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Is There Comfort for Noncustodial Parents?

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Visitation Abuse v Unlawful Visitation Interference; Is There Comfort for Noncustodial Parents?

By [Celia Guzaldo Gamrath](#)

This article examines and contrasts the civil visitation abuse statute and the criminal visitation interference law. It analyzes the Warren decision, examines its ramifications, and discusses practical matters for police and parents confronted with enforcement of visitation issues. The author argues for making the interference-with-visitation law more effective and even-handed.

In *People v Warren*,¹ a decision handed down seven years ago, the Illinois Supreme Court drew a distinction between joint custodial parents and noncustodial parents with visitation rights, restricting the rights of a joint custodian who is not the primary residential parent to enforce visitation. Justice Charles Freeman, writing for the unanimous court, held that in criminal interference matters the concept of visitation is inapplicable in the context of a joint custodial parent-child relationship; thus, individuals with joint custody "cannot commit visitation interference against each other or be subject to [sanctions] for such conduct."²

The *Warren* decision has frustrated parents who are not the primary custodians but who in theory enjoy joint decision-making power in major decisions affecting their children, such as education, religion, and medical treatment. Although these parents have recourse under the civil visitation abuse statute,³ there is no mechanism for immediate police enforcement of a visitation order under the criminal visitation interference

statute.⁴

Visitation abuse and unlawful visitation interference are distinct statutory offenses. Under the unlawful visitation interference statute, noncustodial parents have a criminal remedy for interference with court-ordered visitation. Under the Illinois Marriage and Dissolution of Marriage Act ("IMDMA"), both custodial and noncustodial parents have a civil remedy for visitation abuse.

The criminal visitation interference law was designed to deter violations and enable noncustodial parents to go directly to the police to enforce the visitation order.⁵ Because of *Warren*, the police have refused to enforce the criminal statute in cases of joint custody, requiring the parent without primary residential custody to go through a civil hearing in family court first to seek relief.

This article compares the civil visitation abuse statute with the criminal visitation interference law. It analyzes the *Warren* decision, examines its ramifications, and discusses practical matters for police and parents confronted with enforcement of visitation issues. It also argues in favor of making the interference with visitation law more effective and even-handed.

I. Visitation Abuse (Civil)

"Visitation is a right or permission granted to a noncustodial parent to visit with his or her child."⁶ Visitation abuse occurs when a party has willfully and without justification denied another party visitation as set forth by the court or exercised his or her visitation rights in a manner that is harmful to the child or child's custodian.⁷

In cases of visitation abuse, section 607.1 of the IMDMA permits the court to provide an expedited civil procedure for enforcement of court-ordered visitation.⁸ To commence an enforcement action based on visitation abuse, the petitioner must file a petition setting forth (i) his or her name, residence address or mailing address, and telephone number; (ii) the respondent's name and place of residence, place of employment, or mailing address; (iii) the nature of the visitation abuse, giving dates and other relevant information; (iv) that a reasonable attempt was made to resolve the dispute; and (v) the relief sought.⁹

After hearing all of the evidence, the court may order several forms of relief, including modification of the visitation order, supervised visitation and make-up visitation, counseling or mediation except in cases where there is evidence of domestic violence, and other appropriate relief deemed equitable.¹⁰ However, a change of custody, absent a proper petition to modify custody,¹¹ is an improper remedy for visitation abuse.¹² Moreover, the trial court may order mandatory mediation in cases of visitation abuse only after hearing all of the evidence and assessing whether mediation would be useful in resolving a specific dispute before the court; the court may not order mediation of prospective visitation disputes.¹³

The trial court's finding that a person committed visitation abuse will not be disturbed on appeal unless it is against the manifest weight of evidence.¹⁴ Although a party is not in a position to impose any conditions upon another parent's visitation, where the party's actions stem from concern about how the other parent is treating the child rather than an intent to interfere with visitation, a court may find that no visitation abuse has occurred.¹⁵

Pursuant to section 607.1(f), attorney fees and costs shall be assessed against a party if the court finds the enforcement action is vexatious and constitutes harassment.¹⁶

Correspondingly, under section 508(b) of the IMDMA,¹⁷ a court must award attorney fees against the offender if it finds "the underlying failure to comply with [a visitation] order [is] without cause or justification."¹⁸

In 1994, with the enactment of the unlawful visitation interference statute,¹⁹ section 607.1 of the IMDMA was amended to insert the exception at the end of subsection (d): "Nothing contained in this Section shall be construed to limit the court's contempt power, except as provided in subsection (g) of this Section."²⁰ Subsection (g) was also added to exclude persons convicted of unlawful visitation interference from the application of section 607.1 and to preclude contempt orders from being entered against such persons for the same conduct for which they were convicted.²¹

In 1996, *Warren* held unconstitutional the corresponding provision of the unlawful visitation interference statute that prohibits the court's imposition of civil contempt sanctions following a conviction under the criminal statute.²² The court found that provision of the criminal statute invalid as being "an undue infringement on the court's inherent powers" and severed subsection (h) of section 10-5.5 from the rest of the criminal statute.²³

Because the court's review in *Warren* was limited to the unlawful visitation interference law, the court did not examine whether the 1994 amendments to section 607.1 were unconstitutional as well. However, it is apparent that the provisions in section 607.1(d) and (g) that limit the court's contempt power are just as flawed as the corresponding provision in the unlawful visitation interference statute. Indeed, the power to punish for contempt is an inherent power of the judicial branch of government; the legislature may not restrict the court's use of contempt.²⁴

II. Unlawful Visitation Interference (Criminal)

In 1994, the Illinois legislature enacted section 10-5.5 of the Criminal Code of 1961, which created a new criminal offense for unlawful visitation interference with court-ordered child visitation rights.²⁵ Pursuant to section 10-5.5(d), any law enforcement officer who has probable cause to believe that a person has committed or is committing an act in violation of section 10-5.5 shall issue a notice to appear.²⁶ The notice shall (i) be in writing, (ii) state the name of the person and his or her address if known, (iii) set forth the nature of the offense, (iv) be signed by the officer issuing the notice, and (v)

request the person to appear before a court at a specified time and place.²⁷ If a person fails to appear, a summons or warrant of arrest may be issued.²⁸

A person charged with unlawful visitation interference may assert the following affirmative defenses: (i) he or she committed the act to protect the child from imminent physical harm, provided that his or her belief that there was imminent physical harm was reasonable and that his or her conduct in withholding visitation rights was a reasonable response to the harm believed imminent; (ii) the act was committed with the mutual consent of all parties having a right to custody and visitation of the child; or (iii) the act was otherwise authorized by law.²⁹

The purpose of the statute criminalizing unlawful visitation interference "is to provide a remedy for and to deter violations of interference by any person, including the child's custodial parent, with a noncustodial parent's right to visitation."³⁰ Under section 10-5.5 it is a petty offense to violate a visitation provision of a court order relating to child custody by detaining or concealing a child with the intent to deprive another of his or her right to visitation.³¹ After two convictions of unlawful visitation interference a third or subsequent offense is a Class A misdemeanor.³²

As originally enacted and referred to above, subsection (h) of section 10-5.5 provided that civil contempt sanctions were not available against a person convicted of unlawful interference with visitation.³³ The supreme court in *Warren* held subsection (h) invalid as "an undue infringement on the court's inherent powers" and severed it from the remainder of the statute.³⁴

The court observed that the power to punish for contempt does not depend on constitutional or legislative grant. Rather, it inheres in the judicial branch and thus the legislature may not restrict its use. Accordingly, *Warren* held section 10-5.5(h) was unconstitutional, severed that subsection from the statute, and left the rest of section 10-5.5 intact despite constitutional challenges on the grounds of vagueness, due process, and equal protection.³⁵

III. *People v Warren*

The lackadaisical enforcement of the unlawful visitation interference statute by police has caused renewed interest in the *People v Warren* decision. In *Warren*, the defendant was alleged to have knowingly detained her child with the intent to deprive the father of visitation rights. She was charged by information with "unlawful interference with child visitation rights per court order" in violation of section 10-5.5 of the Criminal Code of 1961.³⁶

She moved for dismissal of the information on the grounds that the instrument was insufficient and that the unlawful visitation interference statute was unconstitutional. The circuit court held the statute unconstitutionally vague and violative of equal protection, due process, and separation of powers, and granted defendant's motion to dismiss the complaint. The state appealed directly to the Illinois Supreme Court.³⁷

A. Due Process and Vagueness

Justice Freeman, writing for a unanimous court, disagreed with the trial court's assessment of the statute as vague and uncertain; instead the court believed that a person of fair intelligence is given fair warning as to what conduct is proscribed. The court looked at the information and held the allegations "that defendant committed the offense of unlawful visitation interference in that she knowingly detained her daughter with the intent to deprive Richard Warren of his visitation rights, in violation of visitation set forth in the Bureau County court order in cause number 93-D-3," clearly stated the nature of the offense in terms commonly used and understood.³⁸

The court also held the unlawful visitation interference statute provides sufficient guidelines for its proper application in that it requires before issuance of a notice to appear³⁹ that a "police officer have probable cause to believe that a person has violated the terms of a visitation order."⁴⁰ The probable cause requirement comports with Fourth Amendment safeguards.⁴¹

The court further determined that the affirmative defenses provided in section 10-5.5 (g) are not unconstitutionally vague or confusing. The court stressed that the second affirmative defense of mutual consent merely recognizes that parties may alter visitation schedules at times because of scheduling conflicts and other factors.⁴²

As a practical matter, the mutual consent of the parties will excuse interference with a visitation order by negating the requisite intent to deprive another of his or her visitation rights.⁴³ "Thus, by their mutual assent, the parties have avoided, not agreed to, the commission of a criminal offense."⁴⁴ The court also held that so long as the parties understand that mutual consent is available as an affirmative defense, due process is satisfied.⁴⁵ With respect to the third affirmative defense, "the act was otherwise authorized by law," the court understood that phrase to mean simply that the conduct in detaining and concealing a child is permissible by law, and perceived no difficulty in applying the defense.⁴⁶

B. Equal Protection

As her equal protection challenge, the defendant argued that under the unlawful visitation interference statute she was impermissibly subject to different treatment than noncustodial parents in that the statute unfairly burdens custodial parents with a criminal penalty. In contrast, the statute does not apply to joint custodial parents because they are parties to a joint parenting agreement and may mediate or otherwise resolve their disputes without being subject to contempt or criminal prosecution.⁴⁷ The defendant argued that the disparate treatment given a divorced custodial parent versus that given joint custodial parents amounts to an equal protection violation.

Warren recognized the disparate treatment between the two classes of parents but rejected the defendant's argument that the law violates equal protection. The court observed that the statute is not limited to divorced parents; rather it "covers 'every

person' who commits the offense of visitation interference and provides an affirmative defense for '*a person or lawful custodian*.'"⁴⁸ The law is neutral on its face, operates irrespective of marital status, and includes within its coverage every individual, "including one who may be a stranger to the parent-child relationship, *i.e.*, grandparents, a neighbor, even a baby-sitter."⁴⁹

Further, the court held that the defendant as a sole custodial parent is not similarly situated to divorced joint custodial parents. The court ruled that because visitation is a right or permission granted to noncustodial parents to visit with their children⁵⁰ the "concept of visitation is simply inapplicable" in a joint custody arrangement.⁵¹ The court explained that joint custodial parents share custody of their children⁵² and, unlike the case of a divorced custodial parent, the IMDMA does not mandate visitation for joint custodial parents.⁵³ Accordingly, joint custodial parents "cannot commit visitation interference against each other or be subject to prescribed penalties for such conduct."⁵⁴ In contrast, a divorced sole custodial parent is capable of committing a criminal offense against the other party who is entitled to visitation.⁵⁵

Warren ultimately held that since a divorced custodial parent and divorced joint custodial parents are not similarly situated, equal protection is not offended by their different treatment.⁵⁶ However, the supreme court's distinction misses the mark. Joint custody means joint responsibility and decision-making on important issues,⁵⁷ not shared physical custody.⁵⁸ Joint custody "is simply a tool to maximize the involvement of both parents in the life of a child."⁵⁹ By taking the view that visitation is simply inapplicable to joint custodians, the court has placed an unwarranted limitation on a parent's right to enforce visitation.

IV. The Implications of *Warren*

The supreme court's decision in *Warren* has had a substantial impact upon the prosecution of criminal visitation interference cases, as well as upon the way the police respond to calls about the deprivation of visitation.

Unfortunately, some vindictive parents have used the visitation interference statute to harass and intimidate custodial parents who in good faith have refused to turn over children to abusive parents. Realizing the statute might be used as a power mechanism, the Illinois legislature drafted exceptions to the criminal statute in the form of three affirmative defenses, including the right of a parent to withhold visitation if there is a reason to believe the child could be in danger.⁶⁰ The legislature also should have provided for sanctions in the form of attorney fees and costs against a party who uses the statute to harass and intimidate, the same as it did under the civil visitation abuse statute.⁶¹

It is conceivable that detention and concealment of a child under the criminal visitation interference statute may also constitute deprivation under the civil visitation abuse statute, thereby giving a noncustodial parent with visitation rights the option to proceed

under either section 607.1 of the IMDMA or section 10-5.5 of the Criminal Code. In contrast, under *Warren*, joint custodial parents are given only a civil remedy for visitation abuse and have no criminal recourse.

Prior to the enactment of section 10-5.5, visitation interference was handled exclusively in civil court with family law judges issuing contempt citations against parents who committed visitation abuse or refused to comply with a visitation order. Some police and prosecutors still believe enforcement of visitation belongs in family court and are reluctant to enforce the criminal statute. This is particularly true in counties with limited budgets or high crime rates where the police and prosecutors do not have the resources to enforce the statute. However, by refusing to enforce the criminal statute, noncustodial parents who are denied visitation are forced to endure an expensive and delayed hearing in civil court, a hearing they had hoped to avoid with the enactment of section 10-5.5.

This raises questions of what can be done to make the visitation interference law more effective and whether it is more appropriate for these cases to be handled in civil family court. One suggestion is stiffer penalties for custodial parents who withhold or interfere with visitation. However, if custodial parents are actually jailed for violating a visitation order, the law might do more harm than good to children in their care and custody. It might also send a message to children who refuse to visit or are being abused that they are responsible for jailing the custodial parent who is trying to protect them.

Another suggestion is to require a preliminary finding from family court first that a defendant has interfered previously with the other parent's visitation rights. Such a finding would allow police and prosecutors to take more seriously a complaint for unlawful visitation interference, which in turn might make them more willing to get involved and enforce the criminal statute in an expedited manner. The immediacy of the criminal remedy is vital to parents deprived of visitation who risk being alienated from their children because of less visitation time and more interference by the other parent.

A third suggestion is to amend the criminal statute to allow joint custodial parents to use it to enforce their parenting time. If the law is written to apply to joint custody with primary residence in one parent and the other parent with visitation, then police may have an easier time enforcing the law in an even-handed way by simply looking at a court order setting forth the specific visitation schedule and determining if probable cause exists to believe that a person has committed or is committing an act in violation of section 10-5.5.

Assume, for instance, that a joint custodial parent is scheduled to pick up his or her child from the other at 5:00 p.m. every Friday for weekend visitation. If the parent with physical custody of the child detains or conceals the child, the parent entitled to visitation should have an equal right to call the police and have them enforce it. As the law now stands, however, joint custodians are penalized by the limited enforcement measures available to them.

