

The Tort of Interference with Custody: A Tale of Two Jurisdictions

DAVID CRUMP*

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I. INTRODUCTION

Interference with custody is a malignant tort. When it is accomplished by abducting the children, it breaks their connection to the custodial parent.¹ When it is done by false allegations such as claims of abuse, it may not only remove the children but subject them to indignities such as

* © 2020 David Crump. A.B., Harvard College; J.D., University of Texas School of Law. John B. Neibel Professor of Law, University of Houston.

1. See Joy M. Feinberg & Lori S. Loeb, *Custody and Visitation Interference: Alternative Remedies*, 12 J. AM. ACAD. MATRIM. LAW. 271, 271 (1994).

intrusive medical examinations.² It is no great surprise, therefore, that the claim for interference with custody has been recognized at common law or made law by statute in many states.³

But there are major differences in the way in which courts have applied the laws that their jurisdictions have recognized. In some states, the claim has been treated with the right touch: not so broadly as to inhibit informal dealings between cooperating parents and not so stingily that its purpose is defeated.⁴ But in other states, the claim has been adjudicated too narrowly.⁵ This Article is an effort to find the right balance.

Part II of the Article contrasts two cases as examples. Both cases concern the potential liabilities of coparties who help the offending parent to deny custody to the other. One, from New Jersey, shows a better approach, in which the court correctly considers the element of intent or knowledge and properly reviews the evidence.⁶ The other, from Texas, exemplifies a cramped approach to these issues.⁷

Part III analyzes the difficulties that are hidden in the cases. What level of intent or knowledge should be required?⁸ Does the allegedly offending spouse need to know the particulars of the visitation decree, for example, or is an awareness that the offending parent is encroaching upon the other's time sufficient?⁹ These and other questions are raised and answered in the contexts of the two example cases.

Part IV argues that the claim for interference with custody should be maintained as viable. The temptation to interfere during custody and visitation disputes is strong.¹⁰ Illegal activity is often successful in immediately stopping visitation.¹¹ The harm that it does is significant. It should be added that situations involving battered spouses who receive children present different issues, and those cases are outside the scope of this Article.¹²

The final Part contains the author's conclusions, which include recognition of judges' natural instinct to avoid heavy-handed applications of interference with custody laws. Parents with healthy cooperation tend to make and remake informal exchanges of visitation times and other aspects of their court-

2. See *infra* Part IV.

3. See Feinberg & Loeb, *supra* note 1, at 278 (discussing remedies for the tort).

4. See, e.g., *infra* Section II.A (discussing decision in New Jersey).

5. See, e.g., *infra* Section II.D (discussing decision in Texas).

6. See *infra* Section II.A.

7. See *infra* Section II.B.

8. See *infra* Section III.B.

9. See *infra* Section III.D.

10. See *infra* Part IV.

11. See Feinberg & Loeb, *supra* note 1, at 271.

12. See generally Courtney Cross, *Criminalizing Battered Mothers*, 2018 UTAH L. REV. 259 (discussing different issues raised by this situation).

ordered schedules, and these kinds of casual agreements inevitably precipitate occasional disagreements. Situations like these should not trigger the disproportionate response of liability under the law. But the courts should avoid a standard of knowledge or intent that is impractical to meet and should consider the evidence before them as in other cases with similar issues.

II. THE INTERFERENCE TORT IN TWO JURISDICTIONS

A. *New Jersey*: State v. Froland

After divorce, both the ex-husband (Kindt) and the ex-wife (O'Connor) resided in New Jersey.¹³ Kindt remarried to Froland.¹⁴ A court decree governed the parties' possession of their children.¹⁵ In the year at issue, O'Connor had custody during the Christmas holidays but agreed to allow Kindt to have the children from December 27 through the morning of December 30.¹⁶ But when O'Connor called on December 29, she found that Kindt's telephone had been disconnected, and when she went by Kindt's home, she discovered that it was deserted.¹⁷

Police investigation ultimately revealed that Kindt had removed the children to North Carolina, along with Froland.¹⁸ Froland herself had withdrawn large sums of cash from her bank accounts and forwarded the couple's mail.¹⁹ Kindt had bought a boat, using a pseudonym.²⁰ Froland's computer contained a "to-do list" that included cutting off the telephone and ceasing contact with relatives.²¹ She had sent instructions to Kindt's parents about their possessions in New Jersey and other matters.²² On December 29, Kindt and Froland, together with the children, took public transportation to North Carolina, after maneuvers that the court described as intended to "cover their trail."²³

13. State v. Froland, 936 A.2d 947, 948 (N.J. 2007).

14. *Id.*

15. *Id.* at 949.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

New Jersey authorities issued arrest warrants for Kindt and Froland.²⁴ The Coast Guard, responding to a distress signal, found them on the boat with the children.²⁵ Authorities arrested Kindt, Froland, and another person with them.²⁶ Froland was convicted of kidnapping the children.²⁷

The New Jersey Supreme Court reversed that conviction.²⁸ It held, in accordance with the applicable statute, that kidnapping did not apply to a person who removed children with the consent of a parent.²⁹ Froland had acted, of course, with the consent of Kindt. But the crime of interference with custody existed in New Jersey, and the court held that Froland could be convicted under this statute.³⁰ The statute provided:

A person, including a parent, guardian or other lawful custodian, is guilty of interference with custody if he:

. . . Takes or detains a minor child with the purpose of concealing the minor child and thereby depriving the child's other parent of custody or parenting time with the minor child . . .³¹

“Froland’s behavior,” the court said, “falls squarely within the strictures of the . . . statute.”³² Thus, both she and Kindt “were subject to prosecution under the interference with custody statute.”³³

B. Texas: *Bos v. Smith*

Bos v. Smith featured an ugly, but unfortunately not uncommon, strategy by Mother, Trisha Bos-Smith, to defeat visitation by Father, Craig Smith.³⁴ She coached her son, Mike, to make sexual abuse allegations against Father.³⁵ Later, as part of an agreement that spared her from imprisonment and ended her custody of the children, she admitted that the allegations were concocted.³⁶ Father later filed suit against the children’s maternal Grandparents, Larry and Mary Bos, for assisting Mother’s interference with custody.³⁷

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24. *Id.*
 25. *Id.* at 950.
 26. *Id.*
 27. *Id.*
 28. *Id.* at 948.
 29. *Id.*
 30. *Id.* at 953–54.
 31. N.J. STAT. ANN. § 2C:13-4(a) (2019).
 32. *Froland*, 936 A.2d at 953.
 33. *Id.* at 956.
 34. 556 S.W.3d 293, 296 (Tex. 2018).
 35. *Id.*
 36. *Id.*
 37. *Id.* at 296–97.

The trial court found that Grandparents had acted with knowledge of their interference and awarded \$10.5 million in damages for this and other torts.³⁸ The court of appeals affirmed.³⁹ The Texas Supreme Court reversed and rendered judgment of nonliability on the stated ground that the evidence was insufficient.⁴⁰

Mother was, as the court put it, “stingy” in allowing visitation by Father.⁴¹ Therefore, Father sought and obtained a court decree containing the “standard possession order,”⁴² which actually is a statutory provision in the state Family Code, providing for visitation at certain hours on Tuesdays and Thursdays and specific weekends, as well as holiday schedules.⁴³ Father spoke with Grandparents in several conversations to ask that they seek cooperation on Mother’s part,⁴⁴ and these conversations undoubtedly would have included information about the visitation schedule, which, after all, was part of the law. Mother’s noncooperative behavior remained.⁴⁵

The evidence against Grandparents became more specific with an event unrelated to the false allegations of abuse. Father expressly notified the Grandparents that his visitation was to begin at a specific time.⁴⁶ Mother instead directed Grandparents to take the children to a birthday party, and when the Father arrived to pick them up, no one was there.⁴⁷ Mother later explained that she had forgotten about the birthday party.⁴⁸

The next morning, Mother unexpectedly brought both boys to Father’s home.⁴⁹ But she soon called Mike on the phone and then called 911 to make the first of several false claims of abuse, saying that Mike had reported that Father’s legal assistant had touched Mike’s penis.⁵⁰ Police descended, together with the Department of Family and Protective Services (DFPS),

38. *Id.* at 297.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. TEX. FAM. CODE ANN. § 153.312(a) (West 2019).

44. *Bos*, 556 S.W.3d at 297–98.

45. *See id.*

46. *Id.* at 297.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 297–98.

which launched an investigation.⁵¹ A hospital examination of Mike showed no signs of abuse.⁵² Grandparents took the children for several days.⁵³

Father, Mother, and Mike met with DFPS for a series of interviews.⁵⁴ Mother now maintained that she had misunderstood and it was Father who had abused Mike.⁵⁵ DFPS suggested that it would place the boys in foster care.⁵⁶ To avoid this, DFPS agreed to allow Grandparents to monitor Mother's contact with the children.⁵⁷ They lived with Mother but soon found this arrangement too demanding.⁵⁸

Grandfather began pressuring DFPS for a resolution.⁵⁹ At one point, Grandfather told DFPS that "(1) Mother was a "perfect" mother; (2) Father was a nut with poor parenting skills; and (3) Father used to abuse his daughters and would brainwash them."⁶⁰ "Several years later, Grandfather admitted that he had said these things in a desperate attempt to facilitate termination of the monitoring obligation and that Father was actually a 'stand up guy.'"⁶¹

Mother began dating a psychologist named Bruno, associated with DFPS, who assisted Mother in making false abuse allegations.⁶² The trial court held Bruno liable for interference with custody, and he did not appeal.⁶³

The state supreme court sifted through this and other evidence to support its reversal. The other evidence included: (1) Mother's earlier false allegation against a past boyfriend, including similar wrongful statements, which Grandparents were keenly aware of, because Grandparents paid a sum of money to settle the matter;⁶⁴ (2) Grandparents' taking of the children on other occasions in violation of Father's visitation;⁶⁵ (3) other statements by Grandparents disparaging Father;⁶⁶ (4) Grandfather was at his "wit's end" from the behavior;⁶⁷ (5) Grandparents' continuous communication with Mother;⁶⁸ (6) Grandparents' "monitoring" of Mother while residing

51. *Id.* at 298.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 299.

64. *Id.* at 302, 304.

65. *See id.* at 302.

66. *See id.* at 298, 305.

67. *Id.* at 298.

68. *See id.* at 302.

with her for six weeks;⁶⁹ and (7) psychiatric diagnoses of Mother as suffering from serious mental illnesses, which, although announced after the events, was indicative of behavior during the events.⁷⁰ The court set out the standard for insufficiency of evidence:

Evidence is legally insufficient to support a disputed fact finding when (1) evidence of a vital fact is absent, (2) rules of law or evidence bar us from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a mere scintilla, or (4) the evidence conclusively establishes the opposite of the vital fact. We view the evidence in the light most favorable to the fact finding, indulging every reasonable inference that would support it and disregarding contrary evidence unless a reasonable factfinder could not.⁷¹

These standards are related to the established rule that the court views the evidence as a whole, not as individual pieces unrelated to other pieces.⁷² But unfortunately, the Texas court dealt with every piece separately, explaining it away as though each item of evidence were isolated from the others.⁷³

III. HOW SHOULD A COURT CONSIDER A CLAIM OF INTERFERENCE WITH CUSTODY?

A. Adjudication, Not Conciliation

A divorce judge generally looks for reconciliation of the parties and restoration of amicable relations.⁷⁴ This instinct usually is healthy, because everyone is better off with cooperation, and the law is built around the best interest of the children.⁷⁵ But in a case in which there is a claim of interference with custody, the statute or common law does not depend upon anyone's welfare. Instead, it calls for adjudication.⁷⁶

69. *Id.* at 298.

70. *See id.* at 304.

71. *Id.* at 299–300 (footnotes omitted).

72. *See, e.g., Jewish Hosp. & St. Mary's Healthcare, Inc. v. House*, 563 S.W.3d 626, 630 (Ky. 2018) (reviewing “evidence as a whole”); *Maria A. ex rel. Leslie G. v. Oscar G.*, 919 N.W.2d 841, 852 (Neb. 2018) (same).

73. *See generally Bos*, 556 S.W.3d at 300–08 (analyzing evidence).

74. *See, e.g., Bruegman v. Bruegman*, 417 P.3d 157, 168–69, 170 n.3 (Wyo. 2018) (citing benefits of conciliation).

75. *See, e.g., id.* at 162–64, 168, 170 n.3.

76. For example, the statutes at issue in both *Froland* and *Bos* omitted any term referring to the best interest of the children and simply defined interference with custody. *See supra* notes 30, 42 and accompanying text.

The author of the Texas court's opinion was a former domestic relations judge.⁷⁷ The opinion reflects this orientation: an orientation toward reconciliation. It begins with a detour into the ideal functions of grandparents, the alleged interferers in this case, and it makes excuses for them even before the evidence is recited:

Grandparents have a special role in the family unit and often serve as safety nets for their children and grandchildren. Lending a hand, a heart, and an ear can be especially important when loved ones are experiencing the trauma of divorce. But being there in times of need sometimes ensnares grandparents in bitter divorce disputes. In this tragic case, the grandparents' adult daughter employed egregious and outrageous tactics to prevent her ex-husband from seeing their two small children . . . [T]he grandparents supported their daughter emotionally and as a single mother, helping her care for their grandchildren.⁷⁸

With this beginning, the court signaled that the playing field would not be level. The effort would be to bring everyone together and avoid the pending dispute. The court would work to exonerate the parties who supported the person who interfered.

Whatever the orientation of a court should be in a case involving the best interest of the children, in a case involving interference with custody, the court's focus should be adjudication, not reconciliation. The existence of the claim makes reconciliation a long shot. The resolution likely will include curtailment or termination of an offending parent's rights, as happened in both the New Jersey⁷⁹ and the Texas⁸⁰ cases. The law does not call for balancing or consideration of welfare.

The New Jersey court handled its case more appropriately. Its tone throughout is dispassionate and ostensibly evenhanded. Its consideration of, and rejection of, the crime of kidnapping is credibly based on the law.⁸¹ There is no poetry. The tort or crime of interference with custody is a supremely harmful one, and a court should treat it so as to discourage it, not excuse it.⁸²

B. Proof of Intent and Knowledge by Circumstantial Evidence

“Because . . . intent is rarely overt, . . . [a plaintiff may] support a . . . claim with circumstantial evidence.”⁸³ “Direct evidence of subjective awareness is

77. *Justice Eva Guzman*, TEX. JUD. BRANCH, <http://www.txcourts.gov/supreme/about-the-court/justices/justice-eva-guzman.aspx> [<https://perma.cc/W6CR-PPMD>].

78. *Bos*, 556 S.W.3d at 296 (footnote omitted).

79. *See supra* Section II.A.

80. *See supra* Section II.B.

81. *See State v. Froland*, 936 A.2d 947, 950–56 (N.J. 2007) (analyzing kidnapping conviction).

82. *See id.* at 953–54 (analyzing interference with custody).

83. *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 764 (Tex. 2018).

not required; indeed, when a party's state of mind is at issue, circumstantial evidence is often the only proof available."⁸⁴ Sometimes, there is direct evidence of intent or knowledge, particularly if the actor announces his or her state of mind or if someone else informs the actor convincingly of the likely result.⁸⁵

The Texas court was correct in recognizing that the tort of interference with custody requires "reasonable cause to believe" that a violation is "likely."⁸⁶ But the court's opinion does not give appropriate weight to the circumstantial evidence that was necessary to prove this element.⁸⁷ In at least one instance detailed in the court's opinion, there is direct evidence of the defendants' knowledge of the order—the birthday party.⁸⁸ But usually, evidence proving knowledge or intent is circumstantial. Here, there was ample circumstantial evidence, in addition to direct evidence, that showed knowledge.⁸⁹ The court treats this evidence as though it applied only to Mother and only to schemes or planning. Of course, mere planning does not create liability, as the opinion says;⁹⁰ but the important point is that the court misapprehended this evidence. Far from merely showing a "scheme," Mother engaged in "flagrant" conduct,⁹¹ as the opinion states, and it shows circumstantially that the defendants knew they were violating a court order. The case is similar to another case decided by the court and cited in its opinion, in which knowledge of a scoutmaster's conduct was inferred from prior events.⁹²

First, Grandparents had been involved in an earlier course of similar conduct by their daughter.⁹³ She had made the same kinds of allegations against a boyfriend, and Grandparents actually paid a sum of money to

84. *City of San Antonio v. Tenorio*, 543 S.W.3d 772, 782–83 (Tex. 2018) (footnotes omitted) (first citing *Tex. Dep't of Criminal Justice v. Simons*, 140 S.W.3d 338, 348 (Tex. 2004), *superseded by statute*, TEX. REV. CIV. STAT. ANN. § 101.101(c) (West 2019), *as recognized in* *Worsdale v. City of Killeen*, 578 S.W.3d 57 (Tex. 2019)); and then citing *Bentley v. Bunton*, 94 S.W.3d 561, 596 (Tex. 2002)).

85. *See, e.g., State v. Boyd*, 797 S.W.2d 589, 595 (Tenn. 1990).

86. *Bos v. Smith*, 556 S.W.3d 293, 300 (Tex. 2018).

87. *See supra* notes 45–69 and accompanying text (discussing evidence of Grandparents' awareness).

88. *See supra* notes 45–46 and accompanying text.

89. *See Bos*, 556 S.W.3d at 300.

90. *Id.* at 301.

91. *Id.* at 300.

92. *See Golden Spread Council, Inc. #562 of the Boy Scouts of Am. v. Akins*, 926 S.W.2d 287, 290–91 (Tex. 1996).

93. *Bos*, 556 S.W.3d at 304.

settle her liability for that.⁹⁴ The court’s opinion does not give any weight to this fact.⁹⁵ Second, Grandfather admitted to lying about the Father’s abuse himself.⁹⁶ Again, the court gave no weight to this evidence.⁹⁷ Grandparents lived with Mother for an extended period and communicated with her frequently outside of that period.⁹⁸ Her psychological illnesses, even if diagnosed later, inevitably would have produced conduct that signaled the falsity of Mother’s claims.⁹⁹ In similar fashion, the court dismissed all other evidence of knowledge.¹⁰⁰ Even in the criminal law, ostrich-like behavior proves intent or knowledge.¹⁰¹ Deliberate action to create deniability is prevalent even in intact families on the part of parents,¹⁰² and presumably, it is prevalent with those who assist them.

In spite of this background, the Texas court explained Grandparents’ behavior by referring to how badly Mother behaved.¹⁰³ “Mother’s conduct was so outrageous and unprecedented that Grandparents could not have reasonably anticipated Mother would behave as she did.”¹⁰⁴ One might argue that the extent of outrageousness of observed conduct makes it *more* recognizable, not less so, but this kind of inference usually is left to the trier of fact. One might also argue that earlier similar conduct—false allegations against her boyfriend, requiring payment to settle—would make the conduct not “unprecedented.” Furthermore, one might consider that the evidence cumulatively weighed more than its single parts; but the Texas court excused all indications of knowledge singly, rather than cumulatively.

The New Jersey court, in contrast, recited all of the evidence together and concluded that it was sufficient by looking at it in its totality.¹⁰⁵ The court could have emulated the Texas court’s approach by excusing each fact after reciting it. The opinion then might sound like this: buying a boat is not evidence of interference with custody, taking children on a vacation to South Carolina is not evidence of knowledge that the children were being abducted, and withdrawing sums of money from two bank accounts does not prove knowledge of a nefarious purpose. In summary, knowledge of interference with custody is and should be required before a person

94. *Id.*

95. *See id.* at 300–02.

96. *Id.* at 307.

97. *Id.* at 302.

98. *Id.* at 298, 302.

99. *Id.* at 304.

100. *Id.*

101. *See* United States v. Heredia, 483 F.3d 913, 918–20 (9th Cir. 2007) (en banc).

102. *Id.*

103. *Bos*, 556 S.W.3d at 303.

104. *Id.*

105. *See* State v. Froland, 936 A.2d 947, 948–50 (N.J. 2007).

assisting can be liable, but it should be provable by circumstantial evidence. And the evidence should be considered in its cumulative weight, not viewed and excused in separate bits.

C. *Public Awareness of Interference with Custody*

One puzzling aspect of the Texas court's opinion is its insistence that normal people are unaware of interference with custody.¹⁰⁶ The Texas court seemed to believe that recognition of interference is a strange thing within the general public.¹⁰⁷ This approach seems to lie behind the court's incredulity at Grandparents' apparent awareness of their daughter's actions.¹⁰⁸ In fact, the court makes fact findings in several places in its opinion, to the effect that no one in Grandparent's situation would have anticipated false allegations in this case.¹⁰⁹

The available data are strongly to the contrary. The comprehensive book, *True and False Allegations of Child Sexual Abuse: Assessment and Case Management*, edited by Tara Ney, shows that beginning as early as 1980, a great deal of "media attention has been directed at sexual abuse allegations arising in custody and access disputes."¹¹⁰ Michael F. Elterman and Marion F. Ehrenberg say that many reports about "falsely accused fathers in the popular press" have illustrated the problem.¹¹¹ Another researcher reports that there has been a "media explosion" in which reports of alleged false allegations have been publicized.¹¹²

The New Jersey court correctly avoids skepticism based on an erroneous impression of public ignorance and appropriately reviews the evidence.¹¹³

106. See *Bos*, 556 S.W.3d at 301–02.

107. See *id.*

108. See *id.* at 303 (concluding that Mother's conduct was "unforeseeable").

109. See *id.* at 301–03 (concluding Grandparents had no "reason to attribute a sinister motive"; they "would not have had reasonable cause to believe" any improper behavior existed; and Mother's conduct "was so outrageous and unprecedented" that they "could not have reasonably anticipated [it]").

110. Marion F. Ehrenberg & Michael F. Elterman, *Evaluating Allegations of Sexual Abuse in the Context of Divorce, Child Custody, and Access Disputes*, in *TRUE AND FALSE ALLEGATIONS OF CHILD SEXUAL ABUSE: ASSESSMENT AND CASE MANAGEMENT* 209, 212 (Tara Ney ed., 1991).

111. Michael F. Elterman & Marion F. Ehrenberg, *Sexual Abuse Allegations in Child Custody Disputes*, 14 *INT'L J.L. & PSYCHIATRY* 269, 270 (1991).

112. Meredith Sherman Fahn, *Allegations of Child Sexual Abuse in Custody Disputes: Getting to the Truth of the Matter*, 25 *FAM. L.Q.* 193, 199 (1991).

113. See generally *State v. Froland*, 936 A.2d 947, 950–56 (N.J. 2007) (analyzing evidence).

The Texas court actually imports a false view of public knowledge to avoid deferring to the trier of fact.¹¹⁴

D. Proof of Knowledge or “Reason to Believe” on the Part of a Person Assisting a Violation

The Texas statute contains a requirement of awareness, as presumably all such statutes would. A person who assists a violation is not liable unless he or she “had actual notice of the existence and contents of the order” or “had reasonable cause to believe that the child was the subject of an order and that the persons actions were likely to violate the order.”¹¹⁵ In other words, actual knowledge is not required. A violation exists if the person assisting had “reason[] . . . to believe” that violation was “likely.”¹¹⁶

The Texas court was so hostile to the finding of a violation that it deliberately misread the statute. In fact, the court’s opinion means that no one can be the subject of a successful interference claim unless they know the specifics of particular dates and times in a court order that they have assisted in violating.¹¹⁷ The opinion states, “Under the standard possession order, Father was entitled to possession in specified circumstances. Thus, Father had to prove he was denied possession during those specific times and that Grandparents aided those particular violations.”¹¹⁸

This requirement appears nowhere in the Texas statute,¹¹⁹ and in fact it is contrary to the explicit words of the statute. Furthermore, it is a nonsequitur. The requirement that Father was denied proper access does not imply that someone assisting in a violation needs to know the exact terms of a possession order to be assisting in the violation.

In fact, the term that the court’s opinion adds to the statute would lead to results that the legislature could not possibly have intended. For example, if a person were to assist a violation by secreting the child for months, or for a year, or for a time long enough so that anyone must have known that it violated an access order, the assister could not be proved liable because the assister would not have known the exact dates and hours of access under the order. Alternatively, if someone were to assist in removing the child from the state or even taking the child to a foreign country, the assister could not be proved liable, because the Texas court’s opinion requires knowledge of the exact times in the court’s order.¹²⁰ These results are not

114. *See generally Bos*, 556 S.W.3d at 301–02.
115. TEX. FAM. CODE ANN. § 42.003 (West 2019).
116. *Id.*; *see Bos*, 556 S.W.3d at 300.
117. *Bos*, 556 S.W.3d at 301.
118. *Id.*
119. *See generally* FAM. § 42.003.
120. *See Bos*, 556 S.W.3d at 301.

required by the Texas statute either expressly or impliedly, and the words of the statute are explicitly to the contrary. One can only conclude that these words of the opinion are hyperbole, not to be taken literally.

At one point, the court states that Grandparents “never received a copy of the standard possession order” and they “did not know the details.”¹²¹ This observation should not have been a reason for holding against Father. But given the court’s reasoning, it might be prudent, if it were not so outlandish, for a noncustodial parent to send a copy of the governing decree to every person who might assist in interference, by certified mail.¹²²

Actually, there was at least one instance when the defendants obviously had notice of the time when they were violating the court’s order: the birthday party. On the date in question:

Father called Grandmother and told her he had the right to possess Mike under the standard possession order for the upcoming weekend and would be collecting him from Mother’s house at 6:00 p.m. on Friday evening. . . . [B]ut the boys were not home because, at Mother’s request, Grandmother had taken them to a two-hour birthday party.¹²³

The court points out that Father did not contact Grandmother.¹²⁴ But it does not matter what Mother or Father did, or that it was “just” a birthday party. The important fact is that Grandmother had “reason[] . . . to believe” that the violation she was committing was “likely.”¹²⁵ Even under the court’s added requirement of precise knowledge, which is not within the statute, the violation is indisputable. Furthermore, it does not matter that parents often trade times; the parties had no agreement here.¹²⁶ The court’s holding that this indisputable violation was not a violation may cause more instances of contempt of court orders.

The New Jersey court did not make this mistake. Its holding is based on evidence that meant that Froland had sound reason to believe that there was a violation.¹²⁷ There is and should be a requirement of knowledge,

121. *Id.*

122. Obviously, this advice is unrealistic unless the potential assisters pose a serious risk.

123. *Bos*, 556 S.W.3d at 297.

124. *Id.*

125. TEX. FAM. CODE ANN. § 42.003(b)(1) (West 2019).

126. *See Bos*, 556 S.W.3d at 297.

127. *See generally* State v. Froland, 936 A.2d 947, 950–56 (N.J. 2007) (analyzing evidence).

but it should not be a requirement that the violator have the precise terms of the governing court order in memory.

E. Every Party Is Presumed to Know the Law

The standard possession order in Texas is “standard” because it is a part of the law. By violating the standard possession order, Grandparents automatically violated the law with knowledge, because of the principle that every citizen is presumed to know the law. The standard possession order is set out in its entirety at section 153.312 of the Texas Family Code.¹²⁸ The statute contains specific and exact times for possession, which are imputed as knowledge:

- (1) on weekends throughout the year beginning at 6 p.m. on the first, third, and fifth Friday of each month and ending at 6 p.m. on the following Sunday; and
- (2) on Thursdays of each week during the regular school term beginning at 6 p.m. and ending at 8 p.m., unless the court finds that visitation under this subdivision is not in the best interest of the child.¹²⁹

Further provisions—very specific provisions—govern possessions for vacations, certain holidays, and other situations with specific possession lengths and dates.¹³⁰ If having read the precise law at issue was a requirement, the law could not work. In any event, an assister is presumed to have known the standard possession order established by law, just as they are presumed to know more detailed provisions like the provision of the penal code that defines murder,¹³¹ or specific vehicular violations defined by a transportation code.¹³² In fact, a complete stranger to the family code would have had ample notice of the access schedule in this case, if only from the frequency of Grandparents’ interventions, which included “monitoring” Mother by living on site with her.

IV. THE IMPORTANCE OF KEEPING INTERFERENCE CLAIMS VIABLE

Researchers of false accusations of child abuse are vehement in saying that the accusations cause lasting harm not only to noncustodial parents but also to children. As Elterman and Ehrenberg report, “If an error is made, a child’s physical and psychological security may be jeopardized

128. TEX. FAM. CODE ANN. § 153.312 (West 2019).

129. *Id.* at § 153.312(a); *see also* Cole v. Camelback Mountain Ski Resort, No. 3:16-CV-1959, 2017 WL 2805499, at *4 (M.D. Pa. June 28, 2017) (collecting Supreme Court, federal, and state authorities establishing this proposition).

130. *See generally* FAM. § 153.312.

131. *E.g.*, TEX. PENAL CODE ANN. § 19.02 (West 2019).

132. *E.g.*, TEX. TRANSP. CODE ANN. § 522.011 (West 2019).

or a parent's family life and career may be destroyed."¹³³ And "[c]ase studies of falsely accused fathers in the popular press" have shown that "attempting to prove one's innocence can be emotionally and financially devastating."¹³⁴

The use of false allegations in custody disputes is more widespread than in other contexts. "The proportion of [probably false] allegations of sexual abuse made by parents during . . . custody and visitation [litigation] has been significantly greater" than those made in other circumstances.¹³⁵ Other researchers "were unable to document 10 of 18 (55%) charges of sexual abuse in children evaluated during custody and visitation disputes."¹³⁶ Another researcher "reported four improbable and seven probable allegations of sexual abuse made by the custodial, against the noncustodial, parent (36%)."¹³⁷ These are high proportions of false allegations. Twenty-two percent of false, or improbable, allegations were made by children—meaning nearly 80% by parents or others; one-third of these were produced by custodial disputes.¹³⁸

And the incentive to commit violations is powerful, because violations are successful. Elterman and Ehrenberg say, "Allegations of sexual abuse have been most common in child custody disputes . . . and center around issues of visitation."¹³⁹ Furthermore, "An allegation of sexual abuse . . . will capture the judge's attention and effect an immediate suspension of the noncustodial parent's visitation rights."¹⁴⁰

The legislatures of both New Jersey and Texas wanted to stop this malignant practice with their interference with custody statutes.

V. CONCLUSION

The decisions of the New Jersey and Texas courts are bookends. They illustrate both appropriate and unduly cramped readings of interference with custody laws. Liability under the law should not follow upon every mistaken interference with another parent's custody, because parties should be able to engage in informal trades of visitation times, and even cooperation

133. Elterman & Ehrenberg, *supra* note 111, at 270.

134. *Id.*

135. *Id.* at 272. Researchers tend to use the terms "probable" and "improbable" in describing apparently true and false claims because there is no clear dichotomy.

136. *Id.*

137. *Id.*

138. Ehrenberg & Elterman, *supra* note 110, at 213–14.

139. Elterman & Ehrenberg, *supra* note 111, at 273.

140. *Id.*

produces occasional disputes. But proof of serious violations should not be made unduly difficult. The New Jersey Supreme Court used proper methods of considering the evidence and interpreted the law sensibly. The Texas Supreme Court was so hostile to the interference tort that it misread both the evidence and the governing statute.

Evidence in such a case should be viewed in its totality. One way for a court to sabotage an interference law is to view each piece of evidence in isolation and to explain each piece away separately. The Texas court used this method to reach an unfortunate result, while the New Jersey court properly considered the totality of the evidence. Proof of knowledge, awareness, or “reason to believe” elements of the tort will normally be supplied from circumstantial evidence, because it is impossible to open an offender’s head to find direct proof. The New Jersey court considered circumstantial evidence of knowledge appropriately, but the Texas court did not. Furthermore, the Texas court treated false allegations of abuse as so unfamiliar that people could not possibly be expected to know about their existence, whereas the literature shows that the public is well aware of this phenomenon.

Interpretation of the element of awareness by one assisting a violation is a particularly important issue. The Texas court’s requirement that a violator know the precise terms of the governing court order is not only unrealistic but contrary to the express terms of the statute, which requires only “reason[] . . . to believe” that a violation is “likely.”¹⁴¹ The New Jersey court avoided this mistake. The Texas court compounded its error by failing to realize that the possession order in the case before it was part of the statewide law, expressed verbatim in a statute, of which knowledge was imputed to the violators.

Interference with custody is a malignant tort. The literature documents the harm done both to children and to parents. The claim for interference with custody should be neither so easy to prove that it makes cooperation between parents difficult nor so hard to prove that it ceases to be a viable claim. New Jersey has reached the right balance of these goals, but Texas has not.

141. TEX. FAM. CODE ANN. § 42.003(b)(2) (West 2019).