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Should I Stay or Should I Go? Helping Domestic Violence Survivors with Interstate Cases

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Wednesday, January 24, 2018

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This project is supported by Grants #2015-TA-AX-K056 awarded to Praxis International, and #2016-TA-AX-K030, awarded to the Legal Resource Center, by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, conclusions and recommendations expressed here are those of the presenter(s) and do not necessarily reflect the views of the U.S. Department of Justice.

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What Does the LRC Do?

- Train attorneys, victim advocates, and court personnel about the laws and issues affecting survivors in interstate custody and domestic violence cases
- Assist survivors to find attorneys in interstate cases
- Maintain a database of attorneys and programs available nationwide to assist survivors in interstate cases
- Provide support to practitioners in interstate cases
- Offer resources to attorneys, including case law and sample pleadings
- Maintain a website with jurisdictional and related laws (www.lrcvaw.org)

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When Is It Appropriate to Refer a Case to the LRC?

- The case involves domestic violence.
- There is a child custody issue.
- The case involves more than one state.

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When Is It Appropriate to Refer a Case to the LRC?

- Please note that we do not handle international cases; these involve different laws and issues.
- We do not directly represent survivors, but we assist survivors to find civil attorneys when a jurisdictional legal issue is involved.
- Some of these cases involve criminal charges against a survivor; in such cases, she will need a criminal defense attorney as well as a civil attorney.

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Who Are We and When Are We Available?

- We have 2 part-time attorneys on staff and 1 project coordinator.
- We are open during business hours EST.

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The Uniform Child Custody Jurisdiction and Enforcement Act [UCCJEA]

Does a state have the power to enter a custody order over a child?

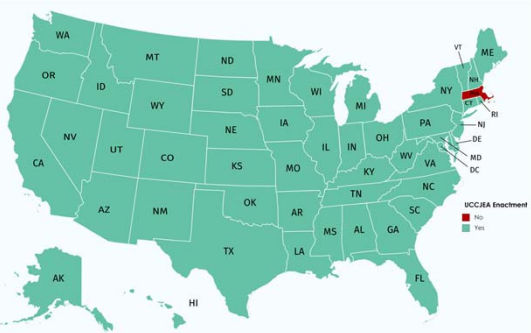
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The Uniform Child Custody Jurisdiction and Enforcement Act [UCCJEA]

- Developed in 1997
- Designed to replace the UCCJA
- Intended to reconcile differences between the UCCJA and PKPA
- So far 49 states, D.C., and the U.S. Virgin Islands have enacted it; currently being considered by the last state, Massachusetts.
- Significant improvement for domestic violence survivors

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UCCJEA Enactment



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When May a Court Hear a Custody Case?

Jurisdictional bases:

- Home state -- trumps other bases (except emergency)
- Significant connection
- "More appropriate forum" jurisdiction
- "No other state" jurisdiction

**Note that the UCCJEA applies after a child is born*

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Highlights of the UCCJEA

What provisions may be used to assist survivors?

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Emergency jurisdiction . . .

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UCCJEA: Emergency Jurisdiction

Temporary emergency jurisdiction:

- Where “necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.”
- Child must be present in the state.

This means that a court can exercise emergency jurisdiction in domestic violence cases where the mother (but not the child) has been abused.

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UCCJEA: Emergency Jurisdiction

Filing for temporary emergency jurisdiction:

- State procedures vary; UCCJEA does not specify procedure and forms.
- May be able to file for temporary emergency order under protection order statute.
- Submit evidence establishing the emergency: evidence of abuse of parent and/or child.

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Inconvenient Forum . . .
(under the UCCJEA, a party can ask a court to transfer a custody case elsewhere)

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UCCJEA: Inconvenient Forum

Factors explicitly include:

1. Whether domestic violence has occurred and is likely to continue and which state could best protect the parties and the child,	5. The agreement of the parties,
2. The length of time the child has resided outside of the state,	6. The nature and location of the evidence including the child's testimony,
3. The distance between the two courts,	7. The ability of each court to decide the issue expeditiously and the procedures necessary to present the evidence, and
4. The relative finances of the parties,	8. The familiarity of each court with the facts and issues in the pending litigation.

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Case Scenario

Lila Smith calls you. You learn in the brief conversation that Lila and Philip have been married for five years and have lived in a rural part of Maryland. They have one child, a seven-month old daughter named Annie. Philip has physically and emotionally abused Lila since shortly after they were married. Philip has never been charged or convicted criminally for the abuse, and Lila has never filed for a civil protection order.

Last night, Philip held a gun to Lila's head in front of Annie and threatened to kill her.

Lila tells you that she wants to leave and move to Wisconsin, where her family lives and where she hopes to find a job.

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Relocation Checklist

What legal issues does Lila need to consider?

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Legal Issues in Relocation

- Has a custody order been entered previously, including as part of a protection order?
- Can she leave without violating the order?
- Will she be charged with contempt or parental kidnapping (criminal)?
 - Domestic violence exemption?
 - Domestic violence defense?
 - Child protection defense?
- Will the state from which she is fleeing have continuing exclusive jurisdiction?
- Can she leave without violating the state relocation law?

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Legal Issues in Relocation

- Should she file for a protection order before she leaves the state?
- Will she be able to file for a protection order in the new state (personal jurisdiction)?
- Will the child custody jurisdictional laws require her to return to the state to litigate a custody case?
- How do the custody laws differ in the two states?
- Are there other legal protections that could keep her safer in one state versus the other?
- Are there immigration-related consequences to leaving the state?

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Should Lila Get a Protection Order before She Moves?

The decision is very complex and legal advice should be sought.

Benefits of obtaining a protection order:

- If issued, a protection order will document the violence, which could be helpful for jurisdictional and custody arguments in the future.
- It may help protect the survivor and would be enforceable nationally.
- If the survivor is awarded custody as part of the protection order, the abuser would not be able to take the children away from her.
- The survivor may not be able to get a protection order from a court in another state later if that court does not have personal jurisdiction over the abuser.

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Risks of Obtaining a Protection Order

- If the protection order is not issued, the abuser will claim that he never abused the survivor (in future legal proceedings).
- If the abuser is awarded some sort of regular visitation, the survivor will have to comply, which may make it impossible to leave the state.
- If a custody order is issued as part of the protection order, this may give the issuing state continuing, exclusive jurisdiction for the duration of the protection order, forcing the survivor to litigate further custody proceedings in the issuing state.

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Risks of Obtaining a Protection Order

- If a custody order is issued as part of the protection order, this may trigger the state's parental kidnapping or relocation laws if the survivor leaves.
- If the survivor seeks a protection order before leaving the state, it may make it more difficult to win an "inconvenient forum" argument later (if she asks the state to transfer the long-term custody case to another state).

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Practical Tips

WHEN A SURVIVOR LEAVES:

- It is important to find out whether a case has been filed in the jurisdiction the survivor has left.
- A left-behind parent may be permitted by a judge to move forward in a custody case even if the other parent does not receive actual notice of the proceeding.
- It is critical to participate in court proceedings in the home state, either in person or by telephone.

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Practical Tips

WHEN A BATTERER ABDUCTS A CHILD:

A survivor may need to seek enforcement of a custody order in the state in which the child has been abducted. In most cases, the survivor will need a "pick up order" from a judge in that state, even if there is already a valid custody order from another state.

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How Can Advocates Help in Interstate Cases?

- Help the survivor find and travel to a safe place within the state to have the time and privacy to seek legal information before relocating.
 - Rural homes may be distant from shelters.
 - Survivors may be trapped at home with no transportation.
- If the survivor has fled to a refuge state, help the survivor find out how to file for a continuance or request permission to appear by telephone for proceedings in the home state.

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How Can Advocates Help in Interstate Cases?

- Help the survivor find representation in the home state.
 - Contact the LRC regarding interstate cases.
 - Check with legal services programs, law school clinics, law firms with pro bono programs, VAWA-funded projects, and volunteer attorney programs for referrals; make connections with solo practitioners in case the legal services program has a conflict.
- Help document the abuse for emergency jurisdiction and inconvenient forum cases.
 - Prior court orders or protection order transcripts
 - Police reports; 911 tapes
 - Medical or school records
 - Physical evidence of destruction or injury; photos of injuries
 - Witnesses

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How Can Advocates Help in Interstate Cases?

- Help the survivor obtain information about any court proceedings that the abuser files back in the home state.
- If the survivor is required to return to the home state for a hearing, help find a safe place to stay, safe transit to the court house, and court accompaniment for support.
- Help problem solve if the abuser has connections with local law enforcement or courts in rural communities.

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Parental Kidnapping

In some states, leaving the state with your children could violate state parental kidnapping laws.

These criminal laws may have different names:

- Parental kidnapping
- Custodial interference
- Child abduction
- Child concealment

Advocates need to be familiar with these criminal laws because advising a survivor that she can leave the state with her children could subject her to criminal charges . . .

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Parental Kidnapping: State Laws

Must there be a court order for kidnapping to occur?

- Some states require flight with children in violation of a court order.
- Some criminalize flight even in the absence of a court order.
- Some state laws are unclear.
- Some expressly criminalize fleeing in both contexts, but create more serious penalties for violating a court order.

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Parental Kidnapping: State Laws

What type of intent is required by these laws?

They vary by state.

- Usually, the parent must intend to do something more than just leave the state with the child.
- Often require things such as “intent to conceal the child from the other parent” or “intent to deprive the other parent of visitation.”

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Parental Kidnapping: State Laws

Are there any protections for survivors?

They vary by state.

Some states have exemptions; others have defenses.

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Parental Kidnapping: State Laws

Exemptions:

- In a few states, language in the parental kidnapping statute exempts victims from prosecution.
- Usually must satisfy a condition for it to apply: e.g., the person must report to law enforcement or to a prosecutor that she has left the state with the children and why, and she must file for custody within a specified amount of time.
- These types of conditions pose problems for many survivors.

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Parental Kidnapping: State Laws

Defenses:

- Unlike exemptions, defenses generally require at least the initial involvement of the criminal justice system.
- Victims may be arrested and jailed initially and permitted to raise a defense later.

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Parental Kidnapping: State Laws

Types of Defenses:

Statutory:

- Fleeing domestic violence
- Fleeing harm to self
- Fleeing harm to child

General criminal law defense:

- Necessity

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Parental Kidnapping: State Laws

Consequences:

- Even if a survivor is acquitted of the criminal charges, often the children are returned to the batterer while a victim is incarcerated or awaiting trial.
- Additionally, she may lose her children in a subsequent custody case if a civil court judge perceives her flight as an attempt to deprive the perpetrator of contact with the children or as an attempt to forum-shop.

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National Organizations

- Legal Resource Center on Violence Against Women
(301) 270-1550, lrc@lrcvaw.org, www.lrcvaw.org
- National Center on Protection Orders and Full Faith & Credit
(800) 903-0111, ext. 2
- National Clearinghouse for the Defense of Battered Women
(800) 903-0111, ext. 3

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Thank you!

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