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Valentina Shaknes, Jordan Messeri, Malissa Osei and Grace Chamoun Taranto
Krauss Shaknes Tallentire & Messeri LLP

USA: Trends & Developments
Valentina Shaknes and Grace Chamoun Taranto
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USA

Law and Practice

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Krauss Shaknes Tallentire & Messeri LLP (KSTM) is dedicated exclusively to the practice of matrimonial and family law – representing clients in all aspects thereof, including divorce proceedings, paternity disputes, and prenuptial and postnuptial agreements, as well as custody, access and support issues. The firm often advises high net worth and celebrity clients in sensitive and complex family matters and represents clients in contested interstate and international family disputes, including proceedings under the Uniform Child Custody Jurisdiction and Enforcement Act and the 1980 Hague Convention on the Civil Aspects of International Child Abduction. KSTM attorneys have achieved landmark victories in federal district and appellate courts, in addition to creating significant new law protecting the interests of parents and children affected by domestic violence. The firm and its attorneys are ranked consistently in the annual Chambers and Partners' High Net Worth Guide as top for family/matrimonial law. KTSM's offices are located in New York City, Greenwich, Connecticut, and Hackensack, New Jersey.

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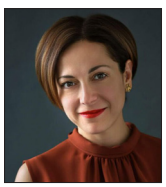

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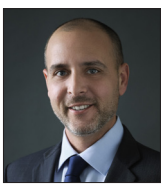

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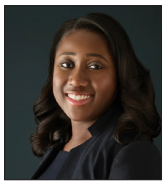

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1. The Care Provider's Ability to Take Decisions About the Child

1.1 Parental Responsibility

In the USA, a parent's right to make decisions for children is protected by the Due Process Clause of the 14th Amendment to the US Constitution.

Although the terminology may vary across the 50 states of the USA, a parent's decision-making power with regard to a child is most often referred to as "legal custody". A parent can have "sole legal custody" by which a parent is individually empowered – or "joint legal custody", which requires parents to co-operate with one another – to make important decisions affecting a child's life, including (but not limited to) a child's education, healthcare, religious upbringing, and extracurricular activities.

1.2 Requirements for Birth Mothers

A birth mother would automatically acquire parental rights or legal custody of the child. A birth mother can lose custody of her child to the authority of the state if a court determines that such relief is in the child's best interests and the court terminates or suspends the mother's parental rights as a result. By way of example, a state can take protective custody of a child and commit guardianship to an authorised social services agency if parental rights are terminated owing to a finding of neglect or abuse, a newborn testing positive for drugs, etc.

1.3 Requirements for Fathers

A father's parental rights in the USA will depend on his relationship to the child's mother at the time of the child's birth. A father acquires parental rights over a child if the child was born of the marriage between the mother and father. In some states, including New York, a father acquires parental rights over a child if the child was born of a civil partnership between the mother and father.

Alternatively, parental rights can be acquired by unmarried fathers in other ways, including – but not limited to – by:

- being registered as the child's father on the birth certificate;
- obtaining a parentage/paternity order from a court (eg, an "Order of Filiation" in New York);
- entering into a custody agreement with the child's mother;
- obtaining a court order granting joint or sole legal custody; and
- entering into a marriage with the mother.

As regards parental rights for a father in a same-sex relationship, please see **1.4 Requirements for Non-Genetic Parents**.

1.4 Requirements for Non-Genetic Parents

There are various categories of non-genetic parents in the USA. Each category has different requirements for acquiring parental rights.

Adoption

US citizens who are at least 25 years old can legally adopt a child, subject to any additional requirements pursuant to specific state laws. Such requirements across various states throughout the USA regarding a person's eligibility to adopt a child include, but are not limited to, passing criminal background checks. In New York, adoption is a legal proceeding whereby a person acquires the rights and responsibilities of a parent in all respects. Once the court grants an order of adoption, the parent and adopted child legally establish the relationship of parent and child.

Step-Parents

Step-parents who wish to acquire parental rights and responsibility for their step-children must formally adopt them. Once the step-children are adopted, the non-custodial parent no longer has parental rights or responsibilities, including child support. Step-parent adoption is the most common type of adoption in the USA.

Same-Sex Relationships

In 2015, the US Supreme Court struck down all state bans on same-sex marriage, and legalised same-sex marriages in all 50 states. Same-sex couples can establish parental rights in various ways, including by adoption, pregnancy and surrogacy. In general, a biological parent automatically has legal custody of the child, and a child born into a marriage is subject to both spouses' legal custody.

Surrogacy

Gestational surrogacy is the process by which a woman agrees to become pregnant via in vitro fertilisation and embryo transfer and to carry and deliver a baby for intended parents, who will be declared the legal parents of the child immediately upon birth. Surrogacy is an important family-building option for many families experiencing fertility or health issues and/or for LGBTQ+ families.

The USA does not have federal laws regarding gestational surrogacy. Instead, each state has the right to create its own laws on the subject, which vary widely from state to state – some of which proscribe compensated surrogacy outright. In New York, surrogacy agreements were unenforceable until the Child Parent Security Act became law in 2021, which allows for compensated gestational surrogacy pursuant to surrogacy agreements and for parentage orders to be granted prior to the birth of a child. New York law only applies to gestational surrogacy, whereby the surrogate's own egg is not used to conceive the child. Arrangements whereby the surrogate is biologically related to the child remain unenforceable in New York and they are prohibited if the surrogate is being compensated.

1.5 Relevance of Marriage at Point of Conception or Birth

Whether the parents are married at the point of the child's birth, rather than at the point of conception, is relevant in the process of obtaining parental responsibility. In general, if a child is born of the marriage (and, in some states, born of a civil/domestic partnership), the parents of that child automatically obtain parental responsibility for the child.

Under New York law, a child born to parents who are married at the time of the child's birth is presumed to be "the legitimate child of both parents", which is also referred to as the "presumption of legitimacy". In addition, a recent decision by a New York appellate division court held that a child's legitimacy is also presumed for a child born of parents who were not married at the time of the child's birth but who subsequently enter into a civil or religious marriage (see *Tiwary v Tiwary*, 189 AD 3d 518 (2d Dep't 2020)).

1.6 Same-Sex Relationships

See **1.4 Requirements for Non-Genetic Parents**.

1.7 Adoption

See **1.4 Requirements for Non-Genetic Parents**.

2. Relocation

2.1 Whose Consent Is Required for Relocation?

When one parent wishes to relocate a child permanently to another country, the relocating parent generally needs the consent of the other parent and/or any other individual who is a legal guardian of the child.

2.2 Relocation Without Full Consent

If a parent wishes to move a child of the family permanently out of the family home to a new country and does not have the written consent of the non-relocating parent or legal guardian, the relocating parent may still seek to relocate by applying to a court with jurisdiction over the child. Under the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), the court with jurisdiction over the child is the court in the state where the child has resided for a period of six months or more. The court may grant permission for the relocation if it determines that relocation is in the child's best interests.

2.3 Application to a State Authority for Permission to Relocate a Child

2.3.1 Factors Determining an Application for Relocation

When a relocating parent cannot obtain the consent of the non-relocating parent or guardian, an application must be made to the relevant state court for permission to relocate. Courts across different states consider various factors when evaluating such requests – all anchored by the paramount concern: the best interests of the child.

In evaluating the request, the court typically considers the following:

- the relocating parent's stated reasons for wanting to relocate;

- whether the move would significantly enhance the child's educational or financial circumstances to the extent that it outweighs the potential disruption to the child's relationship with the non-relocating parent or guardian;
- the child's age, relationships with any siblings who are not relocating, and overall family structure and support in both locations; and
- each parent's capability to meet the child's overall needs, including the ability to foster and facilitate the child's relationship with the other parent or legal guardian.

By way of example, in New York, the relocating parent must make a prima facie showing in the application to the court. New York courts often refer to the precedent set by *Tropea v Tropea*, 87 NY 2d 727, 665 NE 2d 145 (1996) and its progeny to evaluate the specific circumstances of each case. If the court determines that a prima facie case has been established, a hearing will be held wherein both parties can present evidence supporting their positions on the proposed relocation. Depending on the child's age, the court will appoint an attorney to advocate for the child. Additionally, the presiding judge may arrange to speak with the child in camera to determine the child's preferences. After considering all the evidence, including the child's expressed wishes, the court will issue a decision.

In Massachusetts, if the party seeking relocation is the sole physical custodian of the children, the judge must consider the request under a two-prong test:

- first, whether there is a good reason for the move – ie, a real advantage; and
- second, whether the move would be in the best interests of the children.

Key precedents on relocation from other states include:

- *Tropea v Tropea*, 87 NY 2d 727, 665 NE 2d 145 (1996) – New York;
- *Altomare v Altomare*, 77 Mass App Ct 601, 933 NE 2d 170 (2010) – Massachusetts; and
- *in re Marriage of Burgess*, 13 Cal 4th 25, 913 P 2d 473 (1996) – California.

2.3.2 Wishes and Feelings of the Child

The courts will generally consider the wishes and feelings of a child as an important factor. However, this is not dispositive and is just one of many factors to be considered.

2.3.3 Age/Maturity of the Child

In New York, there is no set age for a child's expressed wishes and feelings to be the determining factor. The court retains final say over such matters until a child reaches 18 but may allow a child to decide under certain circumstances, taking into account the child's age, intelligence, and maturity level. The older and more mature the child is, the more weight will be given to the child's wishes and feelings. As a practical matter, a typical teenage child will be able to determine their own outcome.

2.3.4 Importance of Keeping Children Together

The courts generally favour keeping children together. However, there are exceptions, particularly where children are deemed old enough to decide their preference regarding with which parent to reside.

2.3.5 Loss of Contact

Significant weight is placed on the potential loss of contact between the children and the left-behind parent. The more involved the left-behind parent is in the children's lives, and the more parenting time they spend with the children, the less likely it is that relocation will be permitted. Conversely, if a left-behind parent rarely sees the children or is not involved in their day-to-day lives, the more likely it is that relocation will be permitted. The court may also consider the extent to which lost contact can be mitigated, such as by granting the left-behind parent additional access during holidays, vacations, and the summer break from school.

2.3.6 Which Reasons for Relocation Are Viewed Most Favourably?

Applications for relocation are very fact-specific and, in general, no single reason for relocation would be viewed most favourably. Some reasons that would engender sympathy by a court, however, would include where relocation is alleged to be necessary to:

- support the child financially;

- improve the child's educational opportunities – for example, where the child has special educational needs that are not adequately addressed by the child's current school district; and
- increase the parent's and child's access to emotional and physical support systems – for example, by moving closer to family members.

2.3.7 Grounds for Opposition to Relocation

There are no specific grounds for opposing relocation. If a parent's custodial rights would be adversely affected by relocation, they can set forth various reasons for opposition, with a focus on the child's best interests. Generally, courts are most sympathetic to opposition based on the decrease of frequent and meaningful access between the non-applicant and the child as a result of relocation, and would consider the degree to which such a decrease would negatively impact the child and/or whether suitable alternative arrangements could be made to reduce the negative impact. The more significant access or parenting time that the non-applicant spends with the child, and the more involved the non-applicant is in the child's life, the more likely a court would find that relocation is not in the child's best interests – although no factor alone is dispositive.

2.3.8 Costs of an Application for Relocation

The costs of an application for relocation will vary greatly depending on the facts and circumstances. Court fees for filing an application are generally not prohibitive. On the other hand, representation by competent counsel can cost tens of thousands of dollars or more and counsel will generally charge fees pursuant to an hourly billable rate.

Additionally, a litigant may need to hire an expert witness or witnesses to file report(s) with the court and testify with regard to any number of issues. Each expert witness will cost several thousand dollars and cause the other party to hire an expert witness to provide a different opinion. By way of example, an application based on better educational opportunities for the child would likely necessitate an expert in education to testify as to the educational benefits of the relocation, and the opposition would need an expert to testify to an opposing viewpoint.

A worthwhile consideration in many jurisdictions is that an application for relocation is considered a custody modification proceeding. In New York, for example, a court has the discretion to award the less-monied party counsel and expert fees to be paid by the more-monied party pursuant to Section 237 (b) of the Domestic Relations Law and/or Section 651 of the Family Court Act. Indeed, in New York there is a rebuttable statutory presumption that fees be awarded to the less-monied party, subject to the discretion of the court based on consideration of the facts and circumstances.

2.3.9 Time Taken by an Application for Relocation

Generally, there is no set time for relocation proceedings – although courts will generally prioritise relocation and other custody-related matters for adjudication, so as not to leave children and their parents or caretakers in limbo. The duration of proceedings will depend on many factors, including the witnesses and evidence required, and the schedule and availability of the court.

2.3.10 Primary Caregivers Versus Left-Behind Parents

No presumption exists in favour of a primary parent or caregiver or the left-behind parent when relocation applications are considered. The best interests of the child are always the paramount consideration and are determined by weighing the various facts and circumstances presented that are relevant to the child's welfare, including:

- the reasons for the proposed relocation; and
- the effects that the relocation would have on the child's relationship with the left-behind parent.

The weight afforded each factor will depend on the specific facts and circumstances of each case, as – ultimately – will the court's decision.

2.4 Relocation Within a Jurisdiction

Whether a proposed relocation is within the same area, to a different part of the state, or to different country, the same standard applies, which is generally the best interests of the child. The distance of the proposed relocation, however, is a major factor as it will determine the extent to which the proposed relo-

cation will adversely affect the non-applicant's access to the child. The less effect on the other parent's relationship with the child, the more likely the court will be to allow the relocation. By way of example, if the proposed relocation is to "the other side of town" (and this will minimally affect the non-applicant's ability to spend time with the child), a court will generally allow the relocation. If, however, the proposed relocation is of significant distance – such as to a different part of the state or to a different country – to the extent that the relocation significantly affects the non-applicant's access or parenting time with the child, then the court will be less likely to allow the relocation, subject to its decision as to whether the proposed relocation is in the child's best interests following consideration of the relevant facts and circumstances.

3. Child Abduction

3.1 Legality

In the USA, it is a federal criminal offence – punishable by a fine or up to three years in prison – to remove a child under the age of 16 from the USA with the intent to obstruct the lawful exercise of parental rights. The term "parental rights" refers to the right of physical custody of a child (including joint and sole custody) and whether such rights have been determined by a court order or by a binding agreement between the parents or whether they arise by operation of law.

In addition to this federal law, all states in the USA have enacted their own laws making it a crime to remove the child from the state without a court order or without the permission of the other parent and with the intention of defeating such parent's custodial rights. In New York, for example, it is "custodial interference in the first degree" for a parent (or another relative) to take a child under the age of 16 with the intent to keep the child away permanently or for a protracted period of time. Custodial interference in the first degree is a Class E felony punishable by up to four years in prison.

Similarly, in California, any "person" who takes a child and "maliciously deprives a lawful custodia[n] of a right to custody… or visitation" may be prosecuted for "deprivation of custody of a child or right to visitation" (Section 278.5 of the California Penal Code). Depending on the degree, deprivation of custody is punishable by up to three years in prison and a fine of up to USD10,000.

3.2 Steps Taken to Return Abducted Children

The USA is a signatory to the 1980 Hague Convention on the Civil Aspects of International Child Abduction (the "1980 Hague Convention"). The 1980 Hague Convention is a multilateral treaty to which more than 100 other countries are signatories. It is designed to protect children internationally from the harmful effects of their wrongful removal, by establishing an expedited process for the courts or administrative agencies of the country to which the child is removed to return the child to the child's home country ("state of habitual residence"). The 1980 Hague Convention is not a mechanism for resolving custody disputes and, in that expedited proceeding, custody issues are not addressed. Indeed, the fundamental purpose of the 1980 Hague Convention is to ensure – by promptly returning the child – that custodial issues are decided by the country of the child's habitual residence, rather than by the country to which the child was abducted by a parent.

Each of the signatory member states to the 1980 Hague Convention has a Central Authority, which helps to locate abducted children, encourages resolutions of parental abduction cases, and processes requests for the return of children in what are known as both "incoming" and "outgoing" cases. A proceeding pursuant to the 1980 Hague Convention may be brought directly before the courts of a signatory state or through the Central Authority of the state of habitual residence, which co-ordinates with the Central Authority of the country the child was taken to. Cases pursuant to the 1980 Hague Convention are brought in the country in which the children are located, seeking return to the state of habitual residence.

In the USA, the 1980 Hague Convention is implemented through the International Child Abduction Remedies Act (ICARA), a federal law enacted by the US Congress in 1988. Section 9001 (a)(4) of ICARA mandates the prompt return of children "wrongfully removed or retained" within the definition of the 1980 Hague Convention, unless one of the narrow excep-

tions to the return applies. ICARA further establishes a uniform process for "prompt return" and directs that states must act "expeditiously" to return children to their "state of habitual residence". The Office of Children's Issues within the Department of State serves as the Central Authority for the US government.

If a child is removed from the USA without the appropriate consent or an order of the court permitting such removal, the left-behind parent can file a petition for the return of the child under the 1980 Hague Convention, provided that the country to which the child has been removed is a signatory to the 1980 Hague Convention. The Office of Children's Issues will assist in locating the child and with transmitting the request for the return of the child to the country where the child is located, and with locating counsel in such country.

If the country to which the child has been taken is not a signatory to the 1980 Hague Convention (eg, China, Russia or India), the Office of Children's Issues may still be able to assist with the return of the child. However, this process is far more complicated and the resources of the Office of Children's Issues are more limited.

3.3 Hague Convention on the Civil Aspects of International Child Abduction

When a child is taken to the USA from another country that is a signatory to the 1980 Hague Convention, the left-behind parent seeking the return of the child will need to file a petition under the 1980 Hague Convention. The petition can be filed in the child's state of habitual residence and will be transmitted through such country's Central Authority to the USA. Pursuant to the 1980 Hague Convention, proceedings for the return of the child must be filed in the country where the child is located.

The Office of Children's Issues maintains a network of attorneys who provide legal assistance to the parents seeking the return of their children and will assist with obtaining legal representation. Depending on the applicant's financial circumstances, these attorneys may accept incoming 1980 Hague Convention cases for a reduced fee or no fee. Eligible Hague applicants may request pro bono (no fee) or reduced fee legal assistance and the Office of Children's Issues will also assist with interpreting. There is, of course, no guarantee that an attorney will volunteer to take the case. In addition, the Office of Children's Issues will provide a list of full-fee attorneys upon request. These attorneys can work on incoming 1980 Hague Convention cases and some may work on non-Hague cases as well.

Ultimately, a petition for the return of the child under the 1980 Hague Convention must be filed with the court. In the USA, state and federal courts have concurrent jurisdiction to hear such cases and make a determination. The courts in the USA take these proceedings very seriously and will order the return of the child unless the parent opposing such return can establish one of the narrow defences. The 1980 Hague Convention provides five narrow exceptions to return:

- one year and well-settled defence – one year has passed and the child is now well-settled in the new environment;
- consent or acquiescence – the parent seeking the child's return consented or otherwise acquiesced to the removal or retention;
- grave risk or intolerable situation – the return poses a grave risk that the child will be exposed to "physical or psychological harm" or otherwise placed into an "intolerable situation";
- mature child objection – the child objects to return and is mature enough to have their objection considered; and
- human rights and fundamental freedoms – the return contravenes basic human rights and fundamental freedoms.

All these defences are narrowly construed and the burden is on the parent opposing the return to establish that the defence applies.

The proceedings under the 1980 Hague Convention are expedited and take priority over other cases. Even though the 1980 Hague Convention calls for the child's return within six weeks, in practice, these cases may take several months (and sometimes longer). Free legal assistance is not routinely available to the parents opposing the return and legal costs may become quite high. Moreover and pursuant to Section 9007 of ICARA, although the parent seeking the return of the

child is initially responsible for all costs in connection with such petitions (including travel and legal costs), ICARA permits the court to reallocate all such costs to the respondent if the return is granted.

For further information, see the May 2022 Report of the US Department of State on Compliance With the Hague Convention and the HCCH Global Report – Statistical Study of Applications Made in 2021 Under the 1980 Child Abduction Convention.

3.4 Non-Hague Convention Countries

This is not applicable in this jurisdiction. The USA is a signatory to the 1980 Hague Convention.

Trends and Developments

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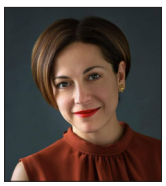

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Unilateral Relocation and Domestic Violence: Safety Must Always Come First

Courts across the USA are virtually unanimous in their view that unilateral relocation by a parent without a court order or the other parent's consent is presumptively disfavoured. In fact, it is often a factor weighing heavily against the relocating party in subsequent custody litigation. When it comes to child relocation, the familiar refrain is to seek permission, not forgiveness. But what happens when there is domestic violence? Or when the cost of seeking approval comes at the expense of the safety of the other parent or their child? In instances of domestic violence, courts must ask: "Does following this procedure endanger a victim's safety?" In those scenarios, should safety not come first?

Domestic violence is not a theoretical problem. It is a national crisis, recognised by the US Surgeon General, which demands a legislative and judicial response infused with empathy, urgency and discernment. When parents flee with a child to escape violence, they are not circumventing the law, but are instead invoking its highest ideals: protection, dignity and justice. It is vital that courts have the tools, training and courage to meet those ideals head-on. At the first instance, this requires proper legislation, followed by appropriate training to ensure that courts are able to recognise and implement the legislation needed to protect victims of domestic violence.

US legislative framework for child relocation

In ordinary circumstances, a parent who seeks to relocate with a child without the other parent's consent must seek a court order allowing them to do so. In the absence of such prior permission, subsequent litigation often ends with an order directing the child's return, whether under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), the 1980 Hague Convention on the Civil Aspects of International Child Abduction (when the relocation is international), or general state statutes.

The UCCJEA, adopted by 49 states and the District of Columbia (all states except for Massachusetts), was enacted to harmonise custody jurisdiction rules across state lines. It aims to prevent forum-shopping, discourage parental abduction, and ensure that custody decisions are made by the court best situated to do so – typically, the child's "home state". The UCCJEA grants exclusive, continuing jurisdiction to the state that entered the original custody order (or the child's home state if a prior custody order was not rendered), provided the child or a parent maintains a significant connection to that state. Critically, it prohibits multiple states from simultaneously asserting jurisdiction, thereby reducing conflict and confusion in cross-border cases. The UCCJEA is a powerful tool for the enforcement of custody determinations and one that streamlines procedures throughout the country.

Federal law also addresses the dangers of unilateral child removal. The Parental Kidnapping Prevention Act (PKPA) establishes national standards for interstate

custody disputes. It mandates that states enforce each other's custody orders and prohibits modifications unless strict criteria are met. If a state modifies another state's valid custody order in violation of the PKPA, the new order is unenforceable. Although the PKPA focuses on jurisdictional integrity, it shares the UCCJEA's core commitment to co-operation and child-centered consistency.

Beyond this overarching framework, individual states have enacted additional anti-relocation statutes to encourage notice, transparency, and judicial oversight. Examples include the following.

- Colorado – the party who is intending to relocate with the child to a residence that substantially changes the geographical ties between the child and the other party is required to provide the other party with written notice as soon as practicable of their intent to relocate, the location where the party intends to reside, the reason for the relocation, and a proposed revised parenting time plan (Colo Rev Stat Section 14-10-129 (2)).
- Florida – a parent must obtain either written consent from the other parent or court approval before relocating a child more than 50 miles for more than 60 days (Fla Stat Section 61.13001).
- Illinois – the relocating parent is required to provide 60 days' notice (in most cases) and obtain court approval if the other parent does not consent, where the relocating parent is moving more than 25 miles from the child's current primary residence in certain counties, 50 miles elsewhere in the state, or out of state (750 ILCS 5/609.2).
- Pennsylvania – relocation is defined as a move that significantly impairs the ability of a non-relocating party to exercise custodial rights and the relocating parent is required to give notice at least 60 days in advance and obtain court approval if the other party objects (23 Pa Cons Stat Section 5337).
- Ohio – the relocating parent is required to file a Notice of Intent to Relocate with the court that issued the custody order, thereby retaining jurisdiction for said court if the relocation is contested by the other parent (ORC Section 3109.051 (G)).
- Georgia – a parent must give the other parent 30 days' notice of a move and a revised address (OCGA Section 19-9-3 (f)).
- Massachusetts – a custodial parent must obtain court approval or the non-custodial parent's consent to move the child out of Massachusetts or to a distant location within the state (MGL Chapter 208, Section 30).

These laws advance the prevailing view that children benefit from having regular meaningful contact with both parents and, in the abstract, this is a laudable goal. Often, however, a relocation by one parent – especially when it is without the consent of the other parent – is actually a fight for safety. This is especially so in cases involving domestic violence, where a child is harmed physically, emotionally or psychologically. Everyone should agree that domestic violence is harmful to children and that protecting children from such harm must trump the perceived benefit a child could receive from maintaining regular in-person contact with both parents. Should the rules governing unilateral relocations not acknowledge and provide exceptions for cases of domestic violence?

Need for robust legislation to protect domestic violence victims in child custody and relocation proceedings

Indeed, some states already do, but much more is needed. First, all states should add domestic violence as an explicit factor to be considered in any relocation proceeding, as well as any subsequent custody litigation. Second, these provisions must provide robust protections for victims of domestic violence. So, what would "robust" legislation look like?

In Michigan, for instance, courts are directed to consider domestic violence in relocation cases, even if the violence was not witnessed by or directed at the child (MCL 722.31). California presumes that awarding custody to a parent who committed domestic violence within the past five years is detrimental to the child, placing the burden on the perpetrator to rebut this presumption (California Code, Family Code – FAM Section 3044 (a)). Although the New York legislature did not take it this far, it does mandate that domestic violence be assessed as a factor in custody determinations, recognising the corrosive effects of such violence on the emotional and physical health of the entire family unit (New York Domestic Relations Law Section 240 (1)(a)).

Still, many of these statutes focus squarely on protecting the child, without expressly protecting the parent – often the survivor – who must escape abuse. A few forward-thinking jurisdictions have taken that next step. Alabama, for instance, recognises that if a parent relocates due to domestic or family violence, such relocation cannot be held against such parent in a subsequent custody or visitation proceeding (Alabama Code Section 30-3-132). Idaho takes a similarly enlightened approach, acknowledging domestic violence as an affirmative defence to custodial interference (Idaho Code Section 18-4506).

Thus, robust protections for victims of domestic violence must – at a minimum – include an express exception to the ban on unilateral relocations in cases of domestic violence, as well as protections for victims of domestic violence in subsequent custody litigations, so that these parents are not penalised for taking extreme measures to protect themselves and their children from harm.

Recognition and implementation of robust legislation

Experience shows, however, that having robust legislation by itself is not sufficient to protect victims of domestic violence unless the courts are able to recognise and implement such legislation in the way that actually protects these victims.

i) *Schultz v Schultz*

In *Schultz v Schultz*, 145 Idaho 859 (2008), for example, a magistrate court in Idaho failed to properly balance these interests. The mother endured years of physical abuse at the hands of her husband, including being locked in a room for two days, slapped, thrown to the ground, grabbed by her hair, punched in the stomach while pregnant, and subsequently physically assaulted in front of the child. The father was eventually arrested for domestic violence and convicted, resulting in the mother fleeing with the parties' daughter to Oregon from Idaho.

The mother obtained a restraining order, began anew, and provided a stable environment for herself and the child. Her husband later filed a motion in Idaho seeking return of the child and sole custody. And yet, despite the credible history of abuse, the lower court ordered the mother to return with the child or relinquish custody of the child to the father.

The mother appealed and the Idaho Supreme Court reversed the decision, castigating the lower court for ignoring the best interests of the child and undermining the palpable danger the mother and child faced if returned. Notably, the Idaho Supreme Court held – inter alia – that "[t]he magistrate court did not reach its decision through an exercise of reason" (Id at 866). The decision by the Idaho Supreme Court stands as a testament to the importance of adhering to justice over procedural rigidity.

ii) *Durand v Rose*

Similarly, in *Durand v Rose*, the defendant/mother fled with the parties' two children from Louisiana to Texas after suffering an assault by the father in the presence of the children (*Durand v Rose*, 2022-0300 (La App 4 Cir 15 September 2022), 366 So 3d 484, 497, writ denied, 2022-01727 (La 18 January 2023), 353 So 3d 127. The facts of this incident were disputed by the parties. The mother alleged that the father struck her, resulting in a black eye, and threatened to kill her. The father, conversely, denied ever threatening to kill her. He admitted that defendant sustained a black eye but testified (along with his friend) that "her eye ran into [his] elbow".

The father moved for an order granting him sole custody of the children and ordering their return to Louisiana. He also requested a civil warrant directing law enforcement to remove the children and return them to him pending further orders from the Louisiana district court. Further, he sought injunctive relief in the form of a temporary restraining order prohibiting the mother from removing the children from the state during the pendency of the action, as well as a preliminary injunction and a permanent injunction to the same effect.

Following a two-day hearing on the issue, the district court denied the defendant's request for sole custody, awarded the parties joint custody of the children, and designated the mother as the domiciliary parent – with the father having physical custody of the children the first weekend of every month, during the summer

months, and on holidays as set forth by the court – but allowed the children to remain with the mother in Texas. The father appealed.

The appellate court affirmed the district court's denial of the father's request for sole custody of the children and approved the mother's relocation to Texas. However, the appellate court reversed the award of joint custody and the award of unsupervised visitation by the father and rendered judgment awarding sole custody of children to the mother, with all visitation of the children by the father to be supervised. Notably, the appellate court determined that the mother's relocation was made in good faith and that there was no evidence that the mother's motivation for moving to Texas was frivolous or intended to limit the father's access to the children.

Safety first

These cases are not outliers. They reflect a growing recognition that survival and the search for safety can never be a custody violation. It is still incumbent on courts to properly recognise and consider allegations of domestic violence. Although the courts may initially struggle with balancing a person's right to parent one's children against protecting those children (and their parents) from domestic violence, the task really should not be that complicated. Once appropriate legislature is in place, the courts should implement that legislation in the way that affords the victims the greatest protection.

Parental relocation without consent is rarely a manipulative act of interference; more often than not, it is an act of desperation and a bid for safety. The law must be capable of discerning between the two. It must evolve to honour the difference between a parent who runs away from responsibility and one who runs to protect their child.

An additional consideration that must be present in all cases involving domestic violence is the cost of delay. For survivors, waiting for court approval before fleeing can mean trading safety for process. In *Matter of Ramon R v Carmen L*, 188 AD3d 545 (1st Dep't 2020), a New York mother and her children escaped domestic violence and lived in shelters for months while awaiting judicial authorisation to relocate. Only after enduring that prolonged period did the court finally approve her move to Colorado. This is not due process; it is a prolonged exposure to fear, danger and harm. When lives are at risk, procedure must never become punishment.

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