Chapter 5 : Child Custody Issues in Domestic Violence Cases

Section 5A: Custody in Domestic Violence Cases

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Domestic relations attorneys practicing need to be aware of the special problems facing survivors. One such problem involves the choice to pursue sole or joint custody. Because of the difficulties and dangers involved, the survivor/client needs to make an informed choice, and the attorney needs to be able to pursue the course of action that best protects the survivor and is in the best interest of the child.

When violence has occurred between parents, a divorce is obviously not going to break all the ties that bind them. When the relationship between the adults has involved repeated incidents of violence, the children are often used by the perpetrator to continue to exert, or attempt to exert, control over the survivor. An award of joint custody can be interpreted by the perpetrator as license to continue acting in a controlling manner. As a court designated equal decision-maker, the perpetrator with joint custody may object to some or all proposals made by the survivor, regardless of the best interest of the child, in order to maintain control.

Many attorneys (and even courts) in Kentucky seem to interpret the case law as requiring a judicial preference for joint custody. This belief may be based in part on the Court of Appeals decision in Chalupa v. Chalupa, Ky. App., 830 S.W 2d. 391 (1992), which required the lower court to first consider joint custody before awarding sole custody. "The difficult and delicate nature of deciding what is in the best interest of the child leads this Court to interpret the child's best interest as requiring a trial court to consider joint custody first, before the more traumatic sole custody." Id. at 393. Of course, in a violent family, a joint custody award is potentially far more traumatic.

The view that joint custody must be considered ignores the subsequent decision in Squires v. Squires, Ky., 854 S.W. 2d. 765 (1993), in which the Supreme Court deliberately chose not to adopt that expansive interpretation by the Court of Appeals. Instead, the Squires Court required the implementation of the custody arrangement best suited for the child in question. The Squires Court went on to acknowledge that "in many cases, embittered former spouses are unwilling to put aside their animosity and cooperate toward their child's best interest. Often joint custody merely prolongs familial conflict and provides vindictive parties with a convenient weapon to use against one another." Id. at 768

The attorney representing the domestic violence survivor must combat the likely charge that the survivor is merely acting as the "unfriendly parent" in order to deprive the other parent of input into the child's upbringing. Abusers may present the façade of the "cooperative spirit" on their

part as justification for the Court to impose joint custody against the will of the domestic violence survivor. In some cases, the survivor's attempts to secure sole custody can appear to be motivated by selfish "unfriendliness," rather than by self-preservation and genuine concern for the child's best interest. Squires presents abusers with a convenient "unfriendly parent" argument in holding that a "cooperative spirit" is not a condition precedent to a joint custody award. "To so hold would permit a party who opposes joint custody to dictate the result by his or her own belligerence and would invite contemptuous conduct." Id. at 768. The attorney must be prepared to establish that the opposition to joint custody is based upon concern for the best interest of the child.

- The best interest of the child is defined at KRS 403.270, which directs the Court to consider all relevant factors including:
- The wishes of the child's parent or parents as to his custody;
- The wishes of the child as to his custodian;
- The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;
- The child's adjustment to his home, school, and community;
- The mental and physical health of all individuals involved; and
- Information, records, and evidence of domestic violence as defined in KRS 403.720.

The statute controls the nature of the custody arrangement as a whole, and not merely the determination of the primary residence of the child. To the attorney representing the domestic violence survivor, the most important component of the statutory best interest definition is subsection (f). Because the definition refers to the statutory provision permitting issuance of domestic violence orders, the existence of a protective order issued under 403.720 will be res judicata. If a 403.720 protective order is not in place, the attorney should strongly consider using 403.725 (4) to obtain an order within the divorce or custody action itself. If this option is not chosen, then proof should be offered during the case in chief regarding the existence of the violence.

The attorney must then consider 403.270 (2), which provides that "the court shall not consider conduct of a proposed custodian that does not affect his relationship to the child. If domestic violence and abuse is alleged, the court shall determine the extent to which the domestic violence and abuse has affected the child and the child's relationship to both parents."

In proving that the violence has had an effect on the child, the best evidence would likely be provided from psychiatric or psychological expert testimony. Dillard v. Dillard , Ky. App., 859 S.W. 2d.134 (1993) involved a custody modification based upon psychological harm to a child who identified with his abusive father. Testimony of a psychologist indicated that the child "will emulate (his father's) unfortunate characteristics and will turn out to be abusive and hostile, and will be unable to maintain a stable marital relationship when he reaches adulthood," unless a change in environment occurs. It is not clear from a reading of the decision whether the testifying psychologist was a treatment provider or a custodial evaluator. Obviously, a treatment provider with an ongoing relationship with the child would provide superior evidence. Custodial evaluators also offer valuable evidence in this area. When the court issues an order appointing a

custodial evaluator in a case involving domestic violence, the attorney should move the court to require the evaluator to make specific findings regarding the impact of the violence on the child. The attorney should also inquire into the experience and training that the evaluator may have in the area of domestic violence and its effect on children.

When expert psychiatric or psychological testimony is not available, the attorney should research investigation by child protective services into allegations of violence in the child's presence. Testimony from school personnel and other objective professionals could be used to show a pattern of unusual behavior by the child (e.g. poor academic work, disruptive behavior) corresponding in time to incidents of violence in the home or in the child's presence.

The attorney should not overlook the testimony of the client/parent in establishing the effect of the violence on the child. As one of the primary caretakers, the parent should be able to describe the child's reaction to violence she or he has witnessed. Children may act out during or subsequent to the violent incident, and the parent will be able to relate these instances to the Court. Treating professionals, if available, should be particularly helpful in identifying these behaviors.

Another area in which treating professionals are helpful is in establishing the effect of the violence on the client/parent, and how the violence has affected the client's ability to parent. KRS 403.270 (1)(c) provides a statutory basis for including evidence of this nature. Violence inflicted upon the survivor outside the knowledge of the child may not result in direct psychological harm to the child. However, this violence may leave the survivor physically, mentally, or emotionally less able to effectively parent the child. As a reaction to abuse, a parent may develop symptoms such as mental health or substance abuse problems. The relationship between the survivor and the child is in this way damaged by the perpetrator, and is admissible as part of the best interest definition. If the perpetrator has previously acted to diminish the capacity of the other parent to provide love and guidance to the child, then the perpetrator has failed to act in the child's best interest. Stated most simply, if the abuser kills the abused parent, the child has been deprived of the love and affection of a parent and this is obviously not in the child's best interest. In failing to act in the child's best interest, the perpetrator has shown why he should not be awarded custody.

Chapter 5: Child Custody in Domestic Violence Cases

Section 5B: Impact of KRS 403.270(1)(a), the De Facto Custodian Statute

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Introduction

In 1998, amendments to KRS 403.270 dramatically altered Kentucky's law concerning nonparent custody determinations by making it easier for non-parents who are "de facto custodians" to obtain custody of children. The amendment requires non-parents who have cared and provided for children during a six-month or one-year period, depending on the age of the child, to be given the same standing in custody matters as is accorded to each parent. To assess the impact of the amendment on cases involving domestic violence, attorneys must have a thorough understanding of the constitutional issues involved, the caselaw on non-parent custody issues, the terms of the statute, and the statute's potential impact on victims of domestic violence who are engaged in custody litigation concerning the children.

Amendment of KRS 403.270 Affecting Parent/Third Party Custody Disputes

During the 1998 session of the General Assembly, KRS 403.270 was amended to create a legal entity identified as a "de facto custodian," and defined as a person shown by clear and convincing evidence to be the primary caregiver and financial supporter of a child who has resided with the person for a period of six (6) months if the child is younger than three (3) years of age and for a period of one (1) year if the child is three (3) years of age or older or has been placed by the Department for Social Services. [Note: Since there is no helpful punctuation, this language is susceptible to a strained interpretation that no residence period is required if the child has been placed by the Department for Social Services. However, the more likely intent is that there is a one-year residency period regardless of age if the child has been placed with the alleged "de facto custodian" by the Department.]

KRS 403.420(4)(c) has been modified to permit the filing of a child custody proceeding in the circuit court by a de facto custodian, regardless of whether the child is in the physical custody of one of his or her parents at the time of filing.

Once someone contesting custody of a child is determined to be a de facto custodian by clear and convincing evidence, that person is entitled to the same standing in custody matters that is given to each parent. The de facto custodian is entitled to consideration equal to that accorded the parent(s) in granting custody in accordance with the best interest of the child. KRS 403.270(1)(b) and (2).

In making the initial determination regarding whether a non-parent should be awarded "de facto custodian" status, the trial court is required to consider the circumstances under which the child was placed or allowed to remain in the custody of the non-parent, including:

1. whether the parent seeking custody was previously prevented from doing so as a result of domestic violence as defined in KRS 403.720; and
2. whether the child was placed with the de facto custodian to allow the parent seeking custody to seek employment, work, or to attend school.

The statute states that the court may grant joint custody to the child's parents or to the child's parents and a de facto custodian. KRS 403.270(5). The statute requires that all persons determined to be de facto custodians shall be joined as necessary parties under Rule 19 of the Kentucky Rules of Civil Procedure.

Additionally, placement of the child with a "de facto custodian" provides grounds to consider a motion to modify custody earlier than the two-year period provided in KRS 403.340, if the placement is made by the custodian appointed under the prior decree. Under the UCCJA proceedings, modification of a prior out-of-state decree may be made if the child has been placed by the previous custodian with a "de facto custodian." KRS 403.340(2)(d).

Upon the death of either parent (not both), if, at the time of death the child is in the custody of a "de facto custodian," the court shall award custody to the "de fact custodian" if the court determines that the best interests of the child will be served by that award. An example would be where the Mother has custody, and has terminal cancer. She lives with the children in her parents' residence. Because of her inability to work due to her illness, the grandparents primarily care for and financially support the children, even though the non-custodial father pays timely child support and visits regularly. Unless the father seeks a custody modification before the relevant time period runs, upon the mother's death, the father and grandparents are on equal standing for a custody determination where the best interest standard will be applied.

Constitutional Rights of Parents

Parents have a fundamental right protected by the United States Constitution to raise a family without interference from the government, unless the government shows an important governmental interest. Even then, the state may intervene only upon a showing that clear and convincing evidence supports the need for state intervention. Santosky v. Kramer, 455 U.S. 745 (1982). Santosky involved a termination of parental rights action under New York state statutes, which provided for termination upon a finding by "fair preponderance of the evidence" that a child is "permanently neglected."

The United States Supreme Court in Santosky declared that a natural parent has a fundamental liberty interest in the care, custody and management of their child protected by the Fourteenth Amendment to the U.S. Constitution, which does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the state. Santosky at 752-754. Deprivation of this fundamental liberty interest requires, at a minimum, fundamentally fair

procedures that include a clear and convincing evidence standard of proof. Santosky did not address the substantive application by New York courts of the "best interest of the child" standard to determine what must be proven by clear and convincing evidence to justify state interference with the fundamental liberty interest of the parent(s) in the care, custody and management of their child(ren).

The Supreme Court further defined parents' constitutional rights in Troxel v. Granville, 120 S.Ct. 2054 (2000). In Troxel, the Court struck down a Washington statute allowing a court to order third party or nonparent visitation with a child if the judge determined it was in the child's best interest, regardless of the parents' opposition. The Court held that the statute infringed on the parents' fundamental right to make decisions concerning the care, custody and control of their children. The determination of a fit parent must be accorded some special weight. Parents' rights can't be violated simply because a judge feels they could have made a better decision in the interest of their child.

Kentucky Caselaw Addressing Non-parent Custody Determinations

In Davis v. Collinsworth, 771 S.W. 2d 329 (Ky. 1989), the Kentucky Supreme Court, addressing a parent/grandparent custody dispute, interpreted Santosky and Stanley v. Illinois, 405 U.S. 745 (1972), to require that any challenge by a third party seeking to abrogate a parent's "fundamental, basic and constitutionally protected rights to raise their own children" must show unfitness by clear and convincing evidence. (Davis at 330). Davis applied the common law doctrine of "unfitness" codified in KRS 405.020. Related cases confirming the required showing of "unfitness" by a natural parent in order for a non-parent to prevail in a custody dispute include McNames v. Corum, 683 S.W.2d 246 (Ky. 1985) and Fitch v. Burns, 782 S.W.2d 618 (Ky. 1989).

A second method for a non-parent to challenge a parent's superior, fundamental liberty interest in raising a child, is by application of the doctrine of waiver of that superior right, i.e., a unilateral voluntary and intentional surrender or relinquishment of a known right, or an election to forego an advantage which the party at his/her option might have demanded or insisted upon.

The case of Greathouse v. Shreve, 891 S.W. 2d 387 (Ky. 1995) involved a father who had initially departed from the household, thereafter having only sporadic contact with the child, due to his immaturity, working out of town, changing jobs, unstable home life, and drug and alcohol problems. However, his attempts to maintain contact were also significantly discouraged and impaired by this hostility of the maternal grandmother, who had filed a false affidavit in a previous paternity proceeding involving the child as the only "way to completely eliminate" the father from the child's life. Greathouse at 389.

The Kentucky Supreme Court in Greathouse remanded for further proceedings because the trial court had not adequately considered whether the fact supported a waiver by clear and convincing evidence of the father's superior, fundamental liberty interest in raising his own child, noting that only upon such a finding could the trial court apply the "best interest" standard to the parent/non-parent custody dispute.

In a companion case to Greathouse, Shifflet, v. Shifflet, 891 S.W.2d 392 (Ky. 1995), the Kentucky Supreme Court suggested that, where the trial court had ordered custody to the grandmother applying a best interest standard and the Court of Appeals had reversed, finding that there was no showing of unfitness on the part of the mother, the best interest standard might be applicable because the facts more properly raised the issue of voluntary waiver of the parents' superior right to custody. The child had been in the temporary custody of the grandmother for more than ten years, along with the mother's other children while the mother was incarcerated for a series of offenses for approximately seven years before her rehabilitation as a law abiding, employed and responsible person. The court rejected application of the doctrine of equitable estoppel, noting that there was no necessity that the other party be mislead, but reaffirmed Greathouse in that "statements and supporting circumstances must be equivalent to an express waiver to meet the burden of proof."

In one of the only cases addressing the Kentucky de facto custodian statute to date, the Kentucky Court of Appeals limited the potential breadth of the statute in Sullivan v. Tucker, Ky. App., 29 S.W.3d 805 (2000). Sullivan involved a grandmother who once had temporary custody of her two grandchildren and then petitioned to be designated a de facto custodian after she lost custody. She argued she was a de facto custodian on the basis of her previous custodial relationship with the children. The court interpreted the statute to require that a person's status as a de facto custodian "must be addressed anew whenever the status is asserted." Id. at 808. A finding of de facto custodian status at some point in time does not entitle the de facto custodian to participation in any and all future custody matters.

Potential Impact of KRS 403.270 Modifications on Child Custody Determinations: Thoughts for Attorneys Representing Victims of Domestic Violence

The creation of the "de facto custodian" entity may have special significance and impact on victims of domestic violence who have children. One of the reasons it is often so difficult for victims of abuse to leave the relationship is because of financial dependence issues. Often, the victim has few, if any of her own resources, and therefore is dependent on the abuser for the basic necessities for herself and her children. Survivors of abusive relationships are often forced to request assistance from family and friends in order to be able to successfully leave the relationship. In an era of ever shrinking public resource availability, this dependency on others for support is likely to increase. Frequently, battered women must return to the home of their parents, or move in with siblings or friends in order to survive and support their children while they attempt to find employment, a place to live, etc. While these support arrangements are often crucial, with the modification of KRS 403.270, special consideration should be given to the possibility that the arrangement could later cause custody complications for the client who has been the victim of domestic violence.

Although the statute does provide that the trial court must consider the circumstances under which the child came to be with the third party, including evidence of domestic violence, or to permit the parent to seek employment, work or attend school, there is still a lot of discretion provided to the court. A likely scenario where the "de facto custodian" situation may arise could be where the victim of abuse left her abuser and with the children moved in with her parents (or

sister or friend – the statute does not require that the third party be a relative in order to gain the "de facto custodian" status) who happily offered to support her and provide child care while she "got on her feet." Initially, the situation might work well for all of the parties involved, until the victim tries to assert independence or engages in behavior not deemed "appropriate" by her parents, e.g. stops going to church, gets a new boyfriend, etc. In this instance, if the required time periods had passed, the grandparents could move the court to grant them "de facto custodian" status and then custody. In this type of situation, the grandparents would more likely have the financial resources to hire an attorney, and since they no longer have to prove their daughter unfit to be on an equal legal status, may likely appear to the court as better able to care for and provide a stable environment for the children.

Additionally, even if the mother's behavior wasn't deemed inappropriate by her parents, the fact that she was working a forty hour week, or was in school full-time, etc. would potentially provide a situation where the grandparents could argue that they were the primary caregivers for the child(ren), in addition to the provider of financial support. The statute provides little guidance as to what "primary caregiver" means, except to say, "the extent to which the child has been cared for, nurtured, and supported by any de facto custodian." KRS 403.270(2)(g)

The statute does require that the court consider the "intent of the parent or parents in placing the child with a de facto custodian." KRS 403.270(2)(h) Therefore, when working with a victim of domestic violence who has children and is planning to seek assistance or already has from family or friends, it will be important to counsel her on the potential ramifications of the arrangements and possibly take protective measures. Some suggestions for preventative steps include encouraging clients who are natural parents to keep an eye on the calendar when relying on third parties to provide assistance, reasserting where possible their superior fundamental liberty interest to make the primary decisions about raising their children before any party is in a position to claim the "de facto custodian" status. Clients who are natural parents should be encouraged to document, through written agreement, power of attorney, etc. the reason(s) for a joint caretaking arrangement as early as possible when undertaken in order to demonstrate the parties' intent that the arrangement is not to infringe on the parents' superior, fundamental liberty interest, but rather to assist the nuclear family in bettering its educational, financial and/or emotional stability. Clients should memorialize proof of primary caretaker and primary financial support. Natural parents will be more likely to prevail where they are able to show that they have not abdicated parental responsibility, but that the reduced caregiving and/or financial support was a) due to circumstances beyond their control, and possibly was b) accepted, ratified or encouraged by the third party. It is important to avoid the appearance of a situation that resembles the pre-modification "waiver" cases, where it was determined that the natural parent's actions amounted to an intentional and voluntary waiver of their superior custody rights.

Domestic violence perpetrators should not be permitted to profit from their offensive and illegal behavior. Therefore, in situations where the perpetrator places the children, who are often taken by force from the victim, with his parents, public policy arguments should be made to prevent his parents from gaining "de facto custodian" status – equal standing, with the victim/mother. Section 403.270(2)(i) provides that the court must consider, as circumstances for placement with the de facto custodian, whether "the parent now seeking custody was previously prevented from

doing so as a result of domestic violence . . .. In this instance public policy arguments should be made that "previously prevented" should not be narrowly interpreted to include merely legal impediments, but to also include domestic violence dynamics realities, of the social, economic and psychological impediments to seeking custody.

Chapter 5: Child Custody in Domestic Violence Cases

Section 5C: Parental Abduction

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The abuser's need for power and control and the victim's need for safety underlie many of the nation's estimated 354,000 annual family abductions. Many abusers abduct their children or keep them after a scheduled visit to coerce their victims to return. Tragically, some abusers, upon realizing that their relationship with their former spouse or partner is over, kill the children and themselves. Victims, on the other hand, sometimes violate state criminal custodial interference laws by relocating with the children to another state when they flee from abuse.

Jurisdictional Issues

- The Uniform Child Custody Act (UCCJA) requires parties to provide information under oath to the court about where the child has lived over the past five years and the names and current addresses of everyone with whom the child has lived during those five years, as well as other information. If disclosure of this information could harm your client, request that the court seal, sequester, or impound the address information in the affidavit or pleading, so that it is only available to the court. Check your state law for specific versions of the UCCJA. Some states specifically provide for confidentiality of information in cases involving domestic violence. Even courts in states that do not have specific laws protecting the confidentiality of identifying information may honor such requests upon sufficient showing.

- Custody orders issued in compliance with the federal Parental Kidnapping Prevention Act (PKPA) are entitled to full faith and credit in other states. To increase the likelihood of enforcement nationwide, proceed in the state with "home state" jurisdiction.

- Custody provisions issued as part of a civil order of protection may be entitled to interstate enforcement under the PKPA, if in compliance with the Act, or under the Violence Against Women Act (VAWA), although there is still confusion as to which of these two federal laws prevail in situations where they conflict.

- Emergency jurisdiction in a child custody proceeding under the UCCJA generally only applies if the parent fled with the child to another jurisdiction because the child was at risk of harm. Some states have extended emergency jurisdiction to circumstances involving a parent fleeing domestic violence with the children. Bear in mind that a custody order issued on the basis of emergency jurisdiction is only supposed to be temporary. It may be enforceable until it is superseded by an order that is entitled to full faith and credit under the PKPA (such as an order issued by the "home state" or by the state with exclusive continuing modification jurisdiction).

- Pursuant to UCCJA, a court may decline jurisdiction if it is an inconvenient forum or if the plaintiff has engaged in reprehensible conduct. You may need to defend your client against such allegations if your client is filing for custody in the sew jurisdiction and maintains an undisclosed address to ensure safety. Ask the home state to decline jurisdiction on inconvenient forum grounds because the victim would be at risk if forced to return there.

  (The UCCJA 18-22 provides the authority for obtaining evidence from other state courts so that there is no necessity to return.) If the abuser has taken the children in an effort to control the victim, argue that the court should decline jurisdiction based on the abuser's conduct. The decision to decline jurisdiction on inconvenient forum grounds is discretionary with the court.

Custody Orders that Prevent Abductions or Facilitate Prompt Recovery

- Every custody order should explicitly state the basis for jurisdiction. Specific statements regarding compliance with the PKPA will make enforcement more likely, and modification less likely, by sister state courts.

- In most states, the court can order that a bond be posted by the parent likely to abduct. The order should specify that the bond money is to be released to the victim parent to defray the costs of recovery in the event of an abduction.

- Since many state criminal custodial interference laws require the abduction to be a knowing violation of an order, the custody order should state in capitalized bold letters: VIOLATION OF THIS ORDER MAY SUBJECT THE PARTY IN VIOLATION TO CIVIL AND/OR CRIMINAL PENALTIES.

- Visitation provisions should be very specific, including the location and timing of pick-up and drop-off points. If an abduction is likely, request supervised visitation.

- Make sure the order states that the children are not allowed to leave a specified geographical area with the abuser.

- Specifically state in the order that the abuser is restricted from taking the children outside of the United States. This language is important in preventing the abuser from being able to request issuance of passports for the children. Send a copy of the court order to the U.S. Department of State, Office of Passport Services to prevent issuance of passports for the children upon application of the other parent. If the children already have passports issued in their names, include a provision in the order requiring the passports to be turned over to the non-abusive parent, or, at a minimum, held by a neutral party during visits.

Further Information to Facilitate Prompt Recovery

- Advise your client to keep several certified copies of the custody order in various places.

- Inform your client about the Missing Children Act, the Missing Children's Assistance Act, and the National Child Search Assistance Act, which mandate that law enforcement officers must enter the missing children on the National Crime Information Center without a waiting period.

- When a child is abducted to a known location, file a motion or extraordinary writ to have the order enforced. (Your client may need to consult with counsel in the jurisdiction where the child is found.) If no order existed prior to the abduction and the abductor's location is unknown, request an ex parte order granting your client sole custody, and make efforts to notify the abductor of the lawsuit, including sending notice to the abductor's last known address, relatives, employer(s), and lawyer.

- In the event of an abduction, particularly if the whereabouts of the child are not known, advise your client to contact the state's missing children clearinghouse, if one exists, and the National Center for Missing and Exploited Children at 800/843-5678.

- In the event of an international abduction, contact the U.S. Department of State, office of Children's Issues at 202/647-2688. Check the State Department to see if the child has been abducted to a country which is a party to the Hague Convention. If so, file a Hague petition for the return of the child.

- Advise your client to inform the school or day care provider not to release information about the child(ren)'s address and to notify your client immediately if anyone attempts to take the child(ren) from school or day care without your client's advance written permission.

- Tell your client to keep up-to-date photographs of the child(ren).

Fleeing with the Children

- Advise your client of the potential civil and criminal liability if your client detains, withholds, or conceals the child(ren) in violation of the custody or visitation rights of another party. Assist your client to be safe without exposing your client to liability.

- A victim of domestic violence who flees or simply relocates with her children may be in violation of criminal custodial interference laws. However, as of 1995, 14 states and the federal International Parental Kidnapping Crime Act of 193 permit flight from domestic violence to be used as a defense to charges of criminal custodial interference. In some states, the victim is required to notify law enforcement and/or file for custody.

- The PKPA allows the Federal and State Parent Locator Service to be used to locate an abducting parent and to make and enforce custody determinations.

Malpractice and Other Ethical Proceedings

- Familiarize yourself with the liability risk and ethical standards for lawyers in parental abduction cases. Lawyers have been unsuccessful defendants in cases which involved the following behavior:

  - Counseling a client to abduct the child from the other parent;

  - Not seeking preventive measures on behalf of a client who repeatedly requested them;

  - Not promptly contacting sister state courts regarding proceedings pending in both states; and

  - Refusing to disclose the whereabouts of children abducted by a parent in contempt of a custody order, thus enabling the parent to continue the fraud on the court.

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Parental Abduction Checklist:

When filing or responding to a custody petition:

1.___Request that the address information in the affidavit or pleading be kept confidential

2.___Proceed in the "home state" so that the order is given full faith and credit nationwide

3.___Check whether the order would be enforceable under the VAWA or PKPA

4.___If client fled abuse, pleased emergency jurisdiction in current state (if law permits); otherwise, tile for custody in the "home state" or consider requesting that the "home state" decline jurisdiction based on inconvenient forum

To prevent abduction or enhance prompt recovery, ensure that the custody order:

1.___States the basis for jurisdiction and that violation may result in civil or criminal penalties

2.___Provides that a bond will be posted by the abuser

3.___Specifies visitation provisions, including that the children may not leave a specified geographical area (or the United States) with the abuser

Advise your client to:

1.___Keep several certified copies of the custody order and related laws, and up-to-date photographs of the children

2.___Contact the state's missing children clearinghouse and the National Center for Missing and Exploited Children (800/843-5678) if the children are abducted

3.___Contact the State Department (202/647-2688) in the event of an international abduction

4.___Inform the school or day care facility not to release the child(ren)'s address

In the event of an abduction, file for sole custody, if appropriate, and:

1.___File a motion, extraordinary writ or *ex parte* order, where appropriate, to enforce order

2.___Check whether the Hague Convention applies

Be aware that:

1.___A victim who relocates with children may be in violation of criminal custodial interference laws and the Federal and State Parent Locator Service may be used

2.___Lawyers risk malpractice and ethical sanctions if they counsel clients to abduct child(ren), fail to seek preventive measures, or fail to contact sister courts regarding pending proceedings.

Chapter 5: Child Custody in Domestic Violence Cases

Section 5D: Custodial Interference

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In order to more appropriately deal with situations involving the interference with lawful custody arising from custody disputes, Kentucky has adopted the following two statutes in addition to its Kidnaping and Unlawful Imprisonment statutes. KRS 509.070 Custodial Interference reads as follows:

(1) A person is guilty of custodial interference when, knowing that he has no legal right to do so, he takes, entices or keeps from lawful custody any mentally disabled or other person entrusted by authority of law to the custody of another person or to an institution.
(2) It is a defense to custodial interference that the person taken from lawful custody was returned by the defendant voluntarily and before arrest or the issuance of a warrant for arrest.
(3) Custodial interference is a Class D felony, unless the person taken from lawful custody is returned voluntarily by the defendant.

KRS 509.060 Defense states "In any prosecution for unlawful imprisonment or kidnaping it is a defense that the defendant was a relative of the victim and his sole purpose was to assume custody of the victim." "Relative" is defined by KRS 509.010(1) as a parent, ancestor, brother, sister, uncle or aunt.

According to the Commentary:
The combined effects of KRS 509.060 and 509.070 are: to render the statutes on unlawful imprisonment and kidnapping inapplicable to situations involving the acquisition of control over another because of familial affection or considerations, and to create a special offense to deal with conduct involving an interference with lawful custody. While eliminating the possibility of child custody disputes constituting unlawful imprisonment or kidnapping, these provisions reflect a judgment that there exists a need to protect "parental custody against all unlawful interruption, even when the child itself is a willing, undeceived participant in the attack on this interest of its parent." Model Penal Code § 212.4, Comments (Tent. Draft No. 11, 1960). The same need exists for protecting the lawful custody of persons who are entrusted to institutional care under authority of law. Because of the fact that most cases to arise under this statute will involve custodial disputes in domestic relations situations, a special defense is provided for a defendant who relinquishes his wrongful custody prior to the initiation of the criminal process through arrest or the issuance of a warrant.

The penalty structure for the offense of custodial interference is designed to encourage an offender to return his victim to lawful custody on his own even though the defense mentioned above is unavailable to him. A "voluntary" return, within the contemplation of this provision, is one that is not stimulated by a threat of immediate apprehension or detection by law enforcement officials. The penalty provision also provides lesser sanctions for commission of this offense by a relative as defined in KRS 509.010.