Relocation Law and Survivors of Domestic Violence

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INTRODUCTION

Imagine that Jane Doe suffered years of physical, emotional, and verbal abuse at the hands of her husband, John Doe. Jane and John have three kids, and Jane wishes to divorce her abusive husband. The one time she mentioned divorcing John and moving out with the kids, Jane suffered severe physical abuse at John's hands. Since then, she has not mentioned divorce and relocation. Every day when she comes home from work, she is verbally and emotionally abused. She fears that John will physically hurt her at any moment if she does or says the wrong thing since he has done so before, so she just keeps quiet. One day after work, John comes home and strikes Jane and their children. At that moment, Jane knows she has to take her children and leave John in order to keep herself and her children safe from harm. Depending on the state she is in, she may or may not be able to leave this situation without informing John of where exactly she is going if she wants to get custody of the children. She may be able to excuse this notice requirement, but if she cannot, she may be charged with child kidnapping. Jane's fate rests in the hands of her state's law on relocation and domestic violence.

While the above fact pattern is not based on a true story, it is a typical situation for many domestic violence survivors, 85% of whom are women.[1] Depending on marital status, prior custody determinations, and applicable state law, survivors may have difficulty fleeing violence with their children without risking their own or their children's safety. Domestic violence survivors may employ the justice system as a tool to help interrupt abusers' cycle of violence and pattern of abuse.[2] When children are involved, however, the justice system may not be a friendly forum for survivors who wish to escape the violence. Many state courts do not allow survivors to simply flee the state with any children without significant legal barriers.[3] In such a situation, the fact that a survivor's

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1. NATIONAL CENTER ON DOMESTIC AND SEXUAL VIOLENCE, FAQ ON DOMESTIC VIOLENCE, http://www.ncdsv.org/images/dv_faqs.pdf (last visited Feb. 11, 2015).

2. Carolyn N. Ko, Note, *Civil Restraining Orders for Domestic Violence: The Unresolved Question of "Efficacy,"* 11 S. CAL. INTERDISC. L.J. 361, 370 (2002); Leaigh Goodmark, *Law is the Answer? Do We Know That For Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 11 (2004).

3. Catherine F. Klein et al., *Border Crossings: Understanding the Civil, Criminal, and Immigration Implications for Battered Women Fleeing Across State Lines with their Children*, 39 FAM. L.Q. 109, 123 (2005).

assailant often knows her destination frustrates the very purpose of relocating.[4] For those survivors, the court may be a forum for further abuse rather than a safe haven and a source of control and freedom.[5]

Different states have dealt with domestic violence survivors and the laws surrounding their relocation in various ways, with no state implementing a perfect system.[6] The greatest challenges facing survivors wanting to relocate with their children are: (1) whether domestic violence is a factor courts consider when determining custody, and (2) the presence of a mandatory notification provision. This note focuses precisely on these challenges. I will first explore the relationship between domestic violence survivors and the courts, then discuss the relocation laws of Massachusetts, California, Alabama, and Idaho, and finally argue that an amalgamation of the laws of those states is superior to any single state's approach to relocation law as it relates to domestic violence survivors. Other important issues surrounding domestic violence and state relocation laws—for example, the rights of the father or the rights of the potentially falsely accused—are outside the scope of this note.

I. SURVIVORS OF DOMESTIC VIOLENCE AND THE COURTS

The American Bar Association reports that approximately 1.3 million women and 835,000 men are physically assaulted by an intimate partner every year in the United States.[7] Survivors of domestic violence often do not leave their abusers initially, and the reasons they stay in the relationship vary drastically.[8] Some of the most common reasons that survivors remain are lack of resources and information about escape, continuing love and hope that their abusers will change, community pressure, mental health problems, fear of both non-violent and violent retribution, and lack of financial resources resulting in dependence on the abuser.[9] A frequently cited reason that survivors stay in an abusive relationship is economic dependency,[10] and some have argued that if survivors "receive assistance in achieving economic independence, more victims will be able to gain safety."[11] In addition, survivors deciding to leave their abusers often struggle with the fragmentation of the court system.[12] For example, family courts may provide orders of safety, custody, and child support whereas district courts

4. *See id.* at 124.

5. *See* discussion *infra* Section I.

6. Of course, there will always be debate on whether or not there can even be a perfect system, and if there can be, what it would look like.

7. AMERICAN BAR ASSOCIATION COMMISSION ON DOMESTIC & SEXUAL VIOLENCE, *Domestic Violence Statistics*, http://www.americanbar.org/groups/domestic_violence/resources/statistics.html (last visited Feb. 11, 2015).

8. *See* Laurie S. Kohn, *The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim*, 32 N.Y.U. REV. L. & SOC. CHANGE 191, 201–02 (2008) (listing eight reasons for a victim's failure to leave an abusive relationship and explaining that most do not succeed on their first attempt).

9. *Id.* at 201–02.

10. Emily Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1734 (2004).

11. *Id.* at 1734–35.

12. *See* Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 21 (1999).

may assist in the criminal prosecution of the abuser.[13] Problematically, each issue requires several hearings to reach resolution.[14] Thus, domestic violence survivors may not be able to commit the time that the legal system demands of its participants,[15] and they may fail to discover "the multiple and complementary options available to them."[16] Moreover, family demands often weigh on survivors, making it more difficult for survivors to come into court on multiple occasions and "lead[ing] a victim to assign low priority to court proceedings."[17]

Once a survivor uses the justice system as a tool to alter the character of her relationship, she may encounter obstacles that extend deeper than the fragmentation of the system. Unfortunately, at the root of these obstacles exists the reality that "[t]he legal system's definition of domestic violence and the totality of battered women's experiences of domestic violence bear little resemblance to one another."[18] This may be because "the legal system sets the standard by which the stories of battered women are judged."[19] This is especially problematic because courts have difficulty recognizing the non-physical abuse cycle of violence, which is also generally invisible in society.[20] Small acts of violence, such as threats and intimidation, do not suffice under the legal definition of abuse, but abusers use them nonetheless to establish and maintain control of their victims.[21] For example, psychological abuse, such as name calling and belittling, can be at least as harmful to survivors as physical abuse, but the legal system generally does not recognize this as a form of abuse sufficient for a civil protection order.[22] Showings of abusers' use of small acts of violence and psychological abuse have "virtually no legal standing."[23]

The last major obstacle that stands in the way of domestic violence survivors achieving desirable legal results is the way they present in court.[24] Courts often demand survivors to present as meek and mild victims with the perfect, single tear trickling down their cheeks at the mention of their abuse.[25] Instead, some survivors have mental health issues, often resulting from the

13. *Id.* at 23–24.

14. *See id.* at 21 (describing one couple that attended sixteen criminal and family court hearings over the course of thirteen months).

15. *Id.* at 25; *see* Kohn, *supra* note 8, at 202.

16. Epstein, *supra* note 12, at 23.

17. Kohn, *supra* note 8, at 202.

18. Goodmark, *supra* note 2, at 28–29.

19. *Id.* at 30.

20. *See* Judith G. Greenberg, *Domestic Violence and the Danger of Joint Custody Presumptions*, 25 N. ILL. U. L. REV. 403, 418, 421 (2005) ("Just as victims and batterers tend to deny and minimize the violence, so do courts . . . At other times, courts minimize the effects of the violence by focusing on the absence of injuries as an indication that the violence is not significant . . . .").

21. *See* Goodmark, *supra* note 2, at 29.

22. *Id.*

23. *Id.*

24. *See* Kohn, *supra* note 8, at 203–06 (discussing how some victims exhibit ambivalence and animosity towards the justice system, attempt to return to their abusers, are unreliable witnesses due to memory issues, display anger instead of meekness when testifying, and so on).

25. *See id.* at 204 ("One expects a victim of violence to be meek, scared, and sweet. Victims who display anger or lack emotion can pose a challenge for lawyers seeking to hold the offender accountable."); *see also* Greenberg, *supra* note 20, at 423–28 (discussing criticisms of victims and the effects of those criticisms on the survivors' court experience).

abuse, or have been disillusioned by their previous experiences with law enforcement or the courts.[26] They could also be responding to the fear of retaliation from their abusers in a way that works best for them, but that may not be the way others believe survivors should respond. Thus, because of the survivor's behavior in court, judges may render inappropriate orders.[27] The negative interactions that survivors have with the court systems often impede their desire to use the courts as a tool to leave abusive relationships. This may lead to a cyclical effect where the victim resists legal intervention "because she harbors a deep distrust of the justice system based on past interactions or collective community perceptions," and the courts lack better understanding of domestic violence victims' situations and behavior because those victims avoid the courts.[28]

As abusers become more educated about the workings of the legal system, they have begun to use the system as an additional forum for abuse.[29] They summon their victims to court numerous times for various hearings, such as modifications, child support, visitation, and violations of civil protection orders, effectively restructuring the relationship between the abuser and survivor in a way that allows the abuser to maintain control.[30] A very important aspect of this abuse perpetrated against the justice system occurs when children are involved. In these instances, abusers may use the courts as a way to force the survivors to maintain contact via their children.[31] This harassment is generally not preventable, because "courts are rightly reluctant to deprive any litigant of the ability to petition the court for redress [and] . . . [a]s a result, batterers routinely manipulate the legal system to continue their abuse – a bitter lesson for the battered women who puts her trust in that system."[32] Litigation abuse is dangerous and potentially detrimental to the survival of the case because it

26. Kohn, *supra* note 8, at 201.

27. *See id.* at 225 ("Judges too have been influenced by psycho-social theories about domestic violence victims and by their own experiences with victim unreliability. Not only do these influences have an inevitable impact on credibility determinations in civil and criminal cases, but judges have begun denying victims' motions to vacate civil protection orders . . .").

28. *Id.* at 203.

29. *See* Goodmark, *supra* note 2, at 24 (describing how abusers file civil protection orders that mirror those filed by the victims but claiming the violence was directed at them and not the victim); Klein et al., *supra* note 3, at 110 (describing how many survivors face harassment and threats from their abusers after they have left, oftentimes in violation of court orders); Greenberg, *supra* note 20, at 411–12 ("Abusive relationships usually involve the batterer establishing control over his victim through a combination of physical, emotional, and financial methods. . . . Some use the continuing connection that comes from joint custody or visitation rights to harass or verbally abuse their victims.").

30. Goodmark, *supra* note 2, at 34; *see* Lois Schwaeber, *Domestic Violence: The Special Challenge in Custody and Visitation Dispute Resolution*, 10 No. 8 Divorce Litig. 141 (1998) ("[A]lthough the parties had separated, perpetrators, in the pretext of custody and visitation issues, continue to attempt to maintain their pattern of coercive control over the abused party and her children." (citing Evan Stark, *Framing and Reframing Battered Women*, *in* DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE 287 (Eve S. Buzawa & Carl G. Buzawa eds., 1992)).

31. Schwaeber, *supra* note 30; *see* Sack, *supra* note 10, at 1682 ("Perpetrators of domestic violence have taken advantage of these changes in the justice system to seek and obtain orders against their victims."); *see also* Greenberg, *supra* note 20, at 411 ("Batterers often use any contact afforded them by the court as a means of continuing the abusive relationship with their former partners.").

32. Goodmark, *supra* note 2, at 34.

forces the survivor to repeatedly come into unwanted and uninitiated contact with the abuser, thereby increasing the chance that the survivor will drop the case in order to cease contact. These abusers intentionally re-victimize the survivors as they attempt to strip away what little control the survivors had over their own court cases.[33]

A majority of female domestic violence victims reside in homes with children under 12 years old.[34] Additionally, it is estimated that between 3.3 million and 10 million children witness domestic violence each year.[35] Survivors cite obtaining custody of the children as one of the most important issues for them as they leave an abusive relationship.[36] Though some may be able to obtain protection by utilizing the legal or social services systems, "survivors fleeing their abusers generally face numerous systemic obstacles to attaining the . . . security they need during this critical period."[37] Even if a survivor is seeking to relocate to escape the violence she has experienced, she often cannot do so without the courts intervening and telling her she must stay in the vicinity of the abuser or notify him of where she intends to relocate.[38] Because "[t]he period immediately following an individual's decision to leave her abusive partner is often accompanied by a significant escalation in danger to the safety and welfare of the survivor and her children,"[39] the safety of the survivor who relocates with her children should be a fundamental concern of state law.

II. MASSACHUSETTS

Massachusetts law considers domestic violence, or abuse, as a factor when making an initial custody award.[40] When a domestic violence survivor faces custody disputes with the adjudicated legal father[41] of their children, the

33. *See* Epstein, *supra* note 12, at 18 (describing how a batterer's threat can lead to a victim dropping charges, thus giving the batterer control over the case).

34. AMERICAN BAR ASSOCIATION COMMISSION ON DOMESTIC & SEXUAL VIOLENCE, *supra* note 7.

35. *Id.*

36. Goodmark, *supra* note 2, at 29.

37. Klein et al., *supra* note 3, at 109–10.

38. *See id.* at 110–11 ("Individuals who, without the consent of the other parent, leave with their children to confidential locations in or out of their home state may face serious criminal penalties under state parental kidnapping statutes."); *see also* discussion *infra* Sections II – V.

39. Klein et al., *supra* note 3, at 110.

40. MASS. GEN. LAWS ANN. ch. 209C, § 10 (West 2013). Abuse is defined as attempting to cause or causing bodily injury or placing another in reasonable fear of imminent bodily injury, and a serious incident of abuse is defined the same but includes a third option of causing another to engage involuntarily in sex acts by force, threat, or duress. *Id.* § 10(e).

41. Massachusetts sets out very defined parameters for determining custody, especially with regard to fathers. Massachusetts distinguishes between children born to unwed mothers and children born to married parents, and this distinction is important for a custody determination and legal rights to relocation without notice to the father. In Massachusetts, if the parents are married at the time the child is born, then the mother's spouse is the legal father. *Id.* ch. 209C, § 6. If the parents were not married at the time the child was born, without being adjudicated or voluntarily acknowledged as the legal father, a putative father has no legal rights regarding the child. *Id.* § 2; *See* Smith v. McDonald, 941 N.E.2d 1, 10–11 (Mass. 2010) (noting that "[t]he putative biological father has no legal rights that need to be protected by the court" when paternity of a nonmarital child has not yet been established pursuant to state law.); Even if a putative parent's name is on the birth certificate, if the parents were not married at the time of the birth, that partner is not the legal parent simply because

Custodial Presumption Act ("CPA") is triggered and applies when the court is issuing any temporary or permanent custody order.[42] Once a court finds that there is a pattern of abuse or serious incident of abuse,[43] the CPA creates a rebuttable presumption that it is not in the best interest of the child for the abuser to have any sort of custody, whether physical or legal.[44] However, the Act is not a guarantee that a legal father who perpetrated violence against the child's mother will not be chosen as a custodial parent.[45] Since the Act only gives rise to a rebuttable presumption against custody with the perpetrator, the perpetrator can overcome that presumption by a preponderance of the evidence and still gain custody. This presumption serves to protect mothers while also protecting fathers' rights, but may also result in survivors of domestic violence being forced to share custody with the perpetrators.

Massachusetts requires the consent of both legal parents, including the noncustodial parent, for a parent to relocate with the child, "unless the court upon *cause shown* otherwise orders."[46] Domestic violence is not a statutory factor for the cause shown prong, nor is it mentioned in the statute at all.[47] Notice is thus required when the custodial parent seeks relocation unless the court finds cause shown in some other factor besides domestic violence.[48] In that case, the custodial parent can relocate without providing notification.[49]

Massachusetts case law makes a distinction in relocation law between situations involving sole physical and legal custody, joint physical and legal custody, and sole physical custody but joint legal custody. Prior to any legal determination of paternity, the mother has sole physical and legal custody.[50] Thus, she can relocate as she wishes without notifying the father. Even if there is a paternity determination after the mother has relocated, the mother is not required to return to Massachusetts because she did not have to seek permission

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of the birth certificate. *See Smith*, 941 N.E.2d at 7 (noting that a putative father of a nonmarital child may only become a legal parent "through an adjudication or by filing a voluntary acknowledgement of paternity executed by both parties."). "Once paternity is established, however, the father, if not unfit, has a constitutionally protected right to parent and maintain a relationship with his child." *Id.* Thus, for children born out of wedlock, in order to award custody to the father, there must be an adjudication of paternity. MASS. GEN. LAWS ANN. ch. 209C, § 10 (West 2013). Without an adjudication or voluntary acknowledgement of paternity, the mother has custody; thus, perpetrators of domestic violence who were never adjudicated as the father and were not married to the mother at the child's birth have no legal rights to prevent the mother from relocating with her child. *Id*.

42. MASS. GEN. LAWS ANN. ch. 208, § 31(a) (West 2013).

43. The law defines abuse, or a serious incident of abuse, as an act between a parent and parent or a parent and child that (1) attempts to cause bodily injury, (2) places someone in reasonable fear of imminent bodily injury, or (3) causes someone to engage in forced sexual relations or sexual relations under duress or threat. *Id*.

44. *Id*. ch. 209C, § 10(e).

45. *See id*.

46. *Id*. ch. 208, § 30 (emphasis added).

47. *Id.;* David M. Cotter, *Relocation of the Custodial Parent: A State-By-State Survey*, 18 No. 6 DIVORCE LITIG. 89, 99–101 (2006).

48. MASS. GEN. LAWS ANN. ch. 209C, § 10 (West 2013).

49. *Id.* The custodial parent can also relocate without notice if the father was never adjudicated to be the legal father and if the parents were not married at the time of the child's birth. *See* discussion *supra* note 43.

50. Smith v. McDonald, 941 N.E.2d 1, 7 (Mass. 2010).

for the move at the time of her relocation.[51]

When divorced parents have joint physical and legal custody, the cause shown prong of Ch. 208 § 30 is satisfied by showing that removal is in the best interests of the child.[52] When physical custody is shared, a judge is less willing to allow parents to freely relocate with the children.[53] The best interests standard is still applied in situations with joint physical and legal custody, but it becomes harder for one parent to show that the move is in the best interests of a child.[54] However, if the move is shown to be in the child's best interest, the court may waive the notice requirement.[55]

When parents do not share physical custody, and the parent with sole physical custody wishes to remove the child from the state without the consent of the other parent, the cause shown prong is still satisfied by showing that the move is in the best interests of the child.[56] Massachusetts allows relocation with a minor child if one parent can show good, sincere reasons for the relocation. Then, the judge weighs the mother, father, and children's interests to determine the best interests of the child.[57] In these situations, the primary inquiry is whether there is a good reason, or a real advantage, for the move.[58] If the court determines that there is a real advantage, taking into consideration all relevant parties, then the need for parental consent to relocate is eliminated.[59]

If the parents were never married, and at least one parent has physical custody but they share legal custody, the *Yannas* and *Mason* tests are still applicable.[60] Children of non-married parents are "entitled to the same rights and protections of the law as other children,"[61] because the purpose of the removal statute "is to preserve the rights of the noncustodial parent and the child to maintain and develop their familial relationships, while balancing those rights with the right of the custodial parent to seek a better life for himself or herself in another State or country."[62]

If the survivor and abuser share legal custody and the survivor does not

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51. *See id*. at 10 (holding that the judge's conclusion that the mother was required to obtain the consent of the father before relocating the child was erroneous.).

52. Mason v. Coleman, 850 N.E.2d 513, 515 (Mass. 2006); Yannas v. Frondistou-Yannas, 481 N.E.2d 1153, 1158 (Mass. 1985).

53. *Mason*, 850 N.E.2d at 519.

54. MASS. GEN. LAWS ANN. ch. 209C, § 10 (West 2013).

55. *See Mason*, 850 N.E.2d at 515 (holding that the appropriate standard when parents have joint physical and legal custody means showing that removal is in the "best interest" of the child).

56. *Yannas*, 481 N.E.2d at 1158. Simply because the move is in the best interest of the custodial parent does not mean it is in the best interests of the child. *Id*.

57. *Id*.; Tammaro v. O'Brien, 921 N.E.2d 127, 133 (Mass. App. Ct. 2010).

58. *See Yannas*, 481 N.E.2d at 1158 ("If the custodial parent establishes a good, sincere reason for wanting to remove to another jurisdiction, none of the relevant factors becomes controlling in deciding the best interests of the child[.]"); MASS. GEN. LAWS ANN. ch. 208, § 30 (West 2013).

59. *See Yannas*, 481 N.E.2d at 1158 (noting that the Massachusetts removal statute provides that "[a] minor child of divorced parents who is a native of . . . this commonwealth . . . shall not, if of suitable age to signify his consent, be removed out of this.").

60. *See* Wakefield v. Hegarty, 857 N.E.2d 32, 35–36 (Mass. App. Ct. 2006) (reviewing the application of the "read advantage" test).

61. *Id*. at 35; MASS. GEN. LAWS ANN. ch. 209C, § 1 (West 2013).

62. *Wakefield*, 857 N.E.2d at 36.

seek a court's assistance in dismissing that requirement, the survivor may be charged with parental kidnapping if she removes the child without permission.[63] A major concern therefore is that if survivors do not feel comfortable in seeking legal intervention with regard to removal and relocation of children, they may either (1) leave without seeking permission from the legal father, or (2) remain in a violent situation when it would be better for both them and their child to leave. Under the current law, however, a domestic violence survivor must either seek to waive the permission requirement or stay in Massachusetts absent a waiver from a judge.

III. CALIFORNIA

The California Family Code protects victims of domestic violence who seek custody of their children in § 3044.[64] Once a court finds that a party seeking custody has perpetrated domestic violence against the other party seeking custody, the child, or the child's siblings within the past five years, "there is a rebuttable presumption that an award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence is detrimental to the best interest of the child."[65] The presumption is rebuttable by a preponderance of the evidence.[66] Factors a court may consider in rebutting the presumption include whether the perpetrator has completed a batterer's intervention program, whether the perpetrator has completed a parenting class, and whether there is a protective order in place.[67] California also specifically defines domestic violence for the purpose of the § 3044 presumption.[68] The perpetration of domestic violence requires a finding by the court that the perpetrator has intentionally or recklessly caused or attempted to cause bodily harm or sexual assault, or has "placed a person in reasonable apprehension of imminent serious bodily injury to that person or to another . . . ."[69] Lastly, the code lists a series of acts that are also included in this definition of domestic violence.[70] Noticeably missing is any mention of acts of non-physical domestic violence.

California child relocation law builds upon the custody determination law. While domestic violence is not specifically mentioned in relocation law,[71] the relocation laws are founded on the court's previous determination of custody.[72] Sections 3006 and 3007 define sole legal and sole physical custody, and "recognize the general right of a parent with sole custody to supervise and make

63. MASS. GEN. LAWS ANN. ch. 265, § 26(a) (West 2013).

64. CAL. FAM. CODE § 3044 (West 2013).

65. *Id.* § 3044(a).

66. *Id*.

67. *Id.* § 3044(b).

68. *Id.* § 3044(c).

69. *Id.*

70. The acts include intentionally or recklessly: causing or attempting to cause bodily injury or sexual assault, placing a person in reasonable apprehension of imminent serious bodily injury to that person or another person, or engaging in any behavior including, but not limited to, threatening, striking, harassing, destroying personal property, or disturbing the peace of another. *Id.*

71. *See id.* §§ 3041, 7501.

72. *See id.* § 7501.

decisions regarding a child's residence and education."[73] Section 7501 outlines the general rule that a parent with custody has the right to change the residence of the child.[74] That right is subject to the power of the court to prohibit a removal that would hurt the rights or welfare of the child.[75] Consequently, this section essentially provides for a presumption in favor of relocation by the custodial parent.[76] However, it "contemplates that even a parent with sole legal and physical custody may be restrained from changing a child's residence, if a court determines the change would be detrimental to the child's rights or welfare."[77]

Thus, California's relocation statute absorbs its policy on domestic violence and child custody. If a parent already has custody, then § 3044 has already done its work. Because of the strong policy in § 3044 against perpetrators of domestic violence, the presumption works to help ensure that survivors are protected from their abusers having custody of their children, and thus having continued contact with the survivors themselves.[78] Even though California relocation law does not explicitly list domestic violence as a factor to consider, this has previously been considered in cases of custody arrangement. Perpetrators of domestic violence are less likely to have any sort of custody of their children, so survivors are relatively free to relocate with their children.

Problems with relocation arise when a survivor is required by law to give notice to the other parent, or the perpetrator of the violence, when she intends to relocate with the children. California law requires that the parent seeking relocation give notice to the other parent of the change of residence of the child.[79] The potential harsh result of this legal requirement on survivors is ameliorated by the qualification that the court does not have to impose a notice requirement if the court considers it inappropriate.[80] Thus, the requirement seems somewhat permissive rather than mandatory, as courts *may* require the party seeking relocation to provide notice more than 45 days in advance of the anticipated move.[81] Without court intervention, the only way a party seeking relocation does not have to provide notice to the other party is if there was a prior written agreement stipulating as much.[82]

Generally, every time a survivor decides to relocate to escape her batterer, the notice requirement has the potential to be detrimental to the survivor's primary object of removing herself from a violent relationship. Alerting her abuser to the exact location of her new address could frustrate the purpose of the move altogether. However, California lessens the harshness of a notice requirement in two primary ways: (1) by allowing the court to eliminate the requirement if appropriate, and (2) by not explicitly requiring that the party

73. *In re* Marriage of Brown and Yana, 127 P.3d 28, 33 (Cal. 2006).

74. CAL. FAM. CODE § 7501(a) (West 2013).

75. *Id.*

76. Cotter, *supra* note 47, at 92–93.

77. *Brown*, 127 P.3d at 33.

78. *See* Greenberg, *supra* note 20, at 411 (discussing how batterers use custody proceedings and determinations to stay in contact with and potentially continue to abuse their victims).

79. CAL. FAM. CODE § 3024 (West 2013).

80. *Id.*

81. *Id.*

82. *Id.*

seeking relocation provide her new address to the other party.[83] In this way, California protects the interests of non-violent parents and their rights to their children by requiring notice of relocation within those families, but it also protects the safety and autonomy of domestic violence survivors by giving the court a way out of requiring that these women provide notice and a specific new address to their abusers.

The case law in California bolsters the statutory protection of survivors who seek to relocate with their children. First, the case law provides for two different standards depending on the stage of a particular custody order.[84] In an initial custody preceding, the standard is the best interests of the child.[85] Under California Family Code § 3011, abuse by one parent against the other is a factor to consider when determining the best interests of the child.[86] Additionally, as discussed above, there is a presumption against awarding custody to a parent who is a perpetrator of domestic violence.[87] Courts must consider all relevant circumstances that bear on the best interests of the child when making these initial custody determinations,[88] and it cannot be doubted that domestic violence bears on the best interests of the child. Additionally, in California initial custody proceedings, the parent seeking to relocate does not bear the burden of showing that the move is necessary.[89]

For altering custody orders that have already been finalized, the standard is a change of circumstance standard rather than the best interests of the child standard.[90] Under the change of circumstances standard, relocation is appropriate only if the parent seeking the custody modification can demonstrate a significant change in circumstance showing that relocation is in the child's best interests.[91] The policy at play in this shift of standards is the recognition of a need for continuity and stability in custody arrangements, as well as understanding the harm that can result from disrupting a custody arrangement and displacing who cares for the child.[92] This policy is derived from *In re Marriage of Burgess* and was codified as official California public policy in CAL. FAM. CODE § 7501(b).[93] Under this standard, the initial burden of proof is on the noncustodial parent to show that the move would be detrimental to the child.[94] The fact that the initial burden of proof is not on the relocating parent aligns with the

83. *See* CAL. FAM. CODE § 3024 (West 2013).

84. *See* Keith R. v. Superior Court of Orange County, 96 Cal. Rptr. 3d 298, 299–300 (Cal. Ct. App. 2009) (noting the application of the "changed circumstances" standard and the "best interest" rule to a move-away order in a child custody case); *In re* Marriage of Brown and Yana, 127 P.3d 28, 32–33 (Cal. 2006) (describing the "changed circumstances rule," a variation on the "best interest standard").

85. *Keith R.*, 96 Cal. Rptr. 3d at 300. Initial custody orders also include domestic violence orders. *Id.*; CAL. FAM. CODE § 3040(b) (West 2013).

86. CAL. FAM. CODE § 3011(b)(2) (West 2013).

87. *See* discussion *supra* p. 9; *Id.* § 3044.

88. In re Marriage of Burgess, 913 P.2d 473, 478 (Cal. 1996).

89. *Id.* at 476.

90. *See generally id.*; *In re* Marriage of LaMusga, 88 P.3d 81 (Cal. 2004).

91. *In re* Marriage of Brown and Yana, 127 P.3d 28, 33 (Cal. 2006).

92. *See id.* ("Not only does this [policy] serve to protect the weighty interest in stable custody arrangements, but it also fosters judicial economy.").

93. CAL. FAM. CODE § 7501(b) (West 2013).

94. *In re* Marriage of Morgan, No. A126715, slip op. at 7 (Cal. Ct. App. Dec. 15, 2010).

determination in § 7501 that a parent with custody has the right to determine where the child lives.[95] Once that initial burden has been carried, the best interests test is applied, and all relevant facts are considered in their totality.[96] Thus, the custodial parent's right to change the child's residence is "a presumptive right" which might fail "if the move would result in detriment to the child."[97]

On its face, this change of circumstances standard on its face seems advantageous for domestic violence survivors. If the noncustodial parent will generally be the abuser, and that parent carries the initial burden of proof, then it seems like the custodial parent has much less work to do to successfully relocate with a child after a final custody order has already been entered. However, California case law allows for courts to account for whether a reason for the proposed relocation is to lessen contact with the noncustodial parent.[98] This is actually detrimental for survivors, because if a survivor wants to relocate, one of her reasons may be fear for herself and for her children. Thus, she may actually want to lessen contact with the noncustodial parent, and that is potentially sufficient to change custody to the noncustodial parent.[99] Despite this concern, since the best interests standard comes into play after the noncustodial parent carries his burden, and that standard includes domestic violence as a factor,[100] California law takes this concern into account and provides outlets for survivors of domestic violence so they do not get caught in legislative traps.

Overall, California's removal law considers domestic violence concerns and does not seem like it would endanger the safety of domestic violence survivors seeking relocation with their children. While notice to the other party is required, a court can determine that notice is inappropriate under the circumstances.[101] This notice also does not require the survivor to include her intended new address, so the perpetrator would not necessarily have access to her new residence.[102] Within the best interests standard, used in both initial custody proceedings and after the noncustodial parent has carried his burden in modifications of final custody orders, there is a statutory consideration of domestic violence.[103] Lastly, the presumption against awarding custody to a perpetrator of domestic violence is a heavy-lifting provision of California law that does a lot of work in favor of domestic violence survivors at the beginning of custody determinations, allowing them more autonomy later to decide whether or not to relocate their children.[104] The primary concern with California relocation law and domestic violence is that courts can consider leaving the noncustodial parent as a reason for relocating, but this is ameliorated by the later

95. *See* CAL. FAM. CODE § 7501 (West 2013).
96. *Morgan*, No. A126715 at 7.
97. *Brown*, 127 P.3d at 33 (quoting *In re* Marriage of Burgess, 913 P.2d 473, 478 (Cal. 1996).
98. *In re* Marriage of LaMusga, 88 P.3d 81, 99 (Cal. 2004).
99. *See id.*
100. *See* discussion *supra* p. 12; *see also* CAL. FAM. CODE § 3011(b)(2) (West 2013).
101. CAL. FAM. CODE § 3024 (West 2013).
102. *Id.*
103. *Id.* § 3011(b)(2).
104. *See id.* §§ 3044, 7501.

application of the best interests standard.[105] Thus, California law is friendly to survivors and understanding of the legal issues they face when relocating.

IV. ALABAMA

Alabama provides strong statutory protection of domestic violence victims who are seeking custody. Firstly, a determination of domestic or family abuse raises a rebuttable presumption that "custody with [the] perpetrator [is] detrimental to the child."[106] Similarly, there is a mirrored presumption in favor of the child residing with the non-perpetrator of domestic violence.[107] Importantly, the statute says that if domestic or family violence has been determined, there is a rebuttable presumption that the child should live with the non-perpetrating parent "in the location of the parent's choice, within or outside the state."[108] However, Alabama statutory law contains a presumption against relocation: relocation is presumed not to be in the best interests of the child.[109] The party seeking the change has the initial burden of proof, and that burden shifts to the non-relocating party if the initial burden is met.[110] However, if there is a determination that the party objecting to relocation has committed domestic violence, that presumption no longer applies to relocation cases.[111]

Additionally, with relocation cases, the person who has the right to establish the principal residence of the child must give notice to any other party entitled to custody of a proposed change of the child's principal residence.[112] The form of this notice is stipulated in another section of the Code: (1) the notice must be given not later than the forty-fifth day before the intended move or (2) the notice must be given on the tenth day after the information becomes known if the person did not know in time to comply with the forty-five day rule and could not reasonably have known in time, and the time of the move cannot be extended, and (3) the notice must include the new address and mailing address, new phone number, child's school, reason for the move, and a notice of an opportunity for the other party to object, and (4) the relocating party has a continuing obligation to provide updated information as it becomes available.[113]

While it seems as though Alabama statutory law provides reasonable protection for victims of domestic violence who wish to relocate, the case law on the issue is relatively sparse. The courts in Alabama have come across many relocation scenarios in which the mother seeks to relocate, the father opposes the move, and the court applies the presumption against relocation since the father was not found to have perpetrated domestic violence.[114] In one such case, the

105. *See id.* § 3011.
106. ALA. CODE § 30-3-131 (2014).
107. *Id.* § 30-3-133.
108. *Id.*
109. *Id.* § 30-3-169.4.
110. *Id.*
111. *Id.*
112. *Id.* § 30-3-163.
113. *Id.* § 30-3-165.
114. *See e.g.*, Henderson v. Henderson, 978 So.2d 36, 42 (Ala. Civ. App. 2007); *see also* Toler v. Toler, 947 So.2d 416, 421 (Ala. Civ. App. 2006).

court found that "[b]ecause the father objected to the change in residence and *had not been found to have committed domestic violence or child abuse*, it was the mother's burden to rebut the presumption that the change in residence she was seeking for the children would not be in the children's best interests."[115] In another case, the court said, "There is no evidence indicating that the father committed domestic violence or child abuse . . . Thus, as the father correctly notes, there was a rebuttable presumption that a change of the son's principal residence was *not* in the son's best interests."[116]

Therefore, while courts in Alabama do not seem to have encountered the specific issue of relocation where domestic violence has been perpetrated, the case law shows that courts do consider domestic violence as a factor when applying the presumption.[117] This is important for survivors because if and when Alabama courts encounter a case with domestic violence, their case law can be used to demonstrate that the presumption against relocation should not be applied in that case, despite the fact that there has not yet been a specific case on point. The assumption is that if the presumption were not applied, then under Alabama law, the custodial parent would be free to relocate without having to prove that the move is in the best interests of the child.

Additionally, Alabama courts consistently apply the presumptions contained in §§ 30-3-131 and 30-3-133, awarding custody to those parents who have not perpetrated domestic violence.[118] Presumably, since Alabama promotes the right of a non-perpetrator of domestic violence to live "in the location of the parent's choice, within or outside the state,"[119] survivors who wish to relocate after domestic violence may do so freely. Notice, however, may still be an issue even with these presumptions. Despite the potential for removing the presumption against relocation in domestic violence cases and the presumption in favor of the non-violent party having custody of the children, Alabama's relocation law is problematic for survivors. The notice provision is the primary struggle, as there is not a statutorily created channel to evade the requirement of detailed notice to the opposing party. Thus, if survivors seek to relocate with their children in order to escape the violence, they may run into serious hurdles that jeopardize their safety when they are statutorily required to send notice of relocation to the opposing party.

V. IDAHO

Idaho has taken a very strong public policy stance regarding domestic violence, which is evidenced by their establishment of domestic violence courts

115. *Henderson*, 978 So.2d at 42 (emphasis added).

116. *Toler*, 947 So.2d at 421 (emphasis omitted) (internal quotation marks omitted).

117. *See e.g.*, *Henderson*, 978 So.3d at 42.

118. *See* Washington v. Washington, 24 So.3d 1126, 1134 (Ala. Civ. App. 2009) (noting that trial courts are required to apply the presumption unless one of the three circumstances outlined in *McCelland v. McCelland*, 841 So.2d 1264, 1267 (Ala. Civ. App. 2000) exist.). For an example of an unsuccessful attempt to apply the presumptions of ALA. CODE §§ 30-3-131 and 30-3-133 when no domestic violence was found to have occurred, see Lamb v. Lamb, 939 So.2d 918, 923 (Ala. Civ. App. 2006).

119. ALA. CODE § 30-3-133 (2014).

that are separate from the state's civil and criminal court systems.[120] Idaho acknowledges that specific courts dedicated to domestic violence "hold offenders accountable, increase victim safety, provide greater judicial monitoring, and coordinate information to provide effective interaction and use of resources among courts . . . ."[121] In addition to determining that "domestic violence is a serious crime that causes substantial damage to victims and children," Idaho also recognizes that "[f]amilies experiencing domestic violence are often involved in more than one court proceeding," so "[s]ubstantial state and county resources are required each year for the incarceration, supervision and treatment of batterers."[122] The Idaho legislature has found that "[d]omestic violence courts have proven effective in reducing recidivism and increasing victim safety," so "[i]t is in the best interests of the citizens of this state to expand domestic violence courts to each judicial district."[123] Because of this strong stance against domestic violence and in favor of effectively utilizing the court systems to help survivors, Idaho has a system uniquely tailored to combatting domestic violence.

In addition to the separate court system, Idaho also has other provisions or statutes to assist with protecting survivors in their custody proceedings. When determining what is in the best interests of the child in Idaho, domestic violence is one factor to consider.[124] Idaho requires that "[t]he father and mother of a legitimate unmarried minor are equally entitled to its custody . . . ."[125] Thus, there is a presumption for joint custody *unless* one of the parents is a habitual perpetrator of domestic violence.[126] In that case "[t]here shall be a presumption that joint custody is not in the best interests of the child . . . ."[127]

Regarding relocation, Idaho has a statute defining child custody interference as intentionally taking a child away from someone else that has either custody rights, visitation rights, or other legal rights to the child.[128] This is a felony if the perpetrator moves across state lines. This statute could capture many survivors who attempt to relocate with their children, effectively rendering them kidnappers and potential felons. Fortunately, fleeing from harm, i.e. domestic violence, is an affirmative defense.[129] Additionally, consent from the other parent is a defense, which implies that there is a notice requirement for parents who wish to relocate with their children.[130] Idaho otherwise does not have any statutory law that directly bears on the issue of relocation of children.

Case law has come to fill the gap left by the legislature regarding relocation of children. In every situation in which the question of where a child should reside arises, including relocation, the best interest standard governs,[131] because

120. IDAHO CODE ANN. § 32-1408 (West 2013).
121. *Id.*
122. *Id.* § 32-1408(1).
123. *Id.* § 32-1408(3).
124. *Id.* § 32-717(g).
125. *Id.* § 32-1007.
126. *Id.* § 32-717B(5).
127. *Id.*
128. *Id.* § 18-4506.
129. *Id.*
130. *Id.* § 18-4506(2)(c).
131. Bartosz v. Jones, 197 P.3d 310, 315, 317–18 (Idaho 2008); Roberts v. Roberts, 64 P.3d 327, 329–

"[i]n Idaho, the child's best interest is of paramount importance in child custody decisions."[132] The parent seeking to move, "[w]hen a move would violate an existing custody arrangement,"[133] bears the burden in showing that the move is in the best interests of the child.[134] Notably, courts must account for Idaho's presumption that it is in the best interest of the child to be in frequent contact with both parents, unless one is a habitual perpetrator of domestic violence.[135] However, this "presumption in favor of joint custody is not equivalent to a presumption against a custodial parent relocating with a child."[136] A custodial parent must only establish that the move is in the best interests of the child, and then she will be permitted to move with the child.[137] Importantly, Idaho courts have implied that it is not in the best interest of a child to live with someone who has a history of committing domestic violence.[138]

Since Idaho relocation law is based on the best interests of the child, and because there are separate domestic violence courts and a strong policy against domestic violence, Idaho has a very protective legal framework for survivors of domestic violence. The domestic violence courts themselves give hope to survivors that the justice system is responsive to their specific needs and increases the likelihood that the justice system is able to make decisions that will not put the survivors at risk for further abuse. Additionally, notice is not statutorily imposed, so survivors may be able to relocate if they can show that the move is in the child's best interest. Under Idaho case law, it is probably not in the child's best interest for an abuser to have custody, so the best interests standard protects survivors in this way as well.[139] While the custody interference is indeed a concern for survivors who choose to relocate their children without consent of the other parent, they have an affirmative defense if they were fleeing from violence.[140] While this would not in and of itself eliminate the criminal charges against the survivor, it would afford her some ground to fight the charges. Ultimately, because the best interests standard dominates relocation, a survivor should be able to go into court and get a determination that it is in the best interests for her to relocate away from violence with her child without ever risking her own safety to do so.

VI. SYNTHESIS OF STATE LAW AND SURVIVOR SAFETY

Survivors of domestic violence pose a unique challenge to relocation law. It may not be safe for them to comply with the usual state law requirements,

30, 331 (Idaho 2003).

132. *Bartosz*, 197 P.3d at 315.

133. *Bartosz*, 197 P.3d at 315.

134. *Id*.; *Roberts*, 64 P.3d at 331. As there is no Idaho law on point, Idaho courts consulted California and New York law to determine their own relocation standard. *Bartosz*, 197 P.3d at 316.

135. *Bartosz*, 197 P.3d at 315; IDAHO CODE ANN. § 32-717B (West 2013).

136. *Bartosz*, 197 P.3d at 317.

137. *Id*. at 317–18 (citing *Roberts*, 64 P.3d at 331).

138. *See* Schultz v. Schultz, 187 P.3d 1234, 1240 (Idaho 2008) ("The record does not support that Sylvia's best interests would be served by removing her from a stable home with a support network and returning her to the custody of a father *with a history of domestic abuse*.") (emphasis added).

139. *See id*.

140. IDAHO CODE ANN. § 18-4506 (West 2013).

especially advance notice to the noncustodial parent. Because abusers often use the court system as an additional forum to continue the domestic abuse,[141] survivors need laws that allow them to act in a way that keeps them and their children safe, while refraining from obstructing the parental rights of the abuser as much as possible. The four states discussed all approach relocation law and its potential intersection with domestic violence survivors differently, and each state offers positive tools for survivors as they seek to relocate with their children and flee from violence. However, no state has a comprehensive law that affords survivors complete protection from potential future violence. Thus, an amalgamation of features from each of the four states would create the most satisfactory protective law for survivors.

Idaho's domestic violence courts serve as the best forum for any custody proceeding where a survivor is involved.[142] Because of the unique challenges facing survivors, it is important to have a legal system that supports them and understands their legal concerns. If domestic violence is ever to be effectively combatted by the judicial system, the system needs to fully understand how to adjudicate proceedings where domestic violence is involved, including custody and relocation proceedings.

In initial custody proceedings, all four states consider domestic violence[143] as a factor when determining which parent gets custody of the child. The best formulation of this factor consideration is in the form of a statutory presumption, as it allows this factor to weigh more heavily in the mind of the court than some other factors. Massachusetts, California, and Alabama all have a presumption that it is not in the child's best interests to live with a parent who has committed domestic violence, in various forms, against another parent.[144] The best articulation of this principle comes from Alabama in its mirror presumptions.[145] By not limiting the occurrence of domestic violence to any particular time frame, Alabama creates broader protection for survivors who previously experienced an incidence of domestic violence. Additionally, the dual presumptions leave less room for judicial error, as they work together to ensure that perpetrators of domestic violence should not presumptively obtain custody of their children.

Regarding relocation, California has a presumption for relocation by the custodial parent,[146] Alabama had a presumption against relocation by the custodial parent,[147] while Massachusetts and Idaho had no presumption at all. If there is a presumption against perpetrators of domestic violence having custody of children, then most survivors will have custody. Thus, a presumption in favor of relocation by the custodial parent will be most beneficial to survivors who wish to relocate with their children. With a presumption at play, survivors will

141. *See* discussion *supra* p. 6–7.

142. *See* IDAHO CODE ANN. § 32-1408 (West 2013).

143. Domestic violence falls under "harmful parental misconduct" in South Dakota. *See* Fuerstenberg v. Fuerstenberg, 591 N.W.2d 798, 809 (S.D. 1999) (discussing harmful parental misconduct).

144. MASS. GEN. LAWS ANN. ch. 208, § 31(a) (West 2013); CAL. FAM. CODE § 3044 (West 2013); ALA. CODE §§ 30-3-131, 30-3-133 (2014).

145. ALA. CODE §§ 30-3-131, 30-3-133 (2014).

146. CAL. FAM. CODE § 7501 (West 2013).

147. ALA. CODE § 30-3-169.4 (2014).

generally be able to move with their children easily and without interference, and the potential for further abuse, from the noncustodial abuser. To protect the rights of the abuser, the presumption would be rebuttable by a preponderance of the evidence, and the presumption additionally would not come into effect if the move would jeopardize the welfare of the child.

The primary safety issue confronting survivors who wish to relocate is notice to the noncustodial parent. Massachusetts' approach to relocation law centers on the adjudication of paternity.[148] This is beneficial for survivors because it allows them a legal opportunity to escape any sort of potential notice requirement if their abuser was never (1) married to the survivor at the time of the birth, thus not the legal father of the child, and (2) adjudicated or voluntarily acknowledged as the father.[149] However, if the father does have paternal rights, mandatory notice of relocation may not be in the best interests of the child or the survivor as the abuser would have access for further abuse.

In the family where no violence occurs, notice of relocation to the noncustodial parent is reasonable as well as encouraged. In those families, the relocation by the custodial parent is not to enhance her safety by escaping the abuse and violence of the noncustodial parent. Rather, it is for a myriad of other reasons, including jobs, schools, work, and new relationships. When survivors seek to relocate with their children, they may be trying to escape the violence and keep themselves and their children safe. In those instances, mandatory notice to the noncustodial parent could put their safety into question. Thus, a judicial approach where notice is excused in the case of a survivor is preferred.

California requires notice of relocation to the noncustodial parent "if the court does not consider it inappropriate."[150] This would be an adequate notice provision as it recognizes the general need for notice of relocation while allowing the court to take into consideration situations and circumstances in which notice is inappropriate, such as in the case of a survivor fleeing violence. This standard, however, falls slightly short because it implies that the survivor would have to seek court approval before moving. If a survivor was to flee violence with her children prior to a court proceeding, she may violate the notice requirement. A statute that allows for retroactive approval of abandoning the notice requirement is preferable to maintain the safety of survivors.[151]

CONCLUSION

Because of the unique social and legal challenges that survivors of domestic violence face, it is critical to their safety that our court systems are a forum for help and protection for those women rather than a source of confusion and anxiety. State laws that require notice from the survivor to her abuser when she

148. *See* discussion *supra* p. 7–8; *see also supra* note 41.

149. *See* discussion *supra* p. 7–8; *see also supra* note 41.

150. CAL. FAM. CODE § 3024 (West 2013).

151. Additionally, survivors who possess a valid and enforceable protection order against the noncustodial parent may also escape liability for the notice requirement, regardless of when they relocate. While South Dakota was not discussed in this Note, it contains this provision in its statutory law. *See* S.D. CODIFIED LAWS § 25-4A-17 (West 2014) ("No notice need be provided pursuant to this section if . . . (3) There is an existing valid protection order in favor of the child or the custodial parent against the noncustodial parent . . . .").

relocates with her children and that ultimately do not recognize the effects of domestic violence on the survivors do not help those women flee to safety. In fact, many state laws serve to force survivors to stay in close proximity to danger if they wish to remain with their children. In looking to the future, states should implement laws that understand domestic violence survivors' challenges and help them lead a safe and happy life.