of marital chastisement, they granted abusive husbands effective immunity to criminal prosecution on the grounds of marital privacy.[23] Court opinions reflected the prevailing societal view that the media and the criminal justice system had no place interfering in domestic violence cases, and that families should be left alone to resolve these matters.[24] This historical underpinning provides a partial explanation for the reluctance of some courts to take domestic violence cases seriously even today.

Increasingly, however, the criminal justice system has begun to respond to domestic violence as a crime. When an early version of the VAWA was being considered, the Judiciary Committee conference report stated the following:

> Our country has an unfortunate blind spot when it comes to certain crimes against women. Historically, crimes against women have been perceived as anything but crime—as a "family" problem, as a "private" matter, as sexual "miscommunication" . . . Until we name a problem, we cannot hope to see it for what it is. And until we name all violence against women as crime, it will be seen neither as violence nor as crime.[25]

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[21] Bradley v. State, 1 Miss. (1 Walker) 156 (1824).

[22] *See, e.g.*, First Sess. on the Problems of Violence Against Women in Utah and Current Remedies: Utah Hearing Before the S. Comm. on the Judiciary, 103d Cong. 12 (1993).

[23] Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 Yale L.J. 2117, 2154 (1996). An early American case held that a husband is permitted "to use towards his wife such a degree of force as is necessary to control an unruly temper and make her behave herself; and unless some permanent injury be inflicted . . . or such a degree of cruelty as shows that it is inflicted to gratify his own bad passions, the law will not invade the domestic forum." Black, 60 N.C. (Win.) at 262.

[24] *See* State v. Oliver, 70 N.C. 60, 61-62 (1874) (holding that "[i]f no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive").

[25] Conf. Rep. No. 102-197, at 37 (1991).

Indeed, the drafters' legislative intent has been realized. Under the VAWA and related federal laws, specialized domestic violence units have been established in courts, prosecutors' offices, and police departments to improve the criminal justice system's response to domestic violence. This cultural shift in our view of what domestic violence is, and the allocation of funding to support services for victims and accountability for offenders, has begun to create a criminal justice system that treats domestic violence like other violent crimes.

In the civil sphere, however, domestic violence survivors continue to confront an antiquated set of attitudes. Judicial comments too often reflect disbelief of domestic violence survivors or blame victims for provoking the violence.[26] Other civil court judges concur that domestic violence is a serious criminal matter, but view it as unrelated to custody and parental fitness.[27] This problem may stem, at least partially, from a lack of understanding that domestic violence reflects an ongoing pattern of behavior. According to an American Bar Association report:

> Domestic violence is a pattern of behavior that one intimate partner or spouse exerts over another as a means of control. Domestic violence may include physical violence, coercion, threats, intimidation, isolation, and emotional, sexual, or economic abuse. Frequently, perpetrators use the children to manipulate victims: by harming or abducting the children; by threatening to harm or abduct the children; by forcing the children to participate in abuse of the victim; by using visitation as an occasion to harass or monitor victims; or by fighting protracted custody battles to punish victims. Perpetrators often invent complex rules about what victims or the children can or

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[26] *See, e.g.*, Giallanza v. Giallanza, 787 So. 2d 162, 164 n.2 (Fla. Dist. Ct. App. 2001) (noting that "neither the Wife's petitions nor the transcripts of the hearings on the petitions show that the Wife is in any fear of domestic violence. Rather, they reflect that she is upset by the Husband's dealing with their children. . . . While this harassment is clearly upsetting to the Wife, it is not sufficient to support any finding that she has any objectively reasonable fear that she is in imminent danger of domestic violence."); Danna v. Danna, 364 S.E.2d 694 (N.C. Ct. App. 1988) (holding that the record did not show that the lower court had before it any evidence, other than Mrs. Danna's bare allegations, that Mr. Danna posed a threat to the children); Hernandez v. Collura, 113 A.D.2d 750 (N.Y. App. Div. 1985) (holding that the vague and unsubstantiated allegations advanced by the mother and denied by the father were insufficient to trigger emergency jurisdiction).

[27] *See, e.g.*, Canty v. Canty, 874 P.2d 1000 (Ariz. Ct. App. 1994); Ciotola v. Fiocca, 86 Ohio Misc. 2d 24 (Ct. Com. Pl. 1997).

> cannot do, and force victims to abide by these frequently changing rules.[28]

Rule-making and enforcement are central characteristics of batterers' interactions with their families.[29]

Courts need to understand that this pattern of power and control can be replicated in any setting. If the victim leaves the perpetrator, the perpetrator may seek to reestablish control by interfering with a victim's ability to obtain employment or job training, by stalking a victim at work, or by harassing the victim through ongoing legal proceedings. In cases in which the two parties have children in common, child custody litigation frequently becomes the perpetrator's most effective weapon.[30]

B. The Danger of Separation Violence

In addition to facing harassment through litigation, domestic violence survivors may be at increased risk for physical violence when they take steps to leave an abusive partner.[31] As described above, domestic violence is a pattern of power and control exercised by a batterer; thus, when a victim attempts to break free of this domination, a batterer may be desperate to reassert control. During this time period, batterers often perpetrate "separation assault" to prevent a survivor from leaving, to retaliate for the separation, or to force the survivor to return.[32]

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[28] Deborah Goelman & Roberta Valente, ABA Commission on Domestic Violence, When Will They Ever Learn? Educating to End Domestic Violence: A Law School Report 26 (1997).

[29] *See, e.g.*, Barbara J. Hart, Rule-Making and Enforcement, the Violent and Controlling Tactics of Men Who Batter, and Rule-Compliance and Resistance, the Response of Battered Women (2000).

[30] *See, e.g.*, Giallanza, 787 So. 2d at 164 (describing the husband's behavior, which included telling the children to call the judge about the wife, making unfounded calls to social services to report that the wife was abusing the children, reporting to the sheriff's office that the wife had left the county with the children, and telling the children that the wife was lying to them).

[31] Callie Marie Rennison & Sarah Welchans, Bureau of Justice Statistics, Intimate Partner Violence 1, 5 (May 2000) (finding that "[t]he percentage of female murder victims killed by intimate partners has remained at about 30% since 1976" and that "divorced or separated persons were subjected to the highest rates of intimate partner victimization"). *See also* Mindy Abel, Denver Metro Domestic Violence Fatality Review 5 (2002) (finding that in 67 percent of the homicides, the victim had expressed a desire to leave or end the relationship).

[32] Martha Mahoney, Legal Images of Battered Women: Redefining the Issue of Separation, 90 Mich. L. Rev. 1, 65 (1991).

A recent review of the Canadian literature on separation assault found that separation entails a six-fold increase in homicide risk for women.[33] Several other North American studies revealed that the risk of assault is highest immediately following separation and when women attempt permanent separation through legal or other action.[34] Separation also increases the likelihood that women will be sexually assaulted by their former partners.[35]

When survivors choose to leave their abusers, they frequently take legal action, such as filing for a protection order, testifying in a criminal case, or seeking custody or a divorce. It is precisely at this time that the abuser is attempting to regain access and control over the victim and children. Courts and family law attorneys must be aware that domestic violence survivors are at increased risk of being assaulted or killed by their batterers. It is fear of this potentially lethal violence that propels many survivors to flee across state or tribal lines for refuge. Often, they fear their children are at risk.

C. The Impact of Domestic Violence on Children

Domestic violence affects children profoundly. Where there are children in the home, perpetrators who abuse their partners also abuse the children in 40 to 60 percent of cases.[36] Children also may be injured physically if they attempt to intervene on behalf of the abused parent.

Research demonstrates that children suffer emotional, behavioral, and developmental impairments simply from witnessing domestic violence in the home.[37] Some children may have nightmares, insomnia, bed-wetting, anxiety, and depression.[38] Others may perform poorly in school due to developmental or social problems, or they may behave aggressively towards others.[39] Witnessing domestic violence affects children in varied ways and

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[33] Walter S. DeKeseredy et al., Separation/Divorce Sexual Assault: The Current State of Social Scientific Knowledge 2 (2002) (unpublished manuscript presented at annual meeting of the American Society of Criminology, on file with author).

[34] *Id.* at 3.

[35] *Id.* at 19.

[36] Mildred Daley Pagelow, Effects of Domestic Violence on Children and Their Consequences for Custody and Visitation Agreements, 7 Mediation Q. 348 (1990).

[37] *See* Bonnie E. Carlson, Children of Battered Women, *in* Helping Battered Women: New Perspectives and Remedies 172, 173 (Albert R. Roberts ed., 1996).

[38] Pagelow, *supra* note 36, at 349.

[39] *Id.*

recovery is influenced by a range of factors, including whether a child has a good relationship with a trusted adult.[40]

Exposure to a battering parent may continue to harm children even after their parents have separated. The parenting characteristics of batterers typically include authoritarianism, under-involvement, and self-centeredness with respect to their children.[41] Moreover, batterers undermine the parenting authority of survivors by emotionally or verbally abusing them in the presence of the children or by making disparaging comments to the children during visitation.[42] Batterers deliberately use the children as weapons after separation to punish victims for leaving or to force them to reconcile.[43] It is critical for judges and family law attorneys to understand that abusers continue to threaten and harm victims and children both physically and emotionally after separation.

D. Relocation May Protect Victims and Their Children

Victims may seek a safe haven in another geographic location for a variety of reasons. In most cases, victims flee to states in which they have family support or a network of friends who can shelter them and their children in a more secure home.[44] This may prevent a perpetrator from having access to the victim, or if the batterer stalks the victim across state lines, friends or family can notify law enforcement. In some cases, victims move to a location where the police, prosecutors, or judges are known to enforce domestic violence laws vigorously.[45]

Victims also may have greater financial resources in other states, such as free housing or childcare provided by family members, enabling victims to support their children. Employment or educational opportunities may be available in other locations, allowing victims to rebuild their lives.

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[40] Peter G. Jaffe et al., Child Custody and Domestic Violence: A Call for Safety and Accountability 28 (2003).

[41] Lundy Bancroft & Jay G. Silverman, The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics 5-10 (2002).

[42] *Id.*

[43] *Id.*

[44] Telephone Interview with Darren Mitchell, Senior Attorney, National Center on Full Faith and Credit, Pennsylvania Coalition Against Domestic Violence (Oct. 7, 2003). *See also* Janet M. Bowermaster, Relocation Custody Disputes Involving Domestic Violence, 46 U. Kan. L. Rev. 433, 449 (1998).

[45] Telephone Interview with Darren Mitchell, *supra* note 44.

These economic resources provide a safeguard by ensuring that victims do not need to return to batterers for survival.

Where both parents reside in the same jurisdiction, state relocation statutes set forth the standards that the custodial parent must meet in order to move out of state. Such laws vary by jurisdiction, but increasingly, they reflect an understanding that a custodial parent who is a domestic violence survivor may need to relocate for safety.[46] Some state laws include 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 inside or outside the state.[47] This approach is recommended in the Model Code on Domestic and Family Violence developed by the National Council of Juvenile and Family Court Judges.[48]

Case law also demonstrates an understanding that victims may need to relocate for their own safety and the safety of their children. In Desmond v. Desmond, the father had abused the mother physically, sexually, and emotionally in the presence of the children.[49] The New York Family Court held that the mother's move with the children from New York to Virginia did not entitle the father to custody.[50] The mother had family support in Virginia and her relocation helped create a tranquil environment for the children.[51]

Increasingly, courts are finding that domestic violence is an exceptional circumstance that justifies relocation.[52] Factors that courts

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[46] *See* Carol S. Bruch & Janet M. Bowermaster, The Relocation of Children and Custodial Parents: Public Policy, Past and Present, 30 Fam. L.Q. 245 (1996).

[47] *See, e.g.*, Ala. Code § 30-3-133 (2003).

[48] Model Code on Domestic and Family Violence (National Council on Juvenile and Family Court Judges 1994), *available at* http://www.ncjfcj.org/dept/fvd/publications.

[49] 509 N.Y.S.2d 979, 982 n.3 (Fam. Ct. 1986).

[50] *Id.*

[51] *Id.* at 982. The court found that the following factors, *inter alia*, should be considered in relocation decisions: the availability of family services locally; the nearby residence of close family members of the abused parent; the severity of the abuse and length of time the abuse has been ongoing; the age of the children; the quality of the children's relationship with each parent; the presence of the children during episodes of spousal abuse; the children's knowledge of such misconduct; the commission of abusive acts toward any of the children; the utterance of credible threats made by the abusive spouse; the economic position of each parent; and other factors significantly bearing on the children's welfare. *Id.* at 983.

[52] *See, e.g.*, Sheridan v. Sheridan, 611 N.Y.S.2d 688 (App. Div. 1994) (noting that exceptional circumstances including domestic violence warrant relocation); Jacoby v. Carter, 563 N.Y.S.2d 344 (App. Div. 1990) (describing domestic violence as exceptional circumstances permitting relocation); Olmo v. Olmo, 528 N.Y.S.2d 880 (App. Div. 1988)

examine in relocation cases have included the safety of the abused parent and children, as well as the need for family support, safe housing, and employment opportunities when recovering from abuse.[53] These considerations are equally important in jurisdictional decisions, but have not been considered fully by courts.[54]

II. CUSTODY LITIGATION IN DOMESTIC VIOLENCE CASES

A. Batterers Use Litigation As a Weapon

Perpetrators often abduct children or pursue protracted custody or visitation litigation as a means of controlling their former partners.[55] Batterers may manipulate custody proceedings to obtain information about their former victims, to continue monitoring them, or to create opportunities for contact in order to perpetrate additional violence.[56] Domestic violence law attorneys are aware that many batterers repeatedly file for modification of custody or visitation orders or raise false allegations to harass victims.[57] Batterers also seek custody or increased visitation to retaliate against victims.[58]

The Odom v. Odom case illustrates this pattern of manipulation of the legal system.[59] Mrs. Odom fled to a shelter with her daughter after Mr. Odom assaulted her and their eight-month-old child.[60] Mr. Odom responded

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(noting that exceptional circumstances, namely the fact that the wife had been beaten by her husband, justified her relocation to another state); Gruber v. Gruber, 583 A.2d 434, 440-41 (Pa. Super. Ct. 1990) (noting that the "children's well-being and best interests [are] inextricably joined to the health and happiness of the custodial parent").

[53] *See, e.g.*, Desmond, 509 N.Y.S.2d at 983; *see also supra* note 51.

[54] For example, courts should consider a victim's safety, employment opportunities, and family support when determining whether to decline jurisdiction in favor of a refuge state. *See* discussion *infra* Part III.

[55] Daniel G. Saunders, Child Custody Decisions in Families Experiencing Woman Abuse, 39 Soc. Work 51, 53 (Jan. 1994).

[56] *See* Bancroft & Silverman, *supra* note 41.

[57] David Adams, Identifying the Assaultive Husband in Court: You Be the Judge, 33 Boston B.J. 23, 24 (1989); Julie Kunce Field, Visiting Danger, Keeping Battered Women and Their Children Safe, 30 Clearinghouse Rev. 295, 304-05 (1996).

[58] *See* Bancroft & Silverman, *supra* note 41.

[59] 606 So. 2d 862 (La. Ct. App. 1992).

[60] *Id.* at 864.

by filing for separation and alleging cruel treatment by Mrs. Odom.[61] He also alleged several times over the following months that Mrs. Odom was abusing their son and urged that the children be placed in foster care.[62] The Department of Social Services found no evidence of abuse.[63] Instead, the Court of Appeals found that Mr. Odom had submitted pictures of the child's legs as evidence of abuse when the lesions were caused by impetigo.[64] Mr. Odom also obtained custody of the child while Mrs. Odom was in a battered women's shelter in another state and refused subsequently to allow her to have visitation.[65] The Court of Appeals ultimately reversed the custody determination stating, "Mr. Odom is a manipulative and vindictive person who will not hesitate to use his children to punish his former wife."[66]

As demonstrated in the Odom case, when victims of domestic violence flee across state lines, perpetrators often file immediately for custody in the original state. In many cases, batterers have made previous threats to take the children away from victims if they leave. As will be seen below, when courts apply jurisdictional statutes without considering domestic violence issues, they enable perpetrators to get away with such threats.

While some perpetrators utilize the legal system to take the children away, others simply abduct the children. According to one study, at least 34 percent of abusers threaten to kidnap their children, and 11 percent actually abduct them.[67] While courts may not be able to prevent parental abduction, they can apply jurisdictional statutes judiciously to ensure that batterers do not benefit from this misconduct.[68]

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[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.* at 866 n.1.

[65] *Id.* at 864.

[66] *Id.* at 868.

[67] Marsha B. Liss & Geraldine Butts Stahly, Domestic Violence and Child Custody, *in* Battering and Family Therapy: A Feminist Perspective 175, 183 (Marsali Hansen & Michele Harway eds., 1993).

[68] *See* Deborah Goelman et al., Child Custody and Full Faith and Credit, *in* Full Faith and Credit: A Passport to Safety 123, 136 (Byron R. Johnson & Neil S. Websdale eds., 1997).

B. Custody and Visitation Orders in Cases Involving Domestic Violence

Courts issue custody and visitation orders in cases involving domestic violence in several ways. Domestic relations statutes govern long-term custody and visitation orders. Such statutes vary by jurisdiction and set forth criteria for determining what is in the best interest of a child. States increasingly have required courts to consider domestic violence in making these determinations. In some states, domestic violence is one factor that courts must consider in custody decisions.[69] In other states, there is a rebuttable presumption that a perpetrator of domestic violence should not receive custody of the children.[70]

Under domestic relations statutes, it may take an average of six months to one year to issue a permanent custody order, which may then be modified if a change in circumstances occurs.[71] In most jurisdictions, courts can issue intermediate custody and visitation orders during a *pendente lite* hearing.[72] In addition, when an emergency can be demonstrated, most jurisdictions allow courts to grant an *ex parte* custody award.[73]

C. Protection Order Statutes

Civil protection orders are available to victims of domestic violence in every state and territory, the District of Columbia, Puerto Rico, and on tribal lands. Protection orders require respondents to refrain from abusive behavior and include other provisions to assist domestic violence survivors. While relief varies by jurisdiction, typically such orders can require the respondent to vacate the home, return certain property, provide child support, and relinquish firearms.[74] Additionally, in most jurisdictions, protection order statutes provide explicitly that courts may issue temporary custody and visitation orders.[75]

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[69] *See, e.g.*, Mo. Rev. Stat. § 452.375.2(6) (2001).

[70] *See, e.g.*, Cal. Fam. Code § 3044(a) (West 2003).

[71] *See, e.g.*, Minn. Stat. § 518.18 (2003).

[72] *See, e.g.*, Haw. Rev. Stat. § 580-11 (2003).

[73] *See, e.g.*, Ark. Code Ann. § 9-27-314(a)(1) (Michie 2003).

[74] *See, e.g.*, Md. Code Ann., Fam. Law § 4-506(d) (2003).

[75] *See, e.g.*, Ala. Code § 30-5-7(c)(4) (2003); Md. Code Ann., Fam. Law § 4-506(d)(6) (2003); 23 Pa. Cons. Stat. Ann. § 6108(a)(4) (West 2003).

Procedurally, most states authorize the issuance of emergency or temporary protection orders after an *ex parte* hearing in which a victim demonstrates immediate danger. Usually, *ex parte* orders last for five to thirty days, until a hearing with both parties can occur. Then there is a full hearing, or if the respondent is not present, a default hearing. Consent orders may be issued without a contested hearing if the respondent concurs. When a full protection order is issued, typically it lasts for one to three years; however, some jurisdictions issue permanent protection orders that last for an indefinite amount of time.[76]

Protection order statutes generally permit courts to include custody and visitation provisions in the order, demonstrating that state and tribal legislatures have determined that there is a strong link between victim safety and court orders regarding the placement of children.[77] Despite such legislative decisions, judicial application of these statutes varies widely by jurisdiction, and sometimes within jurisdictions. A recent survey revealed that even in jurisdictions in which protection order statutes explicitly provide for the issuance of temporary custody and visitation orders, some courts are unwilling to issue such orders.[78] In certain cases, this is because the courts with the authority to issue protection orders are unfamiliar with custody matters and prefer that courts with family law expertise handle these matters.[79] Other courts may be reluctant to utilize the full scope of relief available under protection order statutes because of a misguided notion that protection orders are easy to obtain or that petitioners are attempting to circumvent the rules governing domestic relations cases.[80]

In contrast, courts in many jurisdictions understand the importance of issuing tightly crafted custody and visitation provisions within protection orders to prevent abusers from using children to harass victims. Such orders may specify safe locations for exchange of the children and provide detailed

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[76] *See, e.g.*, N.J. Stat. Ann. § 2C:25-29 (West 2003); *see also* Colo. Rev. Stat. §§ 13-14-102(9)(a), (15)(e)(I) (2003) (protection order is permanent, but custody provision lasts 120 days); Conn. Gen. Stat. § 46b-15(d) (2003) (protection order may be extended beyond six months as necessary).

[77] *See also* Deborah Goelman et al., ABA Center on Children and the Law, Interstate Family Practice Guide: A Primer for Judges 308-10 (1997); Model Code on Domestic and Family Violence, *supra* note 48.

[78] National Center on Full Faith and Credit, Pennsylvania Coalition Against Domestic Violence Survey (2002) (on file with author).

[79] *Id.*

[80] *Id.*

visitation schedules, including provisions for emergencies.[81] The protection order also may specify a third party who should be contacted in the event of a change related to visitation.[82] In some states or tribes, judges issue these types of custody and visitation provisions within protection orders based on explicit statutory provisions.[83] In others, judges use broad catch-all provisions to issue temporary custody provisions within protection orders.[84]

III. JURISDICTIONAL STATUTES

A. Overview

While there are several ways in which courts can issue custody and visitation orders, before courts begin to consider which custody and visitation arrangement would be in the child's best interest, they must first resolve the procedural issue of which court has the authority to hear the case. The determination that a particular state or tribe has jurisdiction over a child custody case has enormous ramifications for the safety of a domestic violence survivor and for the ultimate outcome of the case. If a victim has fled for safety, but is required to return to a dangerous home state to litigate the custody case, she may face a Hobbesian choice of endangering her own safety or giving up her right to fight for custody of the children. If she does not have or cannot afford an attorney in the state with jurisdiction over the custody case, she may for all purposes have lost the case before it begins.

Child custody cases conceivably implicate a web of jurisdictional statutes, including the Uniform Child Custody Jurisdiction Act (UCCJA),[85] the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA),[86] the Parental Kidnapping Prevention Act (PKPA),[87] the VAWA,[88] the

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[81] Catherine F. Klein & Leslye E. Orloff, Civil Protection Orders, *in* The Impact of Domestic Violence on Your Legal Practice: A Lawyer's Handbook 4-1, 4-4 (Deborah Goelman et al. eds., 1996).

[82] *See* Goelman, *supra* note 77, at 308-11.

[83] *See, e.g.*, D.C. Code Ann. § 16-1005(c)(6) (2003).

[84] *See supra* note 81, at 4-1 to -2.

[85] Drafted by NCCUSL in 1968.

[86] Drafted by NCCUSL in 1997.

[87] 28 U.S.C. § 1738A (2003).

[88] Pub. L. No. 103-322, 108 Stat. 1902 (1994) (codified as amended in scattered sections of 8, 16, 18, 28, and 42 U.S.C.).

Violence Against Women Act of 2000 (VAWA 2000),[89] and the Indian Child Welfare Act (ICWA),[90] among others. When these laws were enacted, the degree to which domestic violence was taken into account varied.[91] However, courts can utilize each of these laws to protect victims.

Unfortunately, courts too often have ignored provisions in these statutes that may be used to safeguard survivors and their children. Case law indicates that there is more at play than a neutral application of jurisdictional statutes when mothers are punished repeatedly for fleeing across state lines, despite the documented existence of domestic violence. In Kearney v. Hudson, for instance, the mother filed criminal charges against the father for domestic violence and obtained a restraining order in Connecticut.[92] The father filed for custody in Connecticut after the mother fled to South Carolina for safety, and the protection order was dissolved.[93] Despite the fact that South Carolina had become the child's home state, the Superior Court of Connecticut penalized the mother by refusing to apply the jurisdictional requirements of the PKPA.[94] The court acknowledged that Connecticut did not have jurisdiction under the PKPA's home state rule, but held that the mother unilaterally removed the child at a time when she knew the father was precluded from communicating with her, and that she kept her location secret.[95] Ignoring the mother's safety concerns, the court held that the "[mother] has violated the intent of the PKPA and blatantly acted to frustrate its conduct. If the [father's] claimed domestic violence is reprehensible—and it is—so, too is the [mother's] egregious conduct."[96] By equating the father's domestic violence offense, in which he committed a crime, with the mother's flight, in which she escaped to safety, the court disregarded the parties' motivation and the outcome of their actions.

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[89] Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (codified as amended in scattered sections of 8, 16, 18, 20, 28, and 42 U.S.C.).

[90] 25 U.S.C. §§ 1901-1963 (2003).

[91] For instance, domestic violence was not considered at all when the UCCJA, the PKPA, and the ICWA were drafted, but it was considered extensively when the UCCJEA and the VAWA were drafted.

[92] 2001 Conn. Super. LEXIS 267 (2001).

[93] *Id.* at *1.

[94] *Id.* at *16.

[95] *Id.* at *13-14.

[96] *Id.* at *14.

In contrast, in other cases, courts have been well aware that domestic violence offenders are misusing jurisdictional statutes to gain control. In Schuyler v. Ashcraft, for example, the father and his family repeatedly used the Florida court system to harass the mother, filing false sexual abuse charges and instituting an extraordinary number of legal proceedings on jurisdictional grounds.[97] Early on, the Florida court granted the mother's petition to relocate with the children.[98] Although the original Florida order stated that Florida would not retain jurisdiction for more than six months, the father applied *ex parte* before different judges and was granted orders extending Florida's jurisdiction.[99]

Meanwhile, New Jersey assumed emergency jurisdiction based on the father's threats to abduct the children.[100] The New Jersey court issued a protection order awarding custody to the mother and suspending the father's visitation.[101] Shortly afterwards, the mother was assaulted two blocks from the courthouse by a man who warned her to "drop the charges."[102] At home, she saw the word "dead" written in ketchup on her sliding glass door and received threats that the father would kill her.[103]

In addition to stalking and terrorizing his former partner, the father manipulated the legal system for years to harass her. He persuaded a Florida investigator that he had sole custody and that the mother was unlawfully keeping the children.[104] Consequently, Florida's governor signed extradition papers for the mother.[105] She was arrested in New Jersey in front of her children and held until the misinformation was brought to light.[106]

Ultimately, the Superior Court of New Jersey held that only the original Florida court order was enforceable and that New Jersey alone had

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[97] 680 A.2d 765, 768 (N.J. Super. Ct. App. Div. 1996).

[98] *Id.*

[99] *Id.* at 769. Father's due process violations became clear to the New Jersey court, and father's lawyer was later admonished by the Florida bar for his conduct in this case.

[100] *Id.*

[101] *Id.* at 770.

[102] *Id.*

[103] *Id.*

[104] *Id.* at 771.

[105] *Id.*

[106] *Id.*

jurisdiction to modify the custody and visitation portions of the order.[107] While the mother obtained justice from the courts ultimately, she endured years of harassment, violence, and misuse of the legal system. Judges and attorneys should have utilized provisions in jurisdictional statutes far earlier to grant her relief. To understand how such laws may be used to protect survivors, this article will examine specific provisions in each of the jurisdictional statutes.

B. Uniform Child Custody Jurisdiction Act

The UCCJA represents an initial attempt to bring consistency to state jurisdictional laws. Prior to the development of the UCCJA, parents frequently would take children across state lines and file for custody, or attempt to relitigate a custody case in a more sympathetic forum.[108] In 1968, NCCUSL promulgated the UCCJA to deter parental abduction and to prevent forum-shopping.[109] Over the next two decades, all fifty states and the District of Columbia enacted the UCCJA.

The UCCJA governs jurisdiction over initial custody determinations and is designed to prevent jurisdictional conflict. It does not govern substantive custody law, but rather dictates which court should decide the custody case. Although the drafters intended to deter interstate abduction of children, the UCCJA's structure of four alternative jurisdictional bases hindered these goals.[110]

The four bases for jurisdiction under the UCCJA include the following: home state, significant connection, last resort, and emergency jurisdiction.[111] Under the UCCJA, the home state is defined as the state in which the child lived with a parent, or a person acting as a parent, for at least six months immediately prior to the filing of the custody action.[112] A state has significant connection jurisdiction if the child and at least one parent have a "significant connection" with the state, and there is substantial evidence in the state concerning the child's life.[113] A state can assume

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[107] *Id.* at 777.

[108] UCCJA, Prefatory Note (1968).

[109] *Id.* § 1.

[110] The structure of four alternative bases permitted courts in more than one state to exercise jurisdiction in compliance with the UCCJA.

[111] UCCJA § 3.

[112] *Id.* § 2.

[113] *Id.* § 3.

emergency jurisdiction under the UCCJA if the child is physically present in the state and it is necessary to protect the child because the child has been threatened, abused, mistreated, or neglected.[114] Last resort jurisdiction exists when no other state has home state, emergency, or significant connection jurisdiction.[115] The UCCJA does not address domestic violence explicitly in its jurisdictional bases. Its drafters were likely unaware that domestic violence was an underlying issue in many of the parental abduction cases the UCCJA sought to prevent.

As a result of the UCCJA's silence regarding domestic violence, some courts have denied relief to domestic violence victims who have fled across state lines.[116] In Ricky D.C. v. Carol A.C., for instance, a domestic violence survivor fled with her son from Tennessee to New York because of the long-term physical and mental abuse.[117] The father obtained custody in Tennessee, and the mother did not attend the hearing due to financial constraints.[118] Although the New York Family Court was convinced that the child's return to Tennessee with his father might be contrary to the child's best interests, the court, without judicial communication, held that Tennessee was the home state under the PKPA and the UCCJA, and thus was entitled to exercise jurisdiction.[119] Similarly, in Dschaak v. Dschaak, the mother left North Dakota with her son and fled to West Virginia because of abuse.[120] When she filed for custody, West Virginia declined to

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[114] *Id.*

[115] *Id.*

[116] *See* Moore v. Richardson, 964 S.W.2d 377 (Ark. 1998) (finding that Texas should not have modified an Arkansas order, despite a Texas protective order against father and child's report to DHS that father was still abusing her); Baumgartner v. Baumgartner, 691 So.2d 488 (Fl. Dist. Ct. App. 1997) (holding that where father was arrested and jailed on a domestic violence offense in Florida, court could issue a protection order but that "such temporary protection . . . does not include holding children hostage for a year" given that Germany was the home state and in the midst of exercising jurisdiction); Sarraj/Wazwaz v. Sarraj, 1997 Minn. App. LEXIS 254 (Ct. App. 1997) (finding that Minnesota, the state to which the victim fled, would not exercise home state or emergency jurisdiction since children were not abused, despite the fact that father was convicted of domestic battery against mother in Illinois); Nazar v. Nazar, 474 N.W.2d 206 (Minn. Ct. App. 1991) (holding that Minnesota was entitled to reexamine Louisiana's assumption of emergency jurisdiction to protect mother and children, and suggesting that mother took children from Minnesota under false pretenses); Patricia R. v. Andrew W., 467 N.Y.S.2d 322 (1983) (finding that a single act of violence is insufficient for emergency jurisdiction).

[117] 528 N.Y.S.2d 786, 787 (1988).

[118] *Id.* The case opinion does not indicate whether the mother's attorney requested that the Tennessee court decline jurisdiction based on inconvenient forum.

[119] *Id.*

[120] 479 N.W.2d 484, 485 (N.D. 1992).

exercise jurisdiction, deferring to North Dakota because it was the home state; the father subsequently obtained custody based on the stability of his living arrangement.[121]

1. Emergency Jurisdiction

Despite its lack of explicit reference to domestic violence, the UCCJA can be utilized to protect victims of domestic violence. When victims flee across state or tribal lines to seek refuge, courts may exercise emergency jurisdiction.[122] This permits victims to remain in safe locations while litigating a child custody case.

Often the parent who has abused the other parent also has abused the children.[123] In such cases, courts may exercise emergency jurisdiction under the UCCJA with ease, since the child is in the refuge state and the child has been threatened or subjected to mistreatment or abuse.[124] Only a few courts have been reluctant to exercise emergency jurisdiction when both the victim and the children have been abused.[125]

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[121] *Id.*

[122] *See* Ind. Code Ann. § 31-17-3-3 (Michie 2003); Ky. Rev. Stat. Ann. § 403.420 (Banks-Baldwin 2002); La. Rev. Stat. Ann. § 13:1702(A)(3) (West 2002); Md. Code Ann., Fam. Law § 9-204 (2002); Mass. Gen. Laws ch. 209B, § 2 (2002); Miss. Code Ann. § 93-23-5 (2002); Mo. Rev. Stat. § 452.450 (2002); Neb. Rev. Stat. § 43-1203 (2002); Nev. Rev. Stat. § 125A.050, 1(c)(2)(II) (2002); N.H. Rev. Stat. Ann. § 458-A:3 (2002); N.J. Stat. Ann. § 2A:34-31 (West 2002); Ohio Rev. Code Ann. § 3109.22 (Anderson 2002); 23 Pa. Cons. Stat. § 5344 (2002); R.I. Gen. Laws § 15-14-4 (2002); S.C. Code Ann. § 20-7-788 (Law. Co-op. 2002); S.D. Codified Laws § 26-5A-3 (Michie 2002); Vt. Stat. Ann. tit. 15, § 1032 (2002); Wis. Stat. § 822.03 (2002); Wyo. Stat. Ann. § 20-5-104 (Michie 2002).

[123] Lee H. Bowker et al., On the Relationship Between Wife Beating and Child Abuse, *in* Feminist Perspectives on Wife Abuse 158-59, 162 (Kersti Yllo & Michelle Bograd eds., 1988) (finding that 70 percent of domestic violence perpetrators abused the children as well as their partners); Murray A. Straus & Christine Smith, Family Patterns and Child Abuse, *in* Physical Violence in American Families 254 (Murray A. Straus & Richard J. Gelles eds., 1990) (stating that the incidence of child abuse is 150 percent greater when marital violence exists).

[124] *See, e.g.*, D'Agnese v. D'Agnese, 468 S.E.2d 140 (Va. Ct. App. 1996) (relying on the fact that mother went to Illinois to protect children from abuse—including father beating them, holding a knife to daughter's throat, and threatening to kill family pets with a gun—the Virginia Court of Appeals held that Virginia, the home state, should have deferred to Illinois, the refuge state with emergency jurisdiction).

[125] *See, e.g.*, Deering v. Deering, 1995 Del. Fam. Ct. LEXIS 26 (1995) (holding that "[b]ecause Father remained in Texas and Mother has successfully removed the children from any threat posed by Father, the emergency provision of the UCCJA is not applicable," *id.* at *10); Margaret A.T. v. James L.T., 1991 Del. Fam. Ct. LEXIS 2 (1991) (holding that where mother fled from Maryland to Delaware with children because of abuse, children were not so at risk that Delaware should assume jurisdiction, since Maryland was the home state and proceedings were pending there); Patricia R. v. Andrew W., 467 N.Y.S.2d 322 (1983)

Courts have been more hesitant to exercise emergency jurisdiction when the child has not been physically abused, despite the effects on children of witnessing violence. In Hagedorn v. Hagedorn, for example, the mother fled from Indiana to Louisiana with the child and filed for custody, alleging that the father had abused her and threatened her at gunpoint.[126] Although the Louisiana trial court exercised emergency jurisdiction under the UCCJA, the Court of Appeals of Louisiana reversed the decision, deferring to Indiana as the home state.[127] The appellate court noted that the allegations of physical abuse pertained only to the mother, not to the child, and that the father gave a "plausible explanation of an incident with a loaded shotgun."[128]

In contrast, other states have begun to include domestic violence as a formal basis for exercising emergency jurisdiction. For example, in adopting the UCCJA, Nevada included violence against a parent as a statutory basis for exercising emergency jurisdiction.[129] Thus, a court may exercise emergency jurisdiction when a contestant sets forth that she has been subjected to or threatened with a domestic violence act by an opposing contestant.[130] This measure allowed an abused parent who fled to Nevada to seek custody on an emergency jurisdiction basis even if the child had not been physically abused by the perpetrator.

Case law in other states demonstrates that courts have found violence against a parent to be relevant to emergency jurisdiction,

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(holding that a single act upon which a temporary order of protection was based is insufficient to rise to level of physical or emotional danger to warrant emergency jurisdiction); Hernandez v. Collura, 493 N.Y.S.2d 343, 346 (App. Div. 1985) (holding that where mother fled from Connecticut to New York, her "vague and unsubstantiated allegations" were insufficient for New York court to exercise emergency jurisdiction); Danna v. Danna, 364 S.E.2d 694 (N.C. Ct. App. 1988) (holding that mother's flight with children from Florida to North Carolina in violation of court order constituted wrongful conduct and that her bare allegations of abuse did not necessitate asserting jurisdiction); *In re* Simons, 693 N.E.2d 1111 (Ohio Ct. App. 1997) (holding that where mother and child were abused and fled to Ohio, Ohio Juvenile Court properly exercised its right to decline jurisdiction based on inconvenient forum as proceedings were pending in Kentucky, the home state); *In re* Kastanas, 896 P.2d 726 (Wash. Ct. App. 1995) (holding that Washington had to decline jurisdiction under the PKPA because California was the home state, despite concerns about mother's allegations of abuse against her and the child).

[126] 584 So. 2d 353 (La. Ct. App. 1991).

[127] *Id.*

[128] *Id.* at 355.

[129] *See, e.g.*, Nev. Rev. Stat. 125A.050, 1(c)(2)(II) (2002). (Note that Nevada has since enacted the UCCJEA.)

[130] Nev. Rev. Stat. 125A.050, 1(c)(2)(II) (2002).

particularly when children have been affected by the violence.[131] For instance, courts have exercised emergency jurisdiction when one parent has been assaulted or terrorized by an intimate partner in the child's presence.[132] In Powers v. Powers, the father assaulted the mother and then snatched the children and went to Ohio.[133] Although he had been charged with a domestic violence offense in North Carolina and the mother had temporary custody under a protection order, the father obtained custody in Ohio after alleging that the children had been abused by the mother's (fictional) boyfriend.[134] When the Ohio referee received accurate information about the North Carolina proceedings, he determined that North Carolina should exercise jurisdiction.[135] However, he retained temporary jurisdiction based on an emergency—the father's sinister behavior—and issued an interim order returning the children to their mother.[136]

In Gasaway v. Gasaway, the Appellate Court of Illinois examined the impact of the UCCJA on the Illinois protection order statute.[137] The mother had moved with the children from Indiana to Illinois, and the father filed a motion to modify the Indiana custody order.[138] The Indiana court awarded temporary custody to the father and issued a warrant for the

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[131] *See, e.g.*, Cole v. Super. Ct., 218 Cal. Rptr. 905 (Ct. App. 1985); Farrell v. Farrell, 351 N.W.2d 219 (Mich. Ct. App. 1984); Coleman v. Coleman, 493 N.W.2d 133 (Minn. Ct. App. 1992); Wren v. Wren, 2001 Neb. Ct. App. LEXIS 279 (2001); Quill v. Quill, 471 N.Y.S.2d 623 (App. Div. 1984).

[132] *See, e.g.*, Cole, 218 Cal. Rptr. 905 (finding that emergency jurisdiction could be exercised where father abused mother and one child, even when children who were the subject of the custody case had not been abused); Ripen v. Ripen, 610 So. 2d 686 (Fla. Dist. Ct. App. 1992) (finding that a temporary custody provision within a protection order was consistent with UCCJA); Farrell, 351 N.W.2d 219 (finding that court could exercise emergency jurisdiction where perpetrator physically and verbally abused victim); Coleman, 493 N.W.2d 133 (finding that father's abuse of family permitted court in refuge state to exercise emergency jurisdiction); Quill, 471 N.Y.S.2d 623 (finding that court could exercise emergency jurisdiction when husband hit wife and threatened to take child); Dean v. Crane, 702 N.Y.S.2d 544 (Fam. Ct. 2000) (holding that where Colorado was the home state, New York was entitled to exercise emergency jurisdiction because child had been repeatedly exposed to acts of serious domestic violence visited upon mother).

[133] 642 N.E.2d 451 (Ohio Ct. App. 1994).

[134] *Id.* at 451, 453.

[135] *Id.* at 453.

[136] *Id.* at 453-54.

[137] 616 N.E.2d 610 (Ill. App. Ct. 1993).

[138] *Id.* at 611.

mother's arrest.[139] Meanwhile, the mother obtained an order of protection in Illinois including custody.[140] When the father attempted to remove his daughter from her school in Illinois, he was arrested on charges of child abduction.[141]

Although the Appellate Court of Illinois held that the UCCJA applied, the court distinguished between protection order and long-term custody cases, holding that the lower court could enter an order of protection even though it might have been required to decline jurisdiction under the state custody law.[142] The court reasoned that the domestic violence act should be liberally construed, and that courts promptly should enter and enforce orders which prohibit abuse so that victims are not trapped in abusive situations.[143] The holding acknowledged the importance of safety issues in custody cases involving domestic violence and applied jurisdictional law accordingly. Courts in states governed by the UCCJA should follow this lead and apply the UCCJA in ways that protect victims.

As described below, recent changes in jurisdictional laws, including the UCCJA's successor, clarify the directive that courts should exercise emergency jurisdiction in domestic violence cases even when the children have not been abused. When courts exercise emergency jurisdiction, however, the nature of emergency jurisdiction is temporary. The home state retains the power to exercise jurisdiction in the long run.[144]

2. Inconvenient Forum

Under the UCCJA, the four jurisdictional bases described above determine which court has the authority to hear a custody case. However, any court with the power to exercise jurisdiction may decline based on an inconvenient forum analysis. Courts may consider the following factors:

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[139] *Id.* at 612.

[140] *Id.*

[141] *Id.*

[142] *Id.* at 612-13.

[143] *Id.* at 613.

[144] *See, e.g.*, Banda v. Banda, 565 A.2d 1121 (N.J. Super. Ct. App. Div. 1989) (finding that where mother fled from Indiana to New Jersey due to abuse, New Jersey court could exercise emergency jurisdiction, but only for interim protective measures); Nadeau v. Nadeau, 716 A.2d 717 (R.I. 1998) (holding that where mother fled from Rhode Island to Connecticut with five children to escape father's physical and emotional abuse, Connecticut was entitled to exercise emergency jurisdiction, but once the emergency ceased to exist, the home state had jurisdiction).

- Does another state qualify as the child's home state?
- Does another state have a closer connection with the child and his [or her] family?
- Is evidence concerning the child's present or future care, protection, training, and personal relationships more readily available in another state?
- Have the parties agreed on another forum that is no less appropriate?
- Would the exercise of jurisdiction by a court of this state contravene any of the purposes stated in the UCCJA?[145]

Courts in the home state should utilize these principles to decline jurisdiction in domestic violence cases in which victims have fled across state lines. A court might find, for example, that it is in the child's interest for the home state to decline jurisdiction because the child and victim reside safely in a refuge state, and evidence concerning the child's present care and protection is more readily available in the refuge state. Allowing the survivor to remain in the refuge state, rather than forcing a return to the home state, could protect the survivor and children from physical harm and preserve their financial resources.

Although the UCCJA does not address domestic violence explicitly under its inconvenient forum provision, courts have considered safety issues when declining jurisdiction. In Swain v. Vogt, for instance, a mother left New York—the child's home state—and relocated to Maine with her son to escape abuse.[146] The New York Supreme Court held that the New York Family Court was entitled to decline jurisdiction upon finding that Maine was a more appropriate forum.[147]

Similarly, in Van Norman v. Upperman, the mother left Nebraska with the children after the father threatened to kill her.[148] The father then filed for custody in Nebraska alleging that she had absconded with the children.[149] In the home state, the Nebraska trial court dismissed the case on inconvenient forum grounds, based on the fact that the children were receiving counseling in Kansas and had relatives in Kansas, and that the mother's limited income would make coming to Nebraska for court

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[145] UCCJA § 7(c) (1968).

[146] 206 A.D.2d 703 (N.Y. App. Div. 1994).

[147] *Id.* at 705.

[148] 436 N.W.2d 834, 835 (Neb. 1989).

[149] *Id.* at 835-36.

appearances an extreme hardship.[150] The Supreme Court of Nebraska concurred that Nebraska was entitled to decline jurisdiction.[151]

In other domestic violence cases, courts have found that concerns about children's safety and stability required the home state to decline jurisdiction.[152] In Cronin v. Camilleri, the mother fled with the children from Maryland to Hawaii after the father abused the daughter, and she obtained a protection order in Hawaii.[153] The Maryland trial court declined jurisdiction based on inconvenient forum because the children had relatives in Hawaii, and the mother could earn a living in Hawaii.[154] This case provides a model for courts considering whether to decline jurisdiction based on inconvenient forum where there is a history of domestic violence.

3. Declining Jurisdiction by Reason of Conduct

A court also may decline to exercise jurisdiction if a party has wrongfully taken the child from another state or engaged in similar misconduct.[155] The "clean hands doctrine" ensures that a party who commits objectionable acts does not gain a jurisdictional advantage. Perpetrators of domestic violence often snatch the children and disappear to other geographic locations to punish victims. Under such circumstances, courts should decline jurisdiction by reason of the perpetrator's conduct.[156]

The "clean hands doctrine" has not been utilized appropriately by all courts. In Canty v. Canty, the father assaulted the mother in the presence of the children.[157] The father also failed to return the daughter to the mother

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[150] *Id.* at 836-37.

[151] *Id.* at 837.

[152] *See, e.g.*, Cline v. Cline, 433 N.E.2d 51 (Ind. Ct. App. 1982) (permitting battered spouse to proceed in refuge state); Coleman v. Coleman, 493 N.W.2d 133 (Minn. Ct. App. 1992) (holding that home state of Minnesota would decline jurisdiction where victim sought haven in Nebraska with her relatives); Marlow v. Marlow, 471 N.Y.S.2d 901 (Sup. Ct. 1983) (holding that refuge state should exercise jurisdiction); Merman v. Merman, 603 A.2d 201 (Pa. Super. Ct. 1992) (holding that Pennsylvania appropriately declined jurisdiction based on inconvenient forum where mother had moved with children to New Jersey and later obtained a protection from abuse order on behalf of children).

[153] 648 A.2d 694, 695 (Md. Ct. Spec. App. 1994).

[154] *Id.* at 699.

[155] UCCJA § 8(a) (1968).

[156] *See, e.g.*, Cronin, 648 A.2d at 699-700 (finding that trial court appropriately declined jurisdiction based on father's reprehensible conduct in snatching children twice).

[157] 874 P.2d 1000, 1002 (Ariz. Ct. App. 1994).

after a visit, and he filed for sole custody in Arizona while the mother filed for custody in the Fort Peck Tribal Court in Montana.[158] Despite the father's violence and misconduct, the Court of Appeals of Arizona held that Arizona had continuing jurisdiction and was not required to decline jurisdiction based on the father's misconduct.[159]

While the "clean hands doctrine" has been under-utilized in some cases involving abusers, it also has been misapplied by some courts and used to punish victims who have fled across state lines to escape abuse.[160] In Alexander v. Ferguson, the U.S. District Court in Maryland[161] admonished a domestic violence survivor for flaunting federal law—the PKPA—by commencing custody proceedings in New York, the state where she was living, after an initial hearing had taken place in Maryland.[162] The court did not consider evidence of domestic violence in making its jurisdictional decision, despite the fact that courts in two other states (Pennsylvania and New York) had granted protection orders to the mother.[163]

Courts should be aware that applying the "clean hands doctrine" in this manner undermines the purpose for which it was designed—to censure wrongful conduct. It is critical to examine carefully claims by abusers that their partners have absconded with the children.[164] Courts must understand the context of interstate flight in order to determine whether reprehensible conduct has occurred and refrain from penalizing victims who have fled for their safety.

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[158] *Id.*

[159] *Id.* at 1003.

[160] *See, e.g.*, Dymitro v. Dymitro, 927 P.2d 917 (Idaho Ct. App. 1996) (finding that mother had overstated the violent nature of father's temper and that magistrate was entitled to consider mother's unilateral removal of son from Idaho contrary to the UCCJA); Malik v. Malik, 638 A.2d 1184 (Md. Ct. Spec. App. 1994) (finding that mother's conduct in fleeing Pakistan with children was reprehensible despite her allegations of abuse and the issuance of a restraining order to protect her and the children).

[161] In 1986, this federal court exercised jurisdiction in a PKPA case; note that since the Supreme Court's ruling in Thompson v. Thompson, a federal court could not exercise jurisdiction to resolve conflicting state custody orders. 798 F.2d 1547 (9th Cir. 1986), *aff'd*, 484 U.S. 174 (1988).

[162] 648 F. Supp. 282, 287 (D. Md. 1986).

[163] *Id.* at 286-87.

[164] *See, e.g.*, Blocker v. Blocker, 944 S.W.2d 552 (Ark. Ct. App. 1997) (when mother fled to Arkansas with child due to abuse, father argued that Arkansas should decline jurisdiction based on inconvenient forum and mother's "absconding with the child." The court held that Arkansas was the home state and would not decline jurisdiction).

Some states have codified the concept that the "clean hands doctrine" does not apply to victims of domestic violence who flee across state lines with children.[165] In other states, case law sets forth the principle that victims of domestic violence should not be penalized for escaping with the children.[166] In the Thorenson case, for example, the Washington Court of Appeals found that a domestic violence survivor fled from Florida to Washington with her children in violation of an existing court order, but did so to protect herself and the child from physical and mental abuse.[167] The court held that the victim's flight counterbalanced the "clean hands doctrine" and that the trial court did not abuse its discretion in exercising jurisdiction regardless of the victim's technical violation of Florida's custody decree.[168]

Flight from domestic violence is recognized as a defense to international parental kidnapping.[169] In many states it is also an exemption or an affirmative defense to kidnapping charges.[170] In some jurisdictions, victims are required to notify the district attorney or law enforcement prior to or within a certain amount of time after flight.[171] The legal recognition that victims should not be penalized for escaping with their children provides an existing principle for courts to utilize when determining whether to apply the "clean hands doctrine" under the UCCJA.

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[165] However, the UCCJA states with such protections have since enacted the UCCJEA, which contains a similar provision. *See infra* Part III.C.

[166] *See, e.g.*, Vachon v. Pugliese, 931 P.2d 371 (Alaska 1996) (holding that mother's flight with child to refuge state was not custodial interference or wrongful conduct); Fox v. Fox, 225 Cal. Rptr. 823 (Ct. App. 1986) (holding that where mother fled because she was afraid of father, her flight to California was not reprehensible or objectionable conduct within the meaning of the statute); O'Neill v. Stone, 721 So. 2d 393 (Fla. Dist. Ct. App. 1998) (holding that victim's departure was in the context of domestic violence and that she did not leave the state to circumvent the court-ordered visitation schedule); Swain v. Vogt, 206 A.D.2d 703 (N.Y. App. Div. 1994) (holding that victim was permitted to remove child because of her husband's abuse).

[167] *In re* Thorensen, 730 P.2d 1380, 1387 (Wash. Ct. App. 1987).

[168] *Id.*

[169] 18 U.S.C. § 1204(c)(2) (2003).

[170] *See, e.g.*, Cal. Penal Code §§ 278.5, 278.7 (West 2003); Fla. Stat. ch. 787.03(4)(b) (2003).

[171] *See, e.g.*, Cal. Penal Code § 278.7 (West 2003) (requiring victim of domestic violence who conceals child to make a report to the district attorney's office within a reasonable time—at least ten days—and commence a custody proceeding within a reasonable time—at least thirty days).

4. Pleading Requirements

The UCCJA's pleading requirements also can pose a hazard to domestic violence survivors, as parties are required to include the following information:

- The child's present address;
- The places the child has lived during the past five years;
- The names and addresses of the persons with whom the child has lived;
- Information about other pending or completed custody cases involving the child;
- Information about other persons with custody or visitation claims.[172]

In domestic violence cases, providing this information could endanger the victim or child by giving the perpetrator access to information about where the victim and child live. Often, this is precisely the type of information that enables an abuser to continue to abuse or harass the victim. In some states, the UCCJA or case law permits courts to waive disclosure if this would harm the victim or child.[173] Other procedural safeguards, such as providing the information to the court but keeping it under seal, also may be available.

5. Judicial Communication

The UCCJA requires courts in different jurisdictions to communicate when custody proceedings are pending in more than one state.[174] In domestic violence cases, such communication can be critical to victim safety. For instance, if a victim flees to a refuge state and that state exercises emergency jurisdiction while a proceeding also is pending in the home state, the home state must be informed. This ensures that the court in the home state will be aware of the domestic violence history, the reason for the victim's flight with the children, and the danger of requiring the victim to return to the home state to litigate the custody case.

Judicial communication gives judges the ability to make informed decisions about the safety of victims and children.[175] In Coleman v.

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[172] UCCJA § 9 (1968).

[173] *See, e.g.*, Mass. Gen. Laws ch. 209B, § 3(e) (2002).

[174] UCCJA § 6(c).

[175] *See, e.g.*, Cline v. Cline, 433 N.E.2d 51 (Ind. Ct. App. 1982) (finding that trial court in Indiana was entitled to decline jurisdiction after communicating with California

Coleman, for instance, the mother had moved from Minnesota to Nebraska with the children because of the father's threats and violence.[176] She obtained temporary custody in Nebraska based on emergency jurisdiction, and the father then filed for custody in Minnesota, the home state.[177] The Minnesota court conferred with the Nebraska court regarding jurisdiction and declined to exercise jurisdiction as a result of the judicial communication.[178]

6. Interstate Discovery

The UCCJA's interstate discovery provisions also can be applied to safeguard victims. A court in one jurisdiction may request the following assistance from a court in another jurisdiction:

- 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 party who has physical custody to appear in court with the child.[179]

Thus, if a victim has fled to a refuge state and the home state has declined jurisdiction, the refuge state may ask the home state to make evidence or witnesses available. Conversely, if the home state has retained jurisdiction, but the child and abused parent reside in a refuge state, the home state may request evidence from the refuge state regarding the child's present living circumstances. Electronic forms of communication also may be used to

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court and determining that California was a more appropriate forum, as mother was a battered spouse who had sought safety there with her parents). *But see* Sandra M. v. Jeremy M., 476 S.E.2d 213 (W. Va. 1996) (finding that Florida had exercised jurisdiction properly where mother fled to West Virginia with child due to abuse; although the courts in the two states communicated, the result was unclear and they did not appear to consider safety issues).

[176] 493 N.W.2d 133, 135 (Minn. Ct. App. 1992).

[177] *Id.*

[178] *Id.*

[179] UCCJA §§ 19-22.

facilitate the exchange of information in interstate cases, hence eliminating the need for victims to travel to jurisdictions where their abusers reside.[180]

7. Notice and Opportunity to Be Heard

The UCCJA requires notice and an opportunity to be heard in order for child custody determinations to be enforceable under the Act.[181] Protection orders containing custody provisions generally will be enforceable under the UCCJA because respondents receive notice and an opportunity to be heard.[182] *Ex parte* orders, however, whether issued as part of a temporary protection order or as an emergency custody order, do not conform to the UCCJA's notice provision.[183]

C. Uniform Child Custody Jurisdiction and Enforcement Act

The UCCJEA was promulgated by NCCUSL in 1997 to update the UCCJA. Unlike the UCCJA, the UCCJEA was drafted with domestic violence concerns in mind, in large part because domestic violence victim advocacy organizations participated in the drafting process. The UCCJEA reflects an understanding that when interstate custody disputes arise, domestic violence often is a causal factor.[184] As a result, the UCCJEA contains explicit provisions that courts can utilize to protect victims of domestic violence and to prevent abusers from manipulating the courts in interstate custody cases. The UCCJEA also was designed to harmonize child custody jurisdiction law, given the changes that had been enacted by the PKPA, state domestic violence statutes, and the VAWA.[185]

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[180] Goelman, *supra* note 77, at 302-09.

[181] UCCJA § 4.

[182] *Id.*

[183] *Id.*

[184] Billie Lee Dunford-Jackson, The Uniform Child-Custody Jurisdiction and Enforcement Act: Affording Enhanced Protection for Victims of Domestic Violence and Their Children 2, *available at* http://data.ipharos.com/praxis/documents/uniformchildcustody.pdf (last visited Oct. 14, 2003).

[185] Referring to the original VAWA. As the UCCJEA was drafted in 1997, the VAWA 2000 was not yet law.

1. Jurisdictional Bases

Like the UCCJA, the UCCJEA sets forth four potential bases of jurisdiction: home state, significant connection, last resort, and emergency jurisdiction.[186] The UCCJEA, however, prioritizes home state jurisdiction over the other jurisdictional bases.[187] "Home state" is defined as the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding.[188]

When the UCCJEA was being drafted, victim advocacy organizations recommended that in cases in which victims fled across state lines, the refuge state should have preferred jurisdiction by attaching home state jurisdiction to the state to which the victim fled for safety reasons.[189] The Drafting Committee ultimately rejected this proposal. The Committee was concerned about eroding the traditional concept of home state jurisdiction and hypothesized that the home state often would be the state with better access to evidence.[190]

The UCCJEA elevates the home state.[191] Besides having jurisdiction over initial custody determinations, the home state retains exclusive, continuing jurisdiction.[192] This lasts until the home state determines that relevant persons do not have a significant connection with the state and that substantial evidence is no longer available in the state, or that relevant persons no longer reside in the home state.[193] Similarly, the

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[186] The UCCJEA also provides that a court may exercise jurisdiction as a "more appropriate forum." This occurs when the home state court and the significant connection court decline jurisdiction. *See* Patricia M. Hoff, The ABC's of the UCCJEA: Interstate Child-Custody Practice Under the New Act, 32 Fam. L.Q. 267, 280 (1998).

[187] UCCJEA § 201 (1997).

[188] *Id.* § 102(7).

[189] *See, e.g.*, Letter from American Bar Association Commission on Domestic Violence, to Jeff Atkinson, ABA Advisor to the UCCJEA Drafting Committee 3 (Dec. 19, 1996).

[190] *See* Jeff Atkinson, Report Regarding the NCCUSL Drafting Committee for the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA): Results of the Final Drafting Committee Meeting 1997, *in* Battered Women and the Law 490 (Clare Dalton & Elizabeth Schneider eds., 2001).

[191] UCCJEA, Prefatory Note.

[192] *Id.*

[193] *Id.* § 202.

home state retains jurisdiction to modify custody determinations as long as it has exclusive, continuing jurisdiction.[194] Centralizing power in the home state has particular implications for domestic violence victims who flee across state lines to refuge states in which they have greater support.

2. Emergency Jurisdiction

One of the most prominent changes in the UCCJEA was the expansion of emergency jurisdiction to cases in which a sibling or parent of the child is subjected to or threatened with mistreatment or abuse.[195] The provision was intended to codify common practice under the UCCJA and the PKPA.[196] The comment to the UCCJEA acknowledges that protection order proceedings often are the procedural vehicles through which a court assumes emergency jurisdiction.[197]

Courts may exercise emergency jurisdiction under the UCCJEA to protect victims who flee across state lines even when the children have not been abused. The UCCJEA simply institutionalized the growing trend in case law and state-adopted versions of the UCCJA. It permits courts to exercise emergency jurisdiction when an abused parent flees across state lines and seeks legal relief.

The UCCJEA limits the parameters of emergency jurisdiction by restricting it to temporary orders.[198] The purpose of the temporary order is to protect the child until a state that has initial jurisdiction, exclusive, continuing jurisdiction, or jurisdiction to modify an existing custody order enters an order.[199] This limitation poses a danger to victims who have fled from the home state because the home state retains jurisdiction over the long-term custody proceeding.

In Campbell v. Martin, for instance, a mother fled from Kentucky to Maine with her daughter because the father had threatened to kill them after the mother sought a protection order in Kentucky.[200] The Maine trial court issued a protection from abuse order, including temporary custody, to

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[194] *Id.* § 203.

[195] *Id.* § 204(a).

[196] *Id.* § 204 cmt.

[197] *Id.*

[198] *Id.* § 204.

[199] *Id.*

[200] 802 A.2d 395, 396 (Me. 2002).

the mother.[201] When the mother filed for permanent custody in Maine, however, the Maine trial court held that Kentucky was the child's home state and dismissed the complaint for lack of jurisdiction under the UCCJEA.[202] The appellate court concurred that Maine could exercise emergency jurisdiction in the protection from abuse order, but not jurisdiction over the custody complaint, because the exercise of jurisdiction was no longer necessary to protect the child.[203]

The UCCJEA's emergency jurisdiction provision is a useful tool, but judicial education on domestic violence will enhance its efficacy. In Crabbe v. Kissell, the father abused the mother in Florida and she moved with the child to Connecticut several times.[204] In addition to physical assault, he isolated her by selling her car so she could not leave town and breaking her TTY machine so that she could not communicate by phone.[205] When the mother finally escaped to Connecticut, the father obtained custody in Florida.[206] The mother filed in Connecticut for a temporary restraining order and custody, and the trial court exercised emergency jurisdiction and awarded her custody.[207] The Superior Court of Connecticut, however, disregarded the history of domestic violence and held that Connecticut's exercise of temporary emergency jurisdiction should end.[208] The court also dismissed the restraining order because the father had no minimal contact with the state.[209] This failure to utilize jurisdictional statutes to protect the survivor—including a failure to communicate with the Florida court about the domestic violence history—separated the mother and child permanently. It also sent an ominous message to domestic violence survivors that they may be forced to choose between their own physical safety and retaining custody of their children.

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[201] *Id.*

[202] *Id.* at 397.

[203] *Id.* at 398.

[204] 2001 Conn. Super. LEXIS 3275 (2001).

[205] *Id.* at *2-*3.

[206] *Id.* at *3-*4.

[207] *Id.* at *4-*5.

[208] *Id.* at *6-*7.

[209] *Id.* at *7.

3. Inconvenient Forum

The limits on emergency jurisdiction pose a danger to victims. This danger is addressed in part through the UCCJEA's inconvenient forum provision, which allows a court in the state with preferred jurisdiction to decline to exercise jurisdiction if it determines that it is an inconvenient forum and that there is another more appropriate forum.[210] The UCCJEA mandates that the court consider all relevant factors, including "whether domestic violence has occurred and is likely to continue in the future and which State could best protect the parties and the child."[211]

This mandate to consider domestic violence as a factor in inconvenient forum decisions is a new jurisdictional tool for courts. The UCCJEA instructs a court to determine whether the parties are located in different states because one party is a victim of domestic violence or child abuse.[212] It also requires the court to consider which state can best protect the victim from further violence or abuse.[213]

In a recent inconvenient forum case, the Supreme Court of Montana urged trial courts to give priority to the safety of victims of domestic violence when considering jurisdictional issues.[214] In Stoneman v. Drollinger, the mother relocated from Montana to Washington with four children after the father abused her.[215] In Washington, the mother received a protection order, but the Montana trial court denied the mother's request to decline jurisdiction under the UCCJEA.[216] The Montana Supreme Court reversed, holding that the trial court failed to consider which forum could best protect the mother and children from further abuse.[217] Because the UCCJEA placed domestic violence at the top of the list of inconvenient forum factors to consider, the trial court should have communicated with the Washington court and declined jurisdiction.[218]

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[210] UCCJEA § 207(b) (1997).

[211] *Id.* § 207(b)(1).

[212] *Id.* § 207 cmt.

[213] *Id.* § 207(b)(1).

[214] Stoneman v. Drollinger, 64 P.3d 997 (Mont. 2003).

[215] *Id.* at 999.

[216] *Id.* at 999-1000.

[217] *Id.* at 1004.

[218] *Id.*

This provision has been utilized in at least one intrastate case as well. In Jeanne E.M. v. Lindey M.M., the mother fled from Franklin County, New York, to Albany, New York, because of abuse.[219] The father requested a venue change based on convenience and because the parties had lived in Franklin County, however, the mother had no vehicle to drive there and her safety could have been jeopardized by a forced return.[220] The New York Family Court considered the UCCJEA inconvenient forum principles and held that "it would not serve the ends of justice to deprive the mother of her safe harbor in Albany County."[221] The court viewed the legislative command to consider domestic violence in interstate and international child custody jurisdictional disputes as relevant whether the case involved counties, states, or countries.[222]

The issue of inconvenient forum may be raised upon motion of a party, the court's own motion, or request of another court.[223] This flexibility may be critical in domestic violence cases in which victims are unrepresented, as the refuge court could make a request of the home state court where necessary. Although underutilized by family law attorneys and judges, the UCCJEA's inconvenient forum provision was expanded specifically to cover domestic violence cases and could enhance victim safety if courts used this tool consistently.

4. Declining Jurisdiction by Reason of Conduct

The UCCJEA also requires a court to decline to exercise its jurisdiction when a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct.[224] The "clean hands doctrine" is designed to ensure that abducting parents will not benefit from their unjustifiable conduct.[225] Unlike the drafters of the UCCJA, the drafters of the UCCJEA envisioned that the doctrine would restrict those domestic violence offenders seeking to manipulate the court system.[226] For example, an abusive parent who seizes

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[219] 734 N.Y.S.2d 837, 837 (Fam. Ct. 2001).

[220] *Id.*

[221] *Id.* at 838.

[222] *Id.* at 838-39.

[223] UCCJEA § 207(a) (1997).

[224] *Id.* § 208.

[225] *Id.* § 208 cmt.

[226] *Id.*

the child and flees to another state to establish jurisdiction has engaged in unjustifiable conduct and the new state must decline to exercise jurisdiction.[227] Domestic violence perpetrators commonly abduct their children,[228] and courts can discourage such behavior by declining jurisdiction based on the perpetrator's conduct.

In the past, domestic violence victims have been penalized for fleeing across state lines with children.[229] The UCCJEA, however, exempts cases covered under the emergency jurisdiction provision of the Act from the "clean hands" provision.[230] Thus, when a victim of domestic violence flees across state lines, as long as the standards for emergency jurisdiction have been satisfied, the refuge state court may not decline jurisdiction by reason of the victim's conduct.

The UCCJEA mentions specifically domestic violence cases, emphasizing that the purpose of the "clean hands" provision is to punish the *unjustified* conduct of a person who invokes a court's jurisdiction.[231] Victims may not be punished for flight to escape abuse.[232] In particular, it states that "domestic violence victims should not be charged with unjustifiable conduct for conduct that occurred in the process of fleeing domestic violence, even if their conduct is technically illegal."[233]

Thus, if a parent flees with a child to escape domestic violence and violates an existing custody decree in doing so, the case should not be dismissed automatically under Section 208 of the UCCJEA.[234] Rather, the court must determine whether the flight was justifiable under the circumstances of the case.[235] Courts can use this new jurisdictional tool to provide relief to victims who are forced to flee across state lines with their children.

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[227] *Id.*

[228] Geoffrey L. Greif & Rebecca L. Hegar, When Parents Kidnap: The Families Behind the Headlines 59 (1993) (finding that approximately half of the abductors in their study were violent toward the parent left behind during the marriage).

[229] *See, e.g.*, Kearney v. Hudson, 2001 Conn. Super. LEXIS 267 (2001).

[230] UCCJEA § 208(a).

[231] *Id.* § 208 cmt.

[232] *Id.*

[233] *Id.*

[234] *Id.*

[235] *Id.*

In Nieto v. Ramos, for example, the mother took the child without the father's permission and moved from California to Kentucky.[236] The California trial court transferred custody to the father due to the mother's conduct and discounted the mother's allegations of domestic violence, stating that they were of recent vintage and had not been raised at earlier proceedings.[237] The Court of Appeal of California reversed the decision, holding that California did not have home state jurisdiction under the UCCJEA, and that the mother's conduct was not illegal or wrongful.[238] The court recognized that the mother left the father due to domestic violence and went to Kentucky, where her parents lived, to find a job.[239] Under the UCCJEA, the trial court should not have considered the taking of the child to be wrongful where there was evidence that this was a result of domestic violence.[240]

5. Pleading Requirements

The UCCJEA requires that certain types of information be submitted to the court, including the following:

- Information about the child's present address or whereabouts, the places where the child has lived during the last five years, and the names and present addresses of the persons with whom the child has lived during the period;
- Whether the party has participated in any other proceeding concerning the custody of or visitation with the child;
- Whether the party knows of any proceeding that could affect the current proceeding, including proceedings for enforcement and proceedings relating to domestic violence, protective orders, termination of parental rights, and adoptions;
- The name and address of any person not a party to the proceeding who has physical custody of the child or claims custody or visitation rights.[241]

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[236] 2001 Cal. App. Unpub. LEXIS 1847, at *2 (Ct. App. 2001).

[237] *Id.* at *3-*5.

[238] *Id.* at *8-*9, *11-*14.

[239] *Id.* at *12.

[240] *Id.*

[241] UCCJEA § 209 (1997).

In domestic violence cases, disclosure of such information can endanger adult victims as well as children.[242]

As a safeguard, the UCCJEA contains an optional provision, Section 209(e), designed to protect victims of domestic violence by limiting the disclosure of identifying information, which states:

> If a party alleges in an affidavit or a pleading under oath that the health, safety, or liberty of a party or child would be jeopardized by disclosure of identifying information, the information must be sealed and may not be disclosed to the other party or the public unless the court orders the disclosure to be made after a hearing in which the court takes into consideration the health, safety, or liberty of the party or child and determines that the disclosure is in the interest of justice.[243]

The comment to Section 209 describes an increasing trend in states of enacting laws protecting the confidentiality of information about victims of domestic violence and child abuse.[244] It states that if local or state law does not contain such protections, Section 209(e) should be adopted.[245]

Section 209 of the UCCJEA reflects a balancing of jurisdictional priorities with the recognition that victims of domestic violence may be harmed by traditional practices.[246] The UCCJEA retained the requirement that parties must submit certain types of information to courts.[247] However, the new law tempered the need for such information with the need to ensure that the jurisdictional statute did not endanger inadvertently victims of domestic violence.

6. Judicial Communication

Several provisions in the UCCJEA encourage or require communication and cooperation between courts in different jurisdictions.[248] Such communication is vital in domestic violence cases to ensure that

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[242] *See, e.g.*, Joan Zorza, Confidentiality, *in* The Impact of Domestic Violence on Your Legal Practice, *supra* note 81, at 2-17.

[243] UCCJEA § 209(e).

[244] *Id.* § 209 cmt.

[245] *Id.*

[246] *Id.* § 209.

[247] *Id.*

[248] *Id.* §§ 110, 204.

courts have accurate information about the history of violence. Without judicial communication, the court that receives information only from the perpetrator is unlikely to have an accurate picture of what has happened.[249]

When perpetrators file immediately for custody in the home state, victims should receive notice of the proceedings; however, because of their flight, they may never receive personal notice or notice by publication.[250] In other cases, victims may receive notice but prefer to remain in the refuge state rather than return to a dangerous home state.[251] If a victim does receive notice and is able to obtain legal representation in the home state, the attorney may appear on her behalf.[252] The court in the home state is unlikely to learn from the abuser that the victim fled due to domestic violence; rather, the court may hear allegations from the abuser that the victim abducted or abused the children.[253] However, if a court in the refuge state assumes emergency jurisdiction, this court will understand the history of domestic violence and be able to communicate with the home state court to resolve safely the jurisdictional question.[254] This type of judicial communication will ensure that the home state court can make a jurisdictional decision based on a fuller record, including evidence that one party has perpetrated domestic violence against another.

The UCCJEA provides the following structure for communication between courts. First, it encourages courts to communicate concerning proceedings arising under the UCCJEA.[255] The law generally requires a record to be made of the communication, and it requires courts to give parties the opportunity to present facts and legal arguments before a

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[249] *See, e.g.*, D.B. v. P.B., 692 So. 2d 856, 862 (Ala. Civ. App. 1997) (finding that father's first affidavit to Florida court, which failed to mention that mother had obtained custody and protective order in Alabama proceeding, was misleading).

[250] *See* Goelman, *supra* note 77, at 303-3.

[251] *See, e.g.*, UCCJEA § 111(b) (allowing a court to permit an individual residing in another state to be deposed or to testify by telephone).

[252] *See id.* § 210(c) (permitting court to enter any orders necessary to ensure the safety of child and any person); *id.* § 210 cmt. (suggesting that a court may arrange for the party's testimony to be taken in another state when there are domestic violence safety concerns).

[253] *See* Goelman, *supra* note 77, at 303-3.

[254] This is because the court in the refuge state will have information about the domestic violence from the survivor.

[255] UCCJEA §§ 110, 204.

jurisdictional decision is made.[256] In addition, the parties must be informed about the communication and granted access to the record.[257]

Second, in addition to providing discretionary standards for judicial communication, the UCCJEA requires courts to communicate under certain circumstances.[258] When a court has been asked to exercise emergency jurisdiction and has been informed that a child custody proceeding has been commenced in another forum with initial, continuing, or modification jurisdiction—or that an order has already been made—the court must immediately communicate with the other court.[259] Conversely, a court that is exercising initial, continuing, or modification jurisdiction, upon being informed that another court is exercising emergency jurisdiction, must immediately communicate with that court.[260] The purpose of judicial communication is to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order.[261]

The requirement that courts in different jurisdictions communicate when emergency jurisdiction is at issue establishes a template for communication in cases involving domestic violence. Despite this mandate, however, perpetrators of domestic violence frequently fail to inform courts that custody proceedings are pending in other jurisdictions.[262] Courts should not reward this type of manipulation, but should decline jurisdiction based on misconduct when abusers fail to inform them of proceedings pending in other jurisdictions.

The UCCJEA also contains a provision that requires a court to determine whether a child custody proceeding has been commenced in a court in another state having jurisdiction substantially in accordance with the UCCJEA prior to exercising jurisdiction.[263] A court is prohibited from exercising jurisdiction if a proceeding is pending elsewhere unless the first

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[256] *Id.* § 110.

[257] *Id.*

[258] *See, e.g., id.* § 204.

[259] *Id.* § 204(d).

[260] *Id.*

[261] *Id.*

[262] *See, e.g.*, Crippen, Jr. v. Crippen, 610 So. 2d 686 (Fla. Dist. Ct. App. 1992) (stating that husband failed to inform Wisconsin court of protection order proceeding pending in Florida).

[263] UCCJEA § 206.

proceeding is terminated or stayed based on inconvenient forum.[264] Similarly, if a proceeding for enforcement of a custody order is commenced in one state and the court determines that a modification proceeding is pending elsewhere, judicial communication is mandated.[265]

The UCCJEA provisions requiring judicial communication may be used to assist victims in interstate custody cases. Judicial communication, when used properly, will ensure that the courts have input from both parties. This will prevent courts from relying solely on information provided by domestic violence perpetrators.

7. Interstate Discovery

The UCCJEA also contains provisions regarding interstate discovery that may be useful in domestic violence cases. A party may offer testimony of witnesses located in another state or a court on its own motion may order that the testimony of a person be taken in another state.[266] These procedures allow a victim to avoid physically returning to a home state even if the custody proceeding is taking place in the home state. Technological advances such as telephones, audiovisual equipment, or other electronic means may be utilized, and courts must cooperate to designate an appropriate location for a deposition or testimony.[267]

A court may request that a court in another state take the following action:

- Hold an evidentiary hearing;
- Order a person to produce or give evidence;
- Order that an evaluation be made with respect to the custody of a child involved in a pending proceeding;
- Forward a certified copy of the transcript of the record of the hearing, the evidence otherwise produced, and any evaluation prepared in compliance with the request;
- Order a party to appear in the proceeding with or without the child.[268]

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[264] *Id.*

[265] *Id.* § 307.

[266] *Id.* § 111.

[267] *Id.*

[268] *Id.* § 112.

All pertinent records related to custody proceedings must be preserved until the child turns eighteen years old.[269]

These tools can be used to protect the safety of victims of domestic violence in interstate child custody cases. For example, if the home state retains jurisdiction, it can obtain the testimony of the victim through telephonic deposition without requiring the victim to leave the refuge state. If the home state declines jurisdiction based on inconvenient forum and the refuge state assumes jurisdiction based on significant connection, the refuge state can request that the home state forward transcripts of any related court proceedings or order that an evaluation of the abuser's home in the home state take place. Courts for the most part have not utilized these technological advances to obtain information from other states even though they can do so without requiring the parties to appear personally.[270]

8. Notice and Opportunity to Be Heard

The UCCJEA requires notice and an opportunity to be heard for child custody determinations to be enforceable.[271] The Act does not govern the enforceability of child custody determinations made without notice or an opportunity to be heard.[272] Notice must be given in a manner reasonably calculated to give actual notice, but may be by publication if other means are not effective.[273]

These notice provisions have varied implications for interstate cases involving domestic violence. Protection orders containing custody provisions generally will be enforceable under the UCCJEA because respondents receive notice and an opportunity to be heard.[274] *Ex parte* orders, however, whether issued as part of a temporary protection order or as an emergency custody order, do not conform to the UCCJEA's notice provision.[275]

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[269] *Id.*

[270] Courts may be unaware of these options or uncomfortable seeking assistance from courts in other states, but drafters of the UCCJEA recommended such approaches in domestic violence cases. *See id.* § 210 cmt.

[271] *Id.* § 205.

[272] *Id.*

[273] *Id.* § 108.

[274] *Id.* § 205.

[275] *Id.*

The UCCJEA acknowledges that state laws vary with regard to whether a court has the power to issue an enforceable temporary custody order without notice and hearing.[276] Such temporary orders may be enforceable, as against due process objections, for a short period of time if issued as a protective order or a temporary restraining order to protect a child from harm.[277] *Ex parte* orders therefore may be enforceable, but are not covered by the UCCJEA. This poses a problem for victims of domestic violence who flee across state lines with children after obtaining an *ex parte* protection order. While these orders are not enforceable under the UCCJEA in the absence of notice and an opportunity to be heard, some experts argue that such orders may be enforceable under the VAWA.[278]

9. UCCJEA's Enactment

To date, thirty-four states and the District of Columbia have adopted the UCCJEA.[279] A preliminary survey of these states indicates that the UCCJEA has been utilized most successfully to protect victims of domestic violence in states in which trainings have been conducted about the new jurisdictional law.[280] In some jurisdictions, the benefits of enacting the UCCJEA have not trickled down to survivors of abuse because family law attorneys, victim advocates, and judges are unaware of the protections embedded in the UCCJEA or unwilling to use these tools.[281]

D. Parental Kidnapping Prevention Act

The PKPA was enacted as federal law in 1980 to resolve jurisdictional conflicts that persisted under state adopted versions of the UCCJA.[282] As federal law, the PKPA preempts state law to the contrary and

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[276] *Id.* § 205 cmt.

[277] *Id.*

[278] *See infra* Part III.E.

[279] According to the National Conference of Commissioners on Uniform State Law Laws, these include: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Maine, Michigan, Minnesota, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington, and West Virginia.

[280] *See supra* note 78.

[281] *See supra* note 78.

[282] *See* Goelman, *supra* note 77, at 302-4.

resolves conflicts between jurisdictional statutes in different states.[283] Its purpose was to discourage interstate conflicts, deter abduction, and promote cooperation between states regarding custody matters.[284] The PKPA did not, however, create a cause of action in federal court.[285]

1. Jurisdictional Bases

The PKPA requires courts to give full faith and credit to custody determinations issued by courts in other states as long as the orders meet certain basic requirements.[286] In particular, the PKPA establishes a hierarchy of jurisdictional bases and requires states to enforce orders issued by the court in the state with preferred jurisdiction.[287] The PKPA also elevates continuing, exclusive jurisdiction, prohibiting a court from exercising initial jurisdiction when a valid custody proceeding was pending in another state.[288]

The PKPA sets forth four bases for jurisdiction: home state, significant connection, last resort, and emergency jurisdiction.[289] Home state jurisdiction trumps all other types of jurisdiction. The home state is the state in which the child lived with a parent or a person acting as a parent for at least six months immediately before the custody action is filed.[290] Home state jurisdiction exists in the child's current home state or in a state that was the child's home state within six months before the case was filed.[291]

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[283] *See, e.g.*, Archambault v. Archambault, 555 N.E.2d 201 (Mass. 1990) (holding that PKPA preempted Massachusetts jurisdictional statute).

[284] *See* Goelman, *supra* note 77, at 301-04.

[285] Thompson v. Thompson, 798 F.2d 1547 (9th Cir. 1986), *aff'd*, 484 U.S. 174 (1988).

[286] *See* 28 U.S.C. § 1738A(a) (2003).

[287] 28 U.S.C. § 1738A(c)(2).

[288] The principle of continuing jurisdiction also precludes a court from modifying a custody order from another state except under specified conditions. This principle diverges from earlier law permitting states to modify custody orders issued by courts in other states. *See* New York ex rel. Halvey v. Halvey, 330 U.S. 610 (1947) (holding that despite the Full Faith and Credit Clause of the Constitution, a custody decree is not irrevocable, and that a New York court had the authority to modify a Florida custody decree).

[289] 28 U.S.C. § 1738A(c)(2).

[290] 28 U.S.C. § 1738A(b)(4).

[291] 28 U.S.C. § 1738A(c)(2)(A).

The preference for home state jurisdiction may be useful to victims when perpetrators have abducted the children and taken them across state lines, as victims can file for custody in the state in which they remain.[292] By prioritizing the home state, however, the PKPA hierarchy may pose problems for victims of domestic violence who flee across state lines for safety. In many cases, the child's home state is the state from which the victim fled.[293] By requiring other states to defer to the home state, federal law—if applied to victims who are not represented by competent legal counsel before knowledgeable judges—forces victims to return to the home state to litigate their custody cases.[294]

Significant connection jurisdiction may be exercised under the PKPA only if there is no home state or the home state declined jurisdiction.[295] A state may exercise significant connection jurisdiction if it is in the best interests of the child, and if the child and his or her parents, or the child and at least one contestant, have a significant connection with the state other than mere physical presence.[296]

In addition, "substantial evidence concerning the child's present or future care, protection, training, and personal relationships" in the state must be available.[297] Last resort jurisdiction exists under the PKPA when no other state has home state, significant connection, emergency, or continuing jurisdiction.[298]

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[292] This assumes that the children have lived for at least six months in the state where the victim remains, so that this is the children's home state.

[293] *See, e.g.*, Kreis v. Cummins, 1998 Del. Fam. Ct. LEXIS 9 (1998) (holding that where mother obtained a domestic violence restraining order in California, Delaware—the state where father lived—had continuing jurisdiction under the PKPA to modify original custody order).

[294] For this reason, in similar contexts, advocacy groups would prefer that the law permit a refuge state to automatically be able to enter a permanent order modifying custody. *See* Report Regarding the NCCUSL Drafting Committee, *supra* note 190, at 490.

[295] 28 U.S.C. § 1738A(c)(2)(B).

[296] *Id.*

[297] *Id.*

[298] 28 U.S.C. § 1738A(c)(2)(D).

2. Emergency Jurisdiction

The VAWA 2000[299] modified the emergency jurisdiction provision of the PKPA. Formerly, emergency jurisdiction could be exercised only if the child was physically present in the state and the child had been abandoned or it was necessary to protect the child because the child had been subjected to or threatened with mistreatment or abuse.[300] This definition of emergency jurisdiction was read narrowly by some courts, which refused to exercise emergency jurisdiction when victims were abused but the children were not.[301] As noted above, statutes or case law in many other jurisdictions defined emergency jurisdiction to include cases involving adult victims of abuse, but in certain jurisdictions victims were denied protection from the courts.[302]

The VAWA 2000 expanded emergency jurisdiction under the PKPA to the following situations: "[T]he child is physically present in such state and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because *the child, a sibling, or parent of the child* has been subjected to or threatened with mistreatment or abuse."[303] This change codified in federal law the emerging trend in state law, under the UCCJEA and case law under the UCCJA, to exercise emergency jurisdiction in domestic violence cases in which one parent was abused.[304]

The VAWA 2000 was signed into law on October 28, 2000.[305] The White House press release about the new law described the change to the PKPA, highlighting its importance. The President stated, "[T]he Act amends the Parental Kidnapping Prevention Act to expand emergency jurisdiction to cover domestic violence, thus enabling victims who flee abuse to obtain custody orders without returning to the jurisdiction where

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[299] Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (codified as amended in scattered sections of 8, 16, 18, 20, 28, and 42 U.S.C.).

[300] 28 U.S.C. § 1738A(c)(2)(ii) (prior to amendment by the VAWA 2000).

[301] *See, e.g.*, Hagedorn v. Hagedorn, 584 So. 2d 353 (La. Ct. App. 1991).

[302] *See, e.g.*, Patricia R. v. Andrew W., 467 N.Y.S.2d 322 (1983).

[303] 28 U.S.C. § 1738A(c)(2)(C) (emphasis added).

[304] The intent was to make federal law consistent with the majority of state jurisdictional statutes and case law, which by that time considered domestic violence as a basis for exercising emergency jurisdiction.

[305] Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in scattered sections of 8, 16, 18, 20, 28, and 42 U.S.C.). *See infra* Part III.F.

the batterer resides."[306] As a full faith and credit law, the PKPA requires a state to enforce an order issued by another state based on a domestic violence emergency; however, the PKPA does not amend state law.[307] The legislative history of the PKPA illustrates that the President and Congress understood the jurisdictional obstacles confronted by victims of domestic violence who escape with their children across state or tribal lines.

Despite this federal attention, preliminary reports suggest that most communities are not aware of the expansion of emergency jurisdiction under the PKPA.[308] Even when courts are aware that they can exercise emergency jurisdiction in domestic violence cases, some courts hesitate to do so knowing that the home state retains the authority to exercise jurisdiction in the long-term custody case.[309] The PKPA and state laws, however, were modified precisely for such situations. Failure to use these jurisdictional tools undermines congressional intent and penalizes victims. In states in which educational campaigns have been conducted, courts are more likely to exercise emergency jurisdiction in domestic violence cases.[310]

E. The Violence Against Women Act

In contrast to the jurisdictional statutes discussed previously, the VAWA was enacted with the primary purpose of preventing violent crimes against women, intervening when perpetrators commit such crimes, and improving systemic responses to domestic violence, sexual assault, and stalking.[311] The VAWA's legislative history reveals the drafters' intent:

> Violence against women cries out for attention not only because we have underestimated the problem's scope and intensity, but also because we have underestimated the staying power of subtle

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[306] Statement on Signing the Victims of Trafficking and Violence Protection Act of 2000, 36 Weekly Comp. Pres. Doc. 44, 2662 (Oct. 28, 2000).

[307] 28 U.S.C. § 1738A(a).

[308] National Center on Full Faith and Credit, *supra* note 78. *See also* Joan Zorza, Full Faith and Credit for Custody Orders: Improvements Brought by the UCCJEA and VAWA II, 7 Domestic Violence Rep. 10 (Oct./Nov. 2001).

[309] Curtis v. Curtis, 574 So. 2d 24 (Miss. 1990); Benda v. Benda, 565 A.2d 1121 (N.J. Super. Ct. App. Div. 1989); Garza v. Harney, 726 S.W.2d 198 (Tex. App. 1987).

[310] *See supra* note 78.

[311] *See, e.g.*, Safer Streets, Safer Homes: The Successes of the Violence Against Women Act and the Challenge for the Future, A Report from Senator Joseph R. Biden, Jr., Sept. 1999.

> prejudices barring equal access to our criminal justice system for many women crime survivors. More than one witness has explained to the committee that "the system" often works against, not for, the victim . . . There is reason to believe that the sense of "double victimization" will only end when attitudes about violent crimes against women have changed.
>
> Testimony before the committee showed that victim-blaming attitudes are all too pervasive in this country; they are shared by women and men alike. Witnesses testified that stereotypes like "she asked for it," "she made it up," or "no harm was done" are frighteningly common. Despite States' most fervent efforts at legislative reform, these stereotypes persist and continue to distort the criminal justice system's response to violence against women. They encourage victims' unwilling silence and they blunt society's outrage.[312]

Throughout the four years of hearings prior to the VAWA's enactment, legislators and witnesses emphasized the need to change our cultural tolerance for violence against women.[313] Senator Hatch stated, for instance, "I think it's important that we teach all of our children that no husband or man has a right to raise his fists in anger or brutalize any woman."[314] The VAWA was enacted ultimately to combat historical discrimination against women in the criminal justice system.

Since the President signed the landmark VAWA into law on September 13, 1994, it has made a critical difference in the lives of women across the country. More than $1.5 billion in grant funds have supported the work of prosecutors, law enforcement officers, victim advocates, judges, and social services professionals at the federal, state, local, and tribal levels.[315] While these funds have supported critical programs and helped countless victims, the impact of the VAWA goes far beyond merely distributing money.

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[312] The Violence Against Women Act of 1991, S. Rep. No. 102-197, at 39 (1991).

[313] *See, e.g.*, Staff of Senate Comm. on the Judiciary, 103d Cong., The Response to Rape: Detours on the Road to Equal Justice (Comm. Print 1993); First Session on the Problems of Violence Against Women in Utah and Current Remedies: Utah Hearing Before the Senate Committee on the Judiciary, 103d Cong. 20 (1993).

[314] *See* First Session on the Problems of Violence Against Women in Utah and Current Remedies, *supra* note 313.

[315] Grant funds have led to the creation of specialized domestic violence and sexual assault units in prosecutors' offices, police departments, and courts. In communities across the country, VAWA funds have trained criminal justice personnel and supported shelters and victim advocacy programs for survivors.

The comprehensive law for the first time created a federal response to violence against women, with an emphasis on changing our culture's indifference to it.[316] Under the VAWA and subsequent laws, certain crimes perpetrated primarily against women became federal offenses subject to federal prosecution. These included interstate domestic violence,[317] interstate violation of a protection order,[318] interstate stalking,[319] and possession of firearms by convicted domestic violence offenders[320] or those subject to qualifying protection orders.[321] The VAWA also created the National Domestic Violence Hotline, ensuring that victims throughout the country could obtain access to critical information and resources,[322] and amended federal evidentiary law so that sexual assault survivors could testify without being forced to discuss their sexual histories.[323] Battered immigrants obtained access to immigration relief without relying on their abusers.[324] Furthermore, the VAWA required applicants for funding to collaborate with nonprofit, nongovernmental entities working with domestic violence and sexual assault survivors.[325] These are but a few examples of the comprehensive relief established by the watershed act.

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[316] *See, e.g.*, 42 U.S.C. § 3796gg(a) (2003) (finding that the purpose of this part is to . . . develop and strengthen effective law enforcement and prosecution strategies to combat violent crimes against women); 42 U.S.C. § 3796hh(b)(6) (numbering prior to the VAWA 2000) (finding that a purpose of this program is to educate judges in criminal and other courts about domestic violence); 42 U.S.C. § 13971(a)(3) (numbering prior to the VAWA 2000) (finding that a purpose of this program is to develop education and prevention strategies); 42 U.S.C. § 13981 (prior to Supreme Court ruling in U.S. v. Morrison) (finding that the purpose of this subtitle is to protect the civil rights of victims of gender-motivated violence).

[317] 18 U.S.C. § 2261 (2003).

[318] 18 U.S.C. § 2262.

[319] 18 U.S.C. § 2261A.

[320] 18 U.S.C. § 922(g)(9).

[321] 18 U.S.C. § 922(g)(8).

[322] 42 U.S.C. § 10416 (2003).

[323] 28 U.S.C. § 2074 note (2003).

[324] 8 U.S.C. § 1154(a) (2003); 8 U.S.C. § 1254(a).

[325] 42 U.S.C. § 3796gg-1(c)(2) (2003).

The VAWA drafters were aware that domestic violence frequently involves interstate flight or criminal behavior.[326] As a result, the VAWA required states, tribes, and territories to enforce protection orders issued by other jurisdictions.[327] For a protection order to be enforceable, the issuing court must have had jurisdiction over the parties and the subject matter. Moreover, except under specified circumstances, orders commonly referred to as mutual protection orders are not entitled to full faith and credit.[328]

1. Enforcement of Custody Provisions Within Protection Orders

Subsequent to the enactment of the VAWA, the question arose as to whether the VAWA's full faith and credit provision required custody provisions within protection orders to be enforced across state lines.[329] Domestic violence law experts viewed the question as unresolved because the VAWA originally defined "protection order" as:

> [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 any temporary or final orders issued by a civil and criminal court (*other than a support or child custody order*) 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.[330]

The VAWA did not define the term "child custody order" in any part of the Act, and the VAWA's legislative history did not address the definition of "protection order" or its relationship to child custody or jurisdictional law. Moreover, no court decision has interpreted this parenthetical language or resolved whether the VAWA created an independent grant of authority

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[326] See, for example, new federal interstate domestic violence crimes enacted as part of the VAWA in 18 U.S.C. §§ 2261-2262 (2003).

[327] 18 U.S.C. §§ 2265-2266.

[328] 18 U.S.C. § 2265(c). Note that any relief against the respondent is entitled to enforcement if the order satisfies the other requirements of the full faith and credit provision. Relief against the petitioner is enforceable only if a written pleading was filed seeking the order and the court made specific findings that each party was entitled to such an order.

[329] *See, e.g.*, Full Faith and Credit Project of the Pennsylvania Coalition Against Domestic Violence, Increasing Your Safety: Full Faith and Credit for Protection Orders 8 (n.d.), *available at* http://www.vaw.umn.edu/documents/survivorbrochure/survivorbrochure.pdf (last visited Dec. 2, 2003).

[330] 18 U.S.C. § 2266(5) (emphasis added).

requiring custody provisions within protection orders to be enforced across state and tribal lines.[331]

Some authors suggested that the definition of protection order in the original VAWA appeared on its face to exclude child custody orders from enforcement under the Act's full faith and credit mandate.[332] Others, however, interpreted the parenthetical language to mean that custody provisions were entitled to full faith and credit when issued for safety purposes within civil protection orders, but not when issued in long-term domestic relations cases.[333] The drafters' intent and the impact of the original VAWA on the enforceability of child custody provisions within protection orders may remain shrouded in mystery. Prior to resolution by the courts, the VAWA 2000 amended federal law and the elusive parenthetical.[334]

F. The Violence Against Women Act of 2000

The VAWA 2000 was enacted on October 28, 2000, as Division B of the Victims of Trafficking and Violence Protection Act of 2000.[335] The VAWA 2000 reauthorized grant programs created by the original VAWA, established new grant programs,[336] and strengthened federal law. The law attempted to close gaps in the original legislation by strengthening relief for battered immigrants and by expanding the scope of federal crimes created

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[331] *See supra* note 78; search of interstate case law conducted by author (2002).

[332] *See, e.g.*, Goelman, *supra* note 77, at 306-3; *see also* Joan Zorza, The UCCJEA: What Is It and How Does It Affect Battered Women in Child-Custody Disputes, 27 Fordham Urb. L.J. 909, n.26 (2000).

[333] Battered Women's Justice Project, Full Faith and Credit Provision of the Violence Against Women Act 2 (1996).

[334] Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (codified as amended in scattered sections of 8, 16, 18, 20, 28, and 42 U.S.C.).

[335] *Id.*

[336] The new grant programs created under the VAWA 2000 filled gaps that had been identified during the implementation of the VAWA. The Legal Assistance for Victims Grant Program authorized desperately needed grants for legal assistance to victims of domestic violence, sexual assault, and stalking. 42 U.S.C. § 3796gg-6 (2003). A new supervised visitation program supported safe visitation and exchange in custody cases involving violence. 42 U.S.C. § 10420. Other new programs addressed elder abuse, violence against women with disabilities, and transitional housing. 42 U.S.C. § 14041a; 42 U.S.C. § 3796gg-7; 42 U.S.C. § 10419. The VAWA 2000 continued to promote institutional reform by supporting state and tribal domestic violence and sexual assault coalitions to coordinate victim services and systemic intervention efforts. 42 U.S.C. § 3796gg-1.

by the VAWA and subsequent legislation.[337] The VAWA 2000 also continued to emphasize the importance of intervention in interstate cases involving violent crimes against women.[338] Amendments to the VAWA's full faith and credit mandate prohibited states and tribes from requiring notification to respondents regarding registration of out of state or tribal protection orders unless victims requested that such notification take place.[339] For safety reasons, the law also prohibited registration and filing as a prerequisite for enforcement of out of state or tribal protection orders.[340] To apprehend more offenders who might otherwise escape prosecution at the local level, the VAWA 2000 amended the federal domestic violence and stalking crimes to cover a greater number of interstate cases.[341]

For perhaps the first time under federal law, the VAWA 2000 explicitly acknowledged the link between domestic violence and interstate custody cases, and the potential impact of interstate jurisdictional statutes on victim safety.[342] The VAWA 2000 amended the PKPA to expand emergency jurisdiction to domestic violence cases, promising that victims who fled across state lines with children would have access to courts in the refuge state.[343] The law also required the Attorney General to conduct a study of federal and state laws relating to child custody, including the UCCJEA and the PKPA, and to analyze the effect of those laws on child custody cases involving domestic violence,[344] a task currently under way. Moreover, the Attorney General was instructed to examine the sufficiency

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[337] The VAWA 2000 also extended protections to traditionally marginalized communities. For example, the law increased the set-aside for Indian tribal governments from 4 percent to 5 percent under the Grants to Combat Violent Crimes Against Women and created a 5 percent set-aside for tribes under several other grant programs. 42 U.S.C. § 3796gg-1(b)(1); 42 U.S.C. § 13971(c)(3); 42 U.S.C. § 3796hh(e); 42 U.S.C. § 10420(f); 42 U.S.C. § 3796gg-6(f)(2)(A). The law also expanded the definition of "underserved populations" to include geographic location, race and ethnicity, language barriers, disabilities, alienage status, age, and other underserved populations. 42 U.S.C. § 3796gg-2(7).

[338] *See, e.g.*, Victims of Trafficking and Violence Protection Act of 2000 § 1107 (amendments to domestic violence and stalking offenses).

[339] 18 U.S.C. § 2265(d) (2003).

[340] *Id.*

[341] 18 U.S.C. § 2261-2262.

[342] 28 U.S.C. § 1738A note (2003).

[343] *Id.*

[344] *Id.* See also Senate Report accompanying H.R. 3244, 146 Cong. Rec. S10164, S10194 (2000), and H.R. Rep. No. 106-939 (2000).

of defenses to parental abduction charges in cases involving domestic violence and the burdens and risks encountered by victims of domestic violence arising from the jurisdictional requirements of the PKPA.[345] Congress's recognition that jurisdictional statutes could pose a risk to victims of domestic violence and, conversely, that such statutes could be modified to help empower victims was a turning point.

1. Enforcement of Custody Provisions Within Protection Orders

The VAWA 2000 also redefined the term "protection order." This again raised the question as to whether custody orders are entitled to full faith and credit under the VAWA, and, if so, what type of custody orders are covered by the mandate.[346] The Act redefined "protection order" as:

> [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 any temporary or final order issued by a civil and criminal court (*other than a support or child custody order issued pursuant to State divorce and child custody laws, except to the extent that such an order is entitled to full faith and credit under other Federal law*) 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.[347]

On its face, the modified language in the parenthetical appears to distinguish between support or child custody orders issued pursuant to state divorce and child custody laws, and, by omission, support or child custody orders issued as part of protection orders. The language sets forth clearly that child custody orders issued pursuant to state divorce and child custody laws are entitled to full faith and credit under the VAWA 2000 to the extent that they are entitled to full faith and credit under other federal law. Put simply, if child custody orders are issued under state divorce and custody laws and comply with the PKPA, they are entitled to full faith and credit.

What is less clear, however, is whether the VAWA 2000, through the language in this parenthetical, independently grants full faith and credit to custody provisions within protection orders even when they do not comply with the PKPA. Relying solely on the plain language of the law, the

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[345] 28 U.S.C. § 1738A note (b).

[346] 18 U.S.C. § 2266(5).

[347] *Id.* (emphasis added).

parenthetical specifies only that custody orders issued pursuant to state divorce and child custody laws are *excluded* from the definition of "protection order," and therefore from the VAWA's full faith and credit mandate. Thus, an argument goes, custody provisions within protection orders were intended to be covered fully by the VAWA's full faith and credit requirement, independent of compliance with other federal law.

The written legislative history of the VAWA 2000 does not shed much light on this precise point.[348] With respect to the statutory language, the legislative documents state that the law "revises the definition of 'protection order' to clarify that support or child custody orders are entitled to full faith and credit to the extent provided under other Federal law—namely the Parental Kidnapping Prevention Act of 1980, as amended."[349] The conference reports do not define "child custody orders" as orders contained within protection orders or as orders issued pursuant to state divorce or custody laws, leaving the term open to differing interpretations.[350]

As discussed above, under the original VAWA, the parenthetical included the broad exclusionary language "other than support or custody orders."[351] A reasonable interpretation of the modified parenthetical in the VAWA 2000, consistent with the written legislative history, is that the drafters intended merely to clarify that all child custody orders—regardless of whether they are issued under protection order or domestic relations statutes—are entitled to full faith and credit when they comply with the PKPA.

However, it is notable that Congress chose to specify "child custody orders issued pursuant to State divorce and child custody laws" in the exclusionary language. The VAWA 2000 is a law dealing primarily with domestic violence and sexual assault issues, and it includes a strong focus on enforcing protection orders.[352] Yet, this limited language referencing long-term custody cases (and not protection orders) was selected for the revised parenthetical.[353] Thus, the chosen language supports

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[348] 146 Cong. Rec. S10164, S10193 (2000), (section-by-section summary of Division B, The Violence Against Women Act of 2000, referring to Section 1107); 146 Cong. Rec. H8855, H8882 (2000) (concerning Division B, The Violence Against Women Act of 2000, referring to Section 1107); H.R. Conf. Rep. No. 106-939 (2000), at 105 (accompanying H.R. 3244, Victims of Trafficking and Violence Protection Act of 2000).

[349] *Supra* note 348.

[350] *Supra* note 348.

[351] 18 U.S.C. § 2266(5) (prior to amendment by the VAWA 2000).

[352] *See, e.g.*, 42 U.S.C. § 3796hh (2003).

[353] 18 U.S.C. § 2266(5).

the equally plausible speculation that the drafters indeed meant to differentiate between child custody orders issued in long-term domestic relations cases and those issued within protection orders.

Based on their involvement in the development of the VAWA 2000, experts in the field have reached different conclusions. Some victim advocates conclude that the drafters of the VAWA 2000 intended to create a separate grant of authority for enforcement of child custody orders within protection orders when victims fled across state lines.[354] Others recall that drafters merely wished to clarify existing full faith and credit standards and were not seeking to create a new legal standard distinguishing between custody orders issued within protection orders and those issued within domestic relations orders.[355] Some family law experts conclude that custody provisions incorporated into protection orders are not governed by the VAWA, but are "custody determinations" subject to the PKPA and state law governing jurisdiction in child custody cases.[356]

In reality, the impact of these differing interpretations may be minimal. Certainly if the VAWA 2000 can be cited as an independent authority requiring custody provisions within protection orders to be enforced across state lines, victims of domestic violence in an enforcing state would not need to demonstrate that the issuing state court complied with the PKPA. However, given the VAWA 2000's recent amendment to the PKPA, virtually all custody provisions within protection orders will be consistent with the PKPA's definition of emergency jurisdiction as it now covers domestic violence against a parent.[357]

The enforcement of custody provisions within *ex parte* protection orders across state lines may be the one remaining thorny issue if courts determine that custody provisions within protection orders must comply with the PKPA. *Ex parte* orders fail to comply with the notice requirement

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[354] Telephone Interview with Barbara Hart, Legal Director, Pennsylvania Coalition Against Domestic Violence (Mar. 30, 2001).

[355] Discussion with Frances Cook, former Attorney-Advisor, Violence Against Women Office, U.S. Department of Justice (Mar. 30, 2001), regarding our understanding of the intent of congressional staff in drafting the statutory language.

[356] *See, e.g.*, Patricia M. Hoff, The Uniform Child Custody Jurisdiction and Enforcement Act 3 (Dec. 2001); *see also* Zappitello v. Moses, 458 N.W.2d 784 (S.D. 1990) (pre-VAWA case holding that civil matters arising out of the South Dakota Domestic Abuse Act are subject to the jurisdictional requirements of the South Dakota Uniform Child Custody Jurisdiction Act).

[357] Although virtually all custody provisions within protection orders would be consistent with the expanded definition of "emergency jurisdiction" under the PKPA, to be entitled to full faith and credit under the PKPA, an order also must be issued by a court with jurisdiction under its state law. 28 U.S.C. § 1738A(c)(1) (2003).

in the PKPA.[358] These provisions may be enforceable within the issuing state if domestic violence laws or other laws so provide, but they are unenforceable in other states under the PKPA.[359] Even if *ex parte* orders are not required to be enforced under the PKPA because of the lack of notice, some authors have suggested that *ex parte* orders should be enforced as a matter of judicial courtesy, pending a hearing.[360] Whether custody provisions within protection orders are required to be enforced under the VAWA 2000 or under the PKPA, enforcement is critical to victims of domestic violence and their children.

G. Uniform Interstate Enforcement of Domestic Violence Protection Orders Act

NCCUSL recently promulgated the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act ("Uniform Act").[361] While the Uniform Act provides states with a template for enforcement of out of state protection orders, it narrows the relief available under the VAWA, undermines the broad full faith and credit statutes that many states have enacted, and is inconsistent with certain provisions in the VAWA and the VAWA 2000.[362] This article will not examine the Uniform Act as a whole, but will merely reference those sections of the Act that address custody orders to complete the puzzle of jurisdictional statutes affecting interstate custody and domestic violence cases.[363]

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[358] 28 U.S.C. § 1738A(e). Similarly, *ex parte* orders fail to comply with the notice requirement of the UCCJEA.

[359] *See* Hoff, *supra* note 356, at 6.

[360] *See, e.g.*, Goelman, *supra* note 77, at 306-09.

[361] Drafted by NCCUSL in 2002.

[362] For example, the Uniform Act narrows the VAWA's definition of "protection order," creates a broad immunity (unlike some state statutes) for omissions related to enforcing out of state protection orders, fails to include child support, excludes criminal protection orders from enforcement, and questions the VAWA's full faith and credit mandate.

[363] For information about the potential impact of the Uniform Act on victims of domestic violence, contact the National Center on Full Faith and Credit, Pennsylvania Coalition Against Domestic Violence at (800) 256-5883, ext. 2, the National Network to End Domestic Violence at (202) 543-5566, or the National Council of Juvenile and Family Court Judges, Family Violence Department at (800) 527-3223.

1. Enforcement of Custody Provisions Within Protection Orders

Section 3 of the Uniform Act provides the following: "A tribunal of this State shall enforce the provisions of a valid foreign protection order which govern custody and visitation, if the order was issued in accordance with the jurisdictional requirements governing the issuance of custody and visitation in the issuing State."[364] The drafters state that enforcement of custody and visitation provisions within protection orders is essential because these provisions protect children from potential violence, and because victims will not seek to remain a safe distance from abusers if custody of their children is jeopardized.[365] The drafters conclude that these provisions only may be enforced under the Uniform Act if issued in accordance with the jurisdictional requirements for the issuance of all custody and visitation orders contained, depending on the State, in the UCCJA or the UCCJEA, and the PKPA.[366] In their view, presumably, neither the VAWA 2000 nor state protection order statutes provide an independent basis for enforcing custody provisions within protection orders across state lines when such provisions fail to conform to the PKPA and the UCCJA or UCCJEA.

While NCCUSL's view likely comports with the perspective of the traditional family law bar, drafters of the Uniform Act were not involved with the enactment of the VAWA or the VAWA 2000. A comment to the Uniform Act, for example, suggests incorrectly that the VAWA 2000 provides that "support or custody orders issued pursuant to state divorce or child custody laws are not to be treated as protection orders subject to interstate enforcement."[367] As demonstrated above, the parenthetical language in the VAWA 2000 in fact was—at a minimum—designed to reinforce the principle that support or custody orders issued under domestic relations statutes *must* be enforced to the extent that they are entitled to full faith and credit under the PKPA.

At this time ten states and the District of Columbia have enacted the Uniform Act.[368] Many other states have enacted broader full faith and credit

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[364] Uniform Act § 3(c).

[365] *Id.* § 3(c) cmt.

[366] *Id.*

[367] *Id.*

[368] According to NCCUSL, these jurisdictions include Alabama, California, Delaware, the District of Columbia, Idaho, Indiana, Montana, Nebraska, North Dakota, South Dakota, and Texas.

statutes.[369] For those states that have enacted it, the Uniform Act requires custody provisions within protection orders to be enforced to the extent that they comply with other jurisdictional statutes.[370]

H. Indian Child Welfare Act

The ICWA intersects with other jurisdictional statutes in certain types of cases. Congress enacted the ICWA in 1978 in response to the actions of courts and child protective services agencies that were removing large numbers of Indian children from their families and placing them in non-Indian foster and adoptive homes.[371] The ICWA was designed to prevent the removal of Indian children based on cultural ignorance and, when removal was warranted, to ensure that Indian children retained ties to their culture.[372] The ICWA grants tribal courts jurisdiction over certain proceedings.[373]

While the ICWA establishes minimum federal standards for the removal of Indian children from their families,[374] the law grants Indian tribes exclusive jurisdiction only in specifically defined "child custody proceedings."[375] By definition, such proceedings include foster care placement, termination of parental rights, preadoptive placement, and adoptive placement proceedings involving Indian children.[376] The ICWA does not govern custody proceedings between two parents.[377]

The ICWA is critically important to the preservation of Indian culture and has been described as a means of providing "Indian tribes and families some breathing space while they go about the process of cultural

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[369] Telephone Interview with Darren Mitchell, *supra* note 44.

[370] Uniform Act § 3(c).

[371] 25 U.S.C. § 1901 (2003).

[372] *Id.*

[373] 25 U.S.C. § 1911.

[374] 25 U.S.C. § 1902.

[375] 25 U.S.C. § 1911(a).

[376] 25 U.S.C. § 1903(1).

[377] 25 U.S.C. § 1903.

rebirth."[378] As a result of the ICWA's limited coverage, however, interstate custody cases in which one parent has perpetrated domestic violence against another parent do not implicate the ICWA.[379] One commentator has proposed that although the ICWA does not govern dissolution-based proceedings, its principles suggest that such hearings should turn on principles of sovereignty.[380] Only time will tell if courts are willing to apply the principles of the ICWA to custody proceedings between two parents, since the statutory language exempts such proceedings.

At present, the ICWA applies to "child custody proceedings" whether or not these involve domestic violence.[381] While the ICWA does not directly address domestic violence issues, as a matter of practice, many foster care or termination of parental rights cases stem from domestic violence.[382] Tribal courts have exclusive jurisdiction to hear such cases.[383]

IV. USING THE LAWS IN PRACTICE

A. Application of Jurisdictional Statutes to a Hypothetical Fact Pattern

The following hypothetical fact pattern illustrates the intersection of jurisdictional statutes and the ways in which judges and family law attorneys can apply these statutes to protect victims and children.[384] Consider the following:

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[378] *See* B.J. Jones, The Indian Child Welfare Act: In Search of a Federal Forum to Vindicate the Rights of Indian Tribes and Children Against the Vagaries of State Courts, 73 N.D. L. Rev. 395, 457 (1997).

[379] The ICWA would be implicated, however, if the state or child protective services also were involved.

[380] Lesley M. Wexler, Tribal Court Jurisdiction in Dissolution Based Custody Proceedings, 2001 U. Chi. Legal F. 613, 634 (2001).

[381] 25 U.S.C. § 1911.

[382] *See, e.g.*, Martha Matthews, Addressing the Effects of Domestic Violence on Children, CASANet Resources (Feb. 1999), *available at* http://www.casanet.org/library/domestic-abuse/effects.htm (last visited Dec. 2, 2003).

[383] 25 U.S.C. § 1911.

[384] This hypothetical was developed to train attorneys at the Coalition of Attorneys and Advocates Network Meeting, hosted by the Battered Women's Justice Project, Civil Division, Pennsylvania Coalition Against Domestic Violence, on September 28-30, 2002, in Portland, Oregon.

Samantha Ford lived in Topeka, Kansas, with her husband, James, during nine years of their marriage. They have three children: Simon, age 2; George, age 4; and James, Jr., age 7. James abused Samantha for years, but she was afraid to seek help because he threatened to kill her if she called the police. James did not physically abuse the boys. In October, after James choked Samantha in front of Simon, she took the children and fled to her aunt's home in Ohio.

James figured out where Samantha had gone and made several phone calls to her at her aunt's house, threatening "you'll pay for this," and "you'll never see the kids again if you don't come back." After a few weeks of living with her aunt, Samantha went to court in Ohio and obtained a protection order. The order awarded temporary custody to Samantha and stated that James could not visit with the children until he completed a batterer intervention program.

James, who did not attend the protection order hearing, became enraged after being served with the final protection order. He then went to court in Kansas and obtained a custody order granting him sole custody of the children, without mentioning the existence of the Ohio protection order. Although Samantha had notice of the Kansas proceeding, she was too scared to return to Kansas to attend the hearing and could not afford the trip, let alone an attorney. After James obtained custody of the children and Samantha refused to deliver the children to him, the Kansas court issued an arrest warrant for Samantha.

To remain safe and to obtain legal relief, Samantha Ford will need to find four experienced domestic violence lawyers: a criminal defense attorney and a civil legal attorney in Ohio as well as a criminal defense attorney and a civil legal attorney in Kansas. Her financial constraints may make her eligible for a public defender and a legal aid attorney in each state, who ideally will have received training about the dynamics of domestic violence and about jurisdictional statutes. In practice, a local domestic violence victim advocate or a national domestic violence organization may need to provide technical assistance to the attorneys.

1. Indian Child Welfare Act Does Not Apply

As a starting point, Ms. Ford's civil attorneys would determine that the ICWA does not apply to this scenario.[385] There are no Indian children involved and neither the protection order nor the custody hearing were

[385] *See supra* Part III.H.

"child custody proceedings" under the ICWA's definition.[386] Therefore, tribal court jurisdiction is not an issue.

2. Enforceability of Ohio Protection Order

Next, the attorneys would realize that the courts in Ohio and Kansas have issued two conflicting orders regarding custody of the children. Ms. Ford's civil legal attorney in Ohio might consider whether the Ohio court properly issued a protection order including custody provisions. Ohio's protection order statute permits courts issuing protection orders to temporarily allocate parental rights and responsibilities.[387]

In addition, since most state courts have ruled that custody provisions within protection orders must comply with state jurisdictional statutes,[388] Ms. Ford's attorney presumes that the Ohio court had to comply with Ohio's version of the UCCJA. Under this law, Ohio was not the children's home state when Ms. Ford filed for the protection order, as the children had lived in Ohio for less than six months.[389] The Ohio court could have exercised emergency jurisdiction to protect the children if they were subjected to or threatened with mistreatment or abuse.[390] If the protection order is challenged by Mr. Ford,[391] however, Ms. Ford's attorney may have to demonstrate that the boys were subjected to mistreatment or abuse because they witnessed domestic violence, for example, when Simon saw his father choke his mother. The attorney could provide information in a brief describing the impact of domestic violence on children or call an expert witness to testify about the effects on children of witnessing family violence.

Next, Ms. Ford's family law attorney in Kansas might argue that if the Ohio protection order complied with the requirements of the federal VAWA, it must be enforced across state lines.[392] The attorney could assert

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[386] 25 U.S.C. § 1903.

[387] Ohio Rev. Code Ann. § 3113.31 (Anderson 2002).

[388] *See, e.g.*, Wren v. Wren, 2001 Neb. Ct. App. LEXIS 279 (2001); Zappitello v. Moses, 458 N.W.2d 784 (S.D. 1990).

[389] *See* Ohio Rev. Code Ann. § 3109.22(A)(1).

[390] Ohio Rev. Code Ann. § 3109.22(A)(3).

[391] It would have been useful for the protection order judge to have indicated on the order that he or she complied with the UCCJA and exercised emergency jurisdiction based on the facts of the case.

[392] *See supra* Part III.E.

that the Ohio court had personal jurisdiction over both parties due to Ms. Ford's presence in the state and Mr. Ford's threats over the telephone, and that the Ohio court had subject matter jurisdiction under Ohio's protection order statute. Moreover, by communicating with the family law attorney in Ohio, the Kansas attorney might confirm that the protection order was issued after Mr. Ford had reasonable notice and an opportunity to be heard. As a result, federal law requires Kansas to enforce the Ohio protection order.[393]

Ms. Ford's Kansas family law attorney also might reference the state's full faith and credit and jurisdictional statutes, which require enforcement of protection orders and custody orders issued by other states.[394] Under both federal and state law, then, Ms. Ford's protection order, including the custody provisions, should have been enforced.

3. Questionable Issuance of Kansas Custody Order

Ms. Ford's Kansas family law attorney also may wish to argue that the Kansas custody order was issued improperly. At first glance, the Kansas custody order appears to be valid. Kansas has adopted a version of the UCCJEA,[395] which prioritizes the home state, and Kansas was the home state of the children despite their temporary absence when the custody pleadings were filed. In addition, Ms. Ford received notice of the Kansas hearing as required by the UCCJEA.[396] However, the Kansas UCCJEA requires the court to decline jurisdiction if the person seeking to invoke its jurisdiction has engaged in unjustifiable conduct.[397] Ms. Ford's attorney can argue that Mr. Ford violated the "clean hands doctrine" by failing to inform the Kansas court of the Ohio proceeding and protection order, as the UCCJEA required him to do.[398] If the Kansas court had known of the existing Ohio protection order, the Kansas court could have stayed the proceedings and conferred with the Ohio court as required. Since this did not occur previously due to Mr. Ford's failure to inform the court, the Kansas court may decline jurisdiction based on Mr. Ford's misconduct.

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[393] *See* 18 U.S.C. §§ 2265-2266 (2003).

[394] Kan. Stat. Ann. §§ 38-1360, -1370 (2001); Kan. Stat. Ann. § 21-3843(2) (2002).

[395] Kan. Stat. Ann. § 38-1336.

[396] *See supra* Part III.C.

[397] Kan. Stat. Ann. § 38-1355.

[398] Kan. Stat. Ann. § 38-1356.

4. Which Order Trumps?

The federal PKPA determines which custody orders must be enforced by sister state courts.[399] Ms. Ford's attorneys can argue that the Ohio protection order is enforceable under the PKPA. Consistent with the PKPA, Mr. Ford received notice of the protection order hearing, and the Ohio judge issued the order in compliance with Ohio's jurisdictional statute (the UCCJA).[400] Moreover, since the VAWA 2000 broadened the PKPA's definition of emergency jurisdiction to include domestic violence cases where a parent is abused,[401] Ms. Ford's attorney could assert that there is no question that the Ohio judge issued a custody provision subject to enforcement under the PKPA.

Although the Ohio protection order must be enforced according to the PKPA,[402] Mr. Ford's attorneys may claim that the Kansas custody order also complies with the PKPA. Ms. Ford had notice of the custody hearing, and the Kansas judge arguably issued the order in compliance with Kansas's jurisdictional statute (the UCCJEA). Ms. Ford's attorney, however, may argue that under the PKPA, Kansas should not have exercised jurisdiction during the pendency of the proceeding in Ohio, since Ohio was exercising jurisdiction consistently with the PKPA.[403] Ms. Ford's attorney also may assert that Kansas should have declined jurisdiction based on Mr. Ford's misconduct, but if these arguments fail, the Kansas order also is entitled to enforcement.

Although both orders arguably are consistent with the PKPA, because emergency jurisdiction is temporary in nature, the courts must still resolve which court has jurisdiction over the ongoing custody case. After hearing arguments from both parties, the Kansas court should confer with the Ohio court. Through judicial communication, the courts can resolve the issue of which court will exercise jurisdiction over the ongoing custody matter.

5. Motion to Reconsider Jurisdiction Over the Permanent Custody Matter

Ms. Ford's family law attorney in Kansas should file a motion to reconsider the jurisdictional decision before the Kansas court. The court

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[399] 28 U.S.C. § 1738A (2003).

[400] *See supra* Part III.B.

[401] 28 U.S.C. § 1738A(c)(2)(C).

[402] *Id.*

[403] *See supra* Part III.D.

should conduct a jurisdictional hearing and carefully weigh all of the evidence, since the court has not yet had an opportunity to make a jurisdictional decision with a full record. Ms. Ford's attorney should ask the Kansas court to decline jurisdiction for two reasons.

First, as noted above, Ms. Ford's attorney should argue that Mr. Ford's failure to comply with the Kansas UCCJEA pleading requirements constituted misconduct, thereby permitting the court to decline jurisdiction.[404] The attorney may argue that Mr. Ford deliberately withheld information from the court about the existence of the Ohio protection order to prevent the court from communicating with the Ohio court and making an informed jurisdictional decision. Mr. Ford also attempted to prevent the Kansas court from receiving information about his domestic violence crimes in order to prevail in the substantive custody hearing. Ms. Ford's attorney may wish to provide information to the court regarding the common tactics of domestic violence perpetrators, including the misuse of custody and visitation litigation to maintain control over a victim.[405]

Second, Ms. Ford's attorney should ask the Kansas court to decline jurisdiction based on an inconvenient forum analysis.[406] The Kansas UCCJEA requires the court to consider whether domestic violence has occurred and is likely to continue in the future, and which state could best protect the parties and the children.[407] Ms. Ford's attorney can argue that Ohio is a safer state in which to litigate the child custody case. Kansas has not protected the Ford family previously; the children witnessed the domestic violence in Kansas, and this was the state where Mr. Ford severely abused Ms. Ford for nine years. Ms. Ford was isolated there, and the criminal justice system options and social services relief could not adequately protect her and the children when they lived in Kansas. In contrast, Ms. Ford has family support and a protection order in the state of Ohio, and, perhaps most important, Mr. Ford does not live there. The children and Ms. Ford are likely to heal emotionally in Ohio, away from Mr. Ford, and Ms. Ford's financial resources also may expand, as she could share housing with her aunt and depend on her for childcare. All of these factors indicate that Ohio is the state that could best protect Ms. Ford and the children.

Ms. Ford's attorneys can explain to the court that even the best efforts of Kansas courts and law enforcement cannot guarantee Ms. Ford's safety. Since batterers frequently perpetrate separation violence to punish

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[404] Kan. Stat. Ann. § 38-1355 (2001).

[405] *See* Bancroft & Silverman, *supra* note 41.

[406] *See supra* Part III.C.

[407] Kan. Stat. Ann. § 38-1354(b)(1).

victims for leaving, Ms. Ford's safety and the safety of the children are at high risk now.[408] Mr. Ford has choked Ms. Ford at least once, possibly attempting to kill her, and strangulation is a strong indicator of lethal violence. Ms. Ford's original flight to Ohio after Mr. Ford choked her, and the fact that Mr. Ford continued to threaten her after she left, illustrate Mr. Ford's potential lethality. Forcing Ms. Ford to return to Kansas to litigate the custody case simply is too dangerous.

6. Using Judicial Communication and Interstate Discovery to Protect the Victim and Children

Ms. Ford's Kansas attorney may suggest that the Kansas judge communicate with the judge in Ohio, as required by the Kansas UCCJEA.[409] Such communication is particularly important in a case such as this where the inconvenient forum issue is related to domestic violence. The Kansas judge may discuss the jurisdictional decision with the Ohio judge as long as the parties are permitted to participate or are provided an opportunity to present facts and legal arguments prior to a decision. The Kansas judge also may request that the Ohio judge forward a copy of the transcript of the protection order hearing or evidence from that hearing,[410] such as telephone records indicating that Mr. Ford contacted Ms. Ford in Ohio, to inform the Kansas court's decision about jurisdiction and safety risks.

The Kansas court may protect Ms. Ford's safety throughout the jurisdictional proceeding.[411] The court may permit witnesses, including Ms. Ford, to testify by telephone or by audiovisual means without leaving Ohio.[412] If Ms. Ford has moved to a new address in Ohio and fears for her safety, the Kansas court must seal the information and keep it confidential.[413]

Given the risks to Ms. Ford and the children of participating in ongoing custody litigation in Kansas, the Kansas court may decide to decline jurisdiction and permit the case to proceed in Ohio. The Ohio court may continue to communicate with the Kansas court and utilize interstate

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[408] *See supra* Part I.

[409] Kan. Stat. Ann. § 38-1345.

[410] Kan. Stat. Ann. § 38-1347.

[411] If the Kansas court does not decline jurisdiction, these procedures also can be used to protect Ms. Ford during a custody proceeding.

[412] Kan. Stat. Ann. § 38-1346.

[413] Kan. Stat. Ann. § 38-1356(e).

discovery.[414] For instance, the Ohio court may request that a social study be prepared by Kansas evaluators regarding Mr. Ford's parental fitness and residence.[415]

7. Dismissing Criminal Charges Pending Against Ms. Ford

Ms. Ford's criminal defense attorney in Kansas, meanwhile, may be working to have the criminal charges against Ms. Ford dismissed. The defense attorney should consider informing the prosecutor of the history of domestic violence and providing her with a copy of the Ohio protection order to demonstrate that Ms. Ford kept the children in Ohio for their safety. The prosecutor, who may understand that false criminal charges frequently are filed by perpetrators in domestic violence cases, may be convinced that the family court judges will resolve the child custody issue. She also is aware that flight from domestic violence is an affirmative defense to international parental kidnapping and to child concealment in a number of states.[416] She may employ prosecutorial discretion to dismiss the charges against Ms. Ford.

V. CONCLUSION

As the hypothetical fact pattern demonstrates, each of the jurisdictional laws may be used to protect domestic violence survivors. While the web of statutes governing jurisdiction in interstate custody cases may appear complex, the enactment of the PKPA was designed to bring harmony to these laws. The passage of the VAWA, the VAWA 2000, and the UCCJEA provided courts with specific jurisdictional tools to protect victims who escape across state lines and to prevent perpetrators from manipulating jurisdictional laws to harm their former victims. Initial surveys indicate that some courts, however, have failed to utilize jurisdictional laws for these purposes.[417]

In part, this failure may stem from a lack of knowledge about the new tools. A 2002 survey of state domestic violence coalitions suggested that many judges and family law attorneys may not be aware that the VAWA 2000 expanded emergency jurisdiction under the PKPA to include domestic violence cases. Similarly, judges and attorneys in states that have

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[414] Ohio Rev. Code Ann. § 3109.34(A) (Anderson 2002).

[415] *Id.*

[416] *See* 18 U.S.C. § 1204(c)(2) (2003); *see also* National Clearinghouse for the Defense of Battered Women, Parental Kidnapping Statutes (2003).

[417] *See supra* note 78.

enacted the UCCJEA now may be learning that emergency jurisdiction can be exercised in cases in which a parent has been abused even when the children have not been physically abused.

It is likely, however, that the failure of the legal profession to allow battered women to leave their batterers without sacrificing custody of their children is rooted deeply in misconceptions about domestic violence and the underlying belief that women lie about abuse.[418] In substantive child custody cases, this attitude often is reflected by judges reluctant to grant protection orders when a divorce is pending, believing that women misuse the protection order system to gain an advantage in custody litigation. In jurisdictional cases, this bias is revealed when courts penalize women who flee across state or tribal lines with their children, refusing to exercise emergency jurisdiction even when there is a documented history of domestic violence.

There is a heavy price to pay for failing to understand that victims face lethal danger when they separate from their abusers. The majority of domestic violence homicides are perpetrated *after* victims leave their abusers, and in many interstate child custody cases, the survivor has attempted to escape from the abuser to a safe location. Many people ask why victims do not leave, yet a review of how jurisdictional statutes have been applied suggests that when victims try to leave, they and their children often are punished in child custody litigation.

There are indications that communities are beginning to address these jurisdictional issues with the seriousness they deserve. Across the country, experts are training advocates, lawyers, and judges to apply jurisdictional statutes to protect domestic violence survivors.[419] In Michigan, the Governor's Task Force on Domestic Violence Homicide Reduction recommended adoption of the UCCJEA, illustrating the link between jurisdictional laws and victim safety. Furthermore, courts increasingly are permitting victims to remain in safe locations while litigating their custody cases.[420]

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[418] The lack of attention to safety issues in interstate custody cases also reflects a failure to train family law attorneys to screen for domestic violence and to effectively represent clients in domestic violence cases. *See* Goelman & Valente, *supra* note 28.

[419] Please note that summaries of many of these statutes will be available shortly from the National Center on Full Faith and Credit, Pennsylvania Coalition Against Domestic Violence (1-800-903-0111, ext. 2).

[420] *See, e.g.*, *In re* E.A., 552 N.W.2d 135 (Iowa 1996) (holding that where mother fled from Ohio to Iowa with children, the Iowa trial court was permitted to exercise jurisdiction to protect children); Consford v. Consford, 271 A.D.2d 106 (N.Y. App. Div. 2000) (finding that New York, as the home state, was entitled to exercise jurisdiction; the Supreme Court, Appellate Division noted with concern that allegations of domestic violence had never been explored in any judicial forum); Shoemaker v. Holbert, 1997 Ohio App. LEXIS 4102 (Ct. App. 1997) (finding that where mother fled to Ohio with child and sought

The application of jurisdictional statutes may appear at first glance to be a technical legal issue, not meriting tremendous focus. For battered women, though, fundamental rights are at stake: their right to liberty and their right to raise their children.[421] The right to liberty most certainly includes an ability to live free of fear of violence by a former partner. The right to raise children must include the right to raise children in a safe and stable environment, rather than a home where one parent is forced to struggle each moment for survival. It is time for courts and family law attorneys to recognize how to use the law to protect these rights.

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custody in Ohio, Ohio had jurisdiction; the domestic violence and custody orders issued previously in Kentucky were not permanent orders).

[421] Children also are at risk: domestic violence homicides frequently leave them without a mother. Moreover, children themselves may be killed as part of domestic violence homicides or murder-suicides. In Pennsylvania, for instance, 6-10 percent of the domestic violence related homicides are children killed by their fathers. *See* Pennsylvania Coalition Against Domestic Violence, Third Party Victims of Domestic Violence in Pennsylvania (Aug. 9, 2002).