

Parental Kidnapping and the Tort of Custodial Interference: Not in a Child's Best Interests

Jessica Larson was less than two years old when her mother, Loree, commenced an action to dissolve her marriage to Jessica's father, John.¹ Jessica was temporarily placed in her mother's custody. When the divorce was final, John was given permanent physical custody of his daughter. Despite the court order granting him custody, John was denied access to his daughter when Loree fled the state with Jessica.

After a seven year search, Loree and Jessica were located with the help of the Federal Bureau of Investigation (F.B.I.) and local law enforcement authorities. They had been living in another state with Loree's second husband. There is evidence that Loree had extensive contact with her parents as well as other relatives over this seven year period, yet her parents had continuously denied to John and law enforcement authorities that they had knowledge of Loree's whereabouts. Loree pled guilty to a criminal charge of felony deprivation of parental rights and Jessica was returned to her father. John then filed a civil lawsuit against Loree, her parents, and other relatives for intentional interference with his custodial rights to his minor child, seeking damages for search related costs, emotional distress and loss of Jessica's companionship and society.²

The Minnesota Supreme Court determined that recognizing the tort of custodial interference³ was not the best public policy for the State of Minnesota and reversed the decision of the state court of appeals.⁴ The court's rationale emphasized the best interests of the children involved in such lawsuits.⁵ After balancing the rights of the injured parent with the probable effects on the children, the court determined that creating this new wrong⁶ would only compound the damages already suffered by the child by placing the child in the middle of additional, vicious litigation.⁷ The fact that existing state law already provided means of

1. *Larson v. Dunn*, 460 N.W.2d 39 (Minn. 1990).

2. John also alleged intentional interference with visitation rights, civil conspiracy, intentional infliction of emotional distress, and fraud. The Minnesota Supreme Court only considered the tort of intentional interference with custodial rights. *Id.* at 44.

3. The tort of custodial interference as argued before the Minnesota Supreme Court is based on the Restatement (Second) of Torts § 700 (1977). *See infra* text accompanying notes 108-27.

4. *Larson*, 460 N.W.2d at 47.

5. *Id.* at 45.

6. This was a question never before considered by the Minnesota Supreme Court. *Id.* at 44.

7. *Id.* at 39.

redressing this wrong was also instrumental in the decision.⁸ In rendering a decision which is against the great weight of authority,⁹ the Minnesota Supreme Court realized that the tort of custodial interference is not the cure-all for parental kidnapping as some commentators have espoused.¹⁰ Instead, the tort action may actually do more harm than good to the children "caught in the middle."¹¹

This Note examines the tort of custodial interference as applied to parental kidnapping. It first examines the causes and extent of parental kidnapping and briefly discusses the alternative remedies supplied by law. Next, the tort of custodial interference is examined, focusing on its applications and its inherent problems. Finally, the Note concludes that the tort of custodial interference should not be applied in situations involving parental kidnapping and proposes that more effective and less harmful remedies should be sought.

I. THE PROBLEM OF PARENTAL KIDNAPPING

Parental kidnapping has become an epidemic of both national and international concern.¹² By 1985, there were approximately 100,000 cases reported each year, and authorities estimate that there may be as many as 750,000 child snatchings annually that go unreported.¹³ In fact, the abduction of a child by one of his or her parents is far more common than the more emotionally publicized situation when a child is abducted by a stranger.¹⁴

8. The state legislature dealt with the problem by passing laws making the non-custodial parent's actions a felony, allowing recovery of costs and expenses, enforcing custody decrees across state lines, and giving state courts broad discretion to protect custodial and visitation rights. *Id.* at 46-47.

9. By the court's analysis, 21 jurisdictions have ruled on this issue. *Id.* at 44 n.3. Of these, 11 are decisions of state supreme courts, six are state appeals courts rulings, and the others are federal court cases attempting to predict how the state supreme court will rule. *Id.*

10. See Richard A. Campbell, Note, *The Tort of Custodial Interference — Toward a More Complete Remedy to Parental Kidnappings*, 1983 U. ILL. L. REV. 229.

11. Three justices dissented, citing the following factors as dispositive: respect for unappealed court orders regarding custody, a recognized need for compensation, historical developments in related tort law, the moral aspect of the defendants' conduct, and the preventive and punishment aspects of civil liability. See *Larson v. Dunn*, 460 N.W.2d 39, 47-53 (Minn. 1990).

12. The term parental kidnapping is synonymous with child snatching and child abduction for the purposes of this Note. The international aspects of parental kidnapping are beyond the scope of this Note.

13. *Parental Kidnapping and Child Support: Hearing Before the Subcomm. on Juvenile Justice of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 1 (1985) [hereinafter *1985 Hearings*] (statement of Senator Arlen Specter).

14. *Id.* at 2 (statement of Senator Mitch McConnell).

A parent may abduct his child for many reasons. Many men feel the legal system is biased against the father in determining custody and visitation rights.¹⁵ As a result, the father may be fearful that he will not be granted custody or any kind of favorable visitation rights. The parent may also be angry about the current custodial arrangement.¹⁶ Another emotion which plays a pivotal role in a child abduction is revenge.¹⁷ The child is used as a tool to inflict pain and suffering on the spouse by an angry, hurt, or bitter parent. The child may be used as a bargaining chip in return for more favorable custody terms, or once cornered, the abducting parent may use the child as an inducement to drop any civil or criminal sanctions that may be pending.¹⁸

Traditionally, several factors contributed to, if not encouraged, the problem of parental kidnapping. First, state courts have historically exercised jurisdiction in custody disputes based on several factors which often resulted in more than one state assuming jurisdiction. Jurisdiction has been based on the child's physical presence within the state, the child's domicile, the parents' domicile, or the fact that the court may have issued the original decree.¹⁹ Because the United States Supreme Court has been unwilling to apply the Full Faith and Credit Clause of the United States Constitution to a state custody decree,²⁰ a noncustodial parent was encouraged to snatch his child, forum shop for a state which would refuse to give full faith and credit to an existing custody decree, and attempt to convince a court in that state to award the abducting parent custody.²¹

15. JOHN E. GILL, *STOLEN CHILDREN* 37 (1981).

16. The noncustodial father feels alienated from his children and angry at the legal system, which places strict limits on the amount of time noncustodial parents are allowed to see their children and punishes them for falling behind on support payments. *Id.* at 37-38. Others feel that the court ordered formula used to compute the amount of child support the noncustodial parent must pay is faulty and part of a vindictive system which drives parents to snatch their children and leave the state. See David S. Redmondini, *State's Child Support Rules Draw Bitter Outburst*, INDIANAPOLIS STAR, Dec. 7, 1990, at A1.

17. *Parental Kidnapping: Hearing Before the Subcomm. on Juvenile Justice of the Sen. Comm. on the Judiciary*, 98th Cong., 1st Sess. 166 (1983) [hereinafter *1983 Hearings*] (statement of Kathy Rosenthal, Executive Director of Children's Rights of Florida, Inc.). Because revenge, not love and concern for the child, is often a primary motive, the child may quickly become a source of aggravation and excess baggage. *Id.* This certainly contributes to the damages suffered by the child. See *infra* text accompanying notes 27-34.

18. *1983 Hearings*, *supra* note 17, at 96 (statement of Hon. Christopher Foley).

19. HOMER H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 12.5 (1988).

20. *May v. Anderson*, 345 U.S. 528 (1953).

21. These factors have been alleviated somewhat by the passage of the Uniform Child Custody Jurisdiction Act in every state. See *infra* text accompanying notes 38-46.

Second, a parent who kidnapped his child had little fear of criminal sanctions. Both state and federal laws historically excluded parents from the statutory definition of kidnapping.²² Any criminal sanctions that did apply were not enforced because an abduction was considered the natural result of a parent's desire to be with his child. Consequently, no unlawful intent was present.²³

Finally, federal agencies such as the Federal Bureau of Investigation were unwilling to use their vast resources and expertise on what it viewed as a domestic dispute.²⁴ As a result, the troublesome custody laws, lack of criminal sanctions, and lackluster attention from law enforcement authorities all contributed to an atmosphere in which self-help and "seize-and-run" attitudes prevailed.

The damages resulting from a parental kidnapping are tremendous. The custodial parent may suffer both physically and emotionally. The custodial parent's life often becomes frozen in time; the uncertainty of their child's future consumes them. The parent may not be able to continue working and often is so distraught that his or her physical health deteriorates. Fatigue, stomach pains, and insomnia are common.²⁵ The terrific frustration felt from enduring a fruitless search gives way to the guilt associated with giving up. The financial effects can be equally devastating. Legal fees and search-related costs can quickly consume life savings and even second or third mortgages.²⁶

As great as the custodial parent's damages are, the damages to the child are worse. The abduction itself may be traumatizing, even violent.²⁷

22. The federal kidnapping statute expressly exempts parents from criminal liability. This statute, also known as the Lindbergh Act, codified the notion that parents, even acting wrongfully, did what they thought was best for the child. 18 U.S.C. § 1201 (1988). Most state laws followed this idea by also exempting parents from criminal liability for stealing their child. SANFORD N. KATZ, *CHILD SNATCHING: THE LEGAL RESPONSE TO THE ABDUCTION OF CHILDREN* 90 (1981).

23. See Sanford N. Katz, *Legal Remedies for Child Snatching*, 15 *FAM. L.Q.* 103, 106 (1981) [hereinafter Katz, *Remedies*] (citing *State v. Elliot*, 131 So. 28 (La. 1930); *People v. Nelson*, 33 N.W.2d 786 (Mich. 1948)).

24. *Id.* See also GILL, *supra* note 15, at 66. Local law enforcement officials also view these as domestic disputes and give them low priority. GILL, *supra* note 15, at 66.

25. See GILL, *supra* note 15, at 166-80. One woman could not continue to eat properly and lost 37 pounds in one month. *Id.* at 168. Another finally took her own life because she could not live with the pain any longer. *Id.* at 257.

26. One estimate is that a custodial parent will spend an average of \$20,000 trying to locate and regain custody of the child. *Proposed Federal Parental Kidnapping Prevention Act: Hearings Before the Subcomm. on Child and Human Development of the Senate Comm. on Labor and Human Resources*, 96th Cong., 1st Sess. 35 (1979) [hereinafter *1979 Hearings*] (statement of Lawrence H. Statter). Spending much greater amounts is not uncommon. *Id.* at 66 (statement of Susan Downer) (\$150,000 spent); *id.* at 145 (statement of Caroline Dunkley) (\$80,000 spent).

27. One father had several friends help him physically snatch his five-year-old child

The child's education is often neglected because of frequent moves undertaken to stay one step ahead of the custodial parent. The child may even be held out of school altogether.²⁸ Worse still, the abducting parent's fear of being found may cause frequent name changes, resulting in a child who grows up without an identity.²⁹ The emotional impact can be more devastating. The child often feels unloved, mistrustful, insecure, angry at the custodial parent for allowing the abduction to occur, and guilty for causing his parents to split up.³⁰ The child may become the subject of physical or mental abuse and neglect.³¹ In fact, some authorities consider parental kidnapping itself to be child abuse because of the identity changes, instilled fear of police, lies, separation from the other parent, and fugitive lifestyle which is forced on the child.³²

The long-term effects on a child who has been deprived of a stable environment can be substantial. Many carry lifelong scars. Most abducted children grow up to be emotionally unstable.³³ Nightmares and the fear of being kidnapped again are common. Afraid of being alone, these children cling to loved ones and fear strangers, doorbells, and telephones. They may grow up unable to form healthy relationships due to the lack of trust and security they experienced during their formative years.³⁴ Thus, the parental kidnapping exacts a heavy toll, both physical and emotional, on the child, the custodial parent, and the abducting parent who constantly lives in fear of being discovered.

II. CURRENT LEGAL RESPONSES TO PARENTAL KIDNAPPING

A. *Uniform Child Custody Jurisdiction Act*

The traditional jurisdictional problems in child custody matters led the National Conference of Commissioners on Uniform State Laws to

from his mother and grandparents which resulted in the child being sprayed with Mace as well as a car chase. GILL, *supra* note 15, at 40.

28. *Id.* at 144.

29. *Id.* at 147.

30. *Id.* at 149. The child is often told that the custodial parent does not love him or is dead. This form of brainwashing can result in further detrimental consequences once the child is returned to the custodial parent. *Id.* at 150-51 (daughter refused to refer to her mother as "Mom" and kicked and hit her).

31. One organization working to secure the location and return of abducted children gave a profile of the parental kidnapper as being vengeful, unstable, emotionally immature, abusive, and alcohol or drug dependent. 1983 *Hearings*, *supra* note 17, at 166 (statement of Kathy Rosenthal, Executive Director of Children's Rights of Florida, Inc.).

32. *Id.* at 167. Abuse or neglect can range from the lack of proper clothing to a situation in which the father, in fear of apprehension, kills his child and himself. *Id.* at 7 (statement of Lawrence Lippe).

33. See GILL, *supra* note 15, at 139-49.

34. *Id.* at 149.

formulate the Uniform Child Custody Jurisdiction Act (UCCJA).³⁵ The UCCJA has now been adopted by every state and the District of Columbia.³⁶ Among the purposes of the UCCJA is avoidance of jurisdictional competition, deterrence of abductions of children, and facilitation of the enforcement of custody decrees of other states.³⁷ The UCCJA attempts to limit jurisdiction of custody proceedings to one particular state in order to deter forum shopping.³⁸ It does this by establishing guidelines for courts to use in determining which court has jurisdiction over the child.³⁹ An interested court is to determine jurisdiction based on the child's welfare and best interests.⁴⁰ If concurrent jurisdiction exists, the UCCJA requires cooperation between the competing courts⁴¹ and prohibits any court from assuming jurisdiction in the event of forum non conveniens⁴² or if the petitioner has "unclean hands."⁴³

There are a few limitations inherent in the UCCJA. The UCCJA does not make interstate cooperation mandatory, and because it is a state as opposed to a federal statute, it cannot mandate that full faith and credit be given to a custody decree from another state. Because the UCCJA does not function until the abducting parent seeks to change the existing custodial arrangement, it provides no means for locating the child unless and until the abducting parent shows up in another court. Many parental kidnappers never attempt to "legalize" their custody situation. Further, the UCCJA does not provide for compensatory damages to either the damaged custodial parent or child, nor does it contain any means of punishing the abducting parent.⁴⁴

The UCCJA may have an indirect remedial effect. If a state court cannot or will not litigate custody because it determines that another state possesses jurisdiction over the child, that court may enforce any

35. UNIFORM CHILD CUSTODY JURISDICTION ACT, 9 U.L.A. 115 (1988) [hereinafter UCCJA].

36. *Id.* (listing of each state's individual statute).

37. *Id.* at 124.

38. *Id.* §§ 3, 6-7, 9 U.L.A. 143-44.

39. Consequently, courts are precluded from making their jurisdictional decision based solely on the child's physical presence within the state. *Id.* § 3(b), 9 U.L.A. 144.

40. A child's "home state" has jurisdiction unless there is a significant connection between the forum and the child, it is necessary to protect the child in an emergency, or no other state has or is willing to exercise jurisdiction. *See id.* § 3, 9 U.L.A. 143. "Home state" is defined as the state where the child lived with his parent for at least six months prior to the proceeding. *See id.* § 2(5), 9 U.L.A. 133.

41. *Id.* §§ 12-16, 9 U.L.A. 274-316.

42. *Id.* § 7, 9 U.L.A. 233 (encourages judicial restraint whenever another state appears to be in a better position to determine custody).

43. *Id.* § 8, 9 U.L.A. 251 (court is to decline jurisdiction when petitioner has abducted the child or engaged in some other objectionable activity).

44. *See Katz, Remedies, supra* note 23, at 105.

previous custody decree in a habeas corpus action and return the child to the custodial parent located in the other state.⁴⁵ Despite the fact that the UCCJA does not solve the problem in every instance, it effectively eliminates one factor which made parental kidnapping such an attractive option.⁴⁶

B. The Parental Kidnapping Prevention Act

The Parental Kidnapping Prevention Act (PKPA) was passed to supplement the UCCJA and to offer criminal and civil remedies to the victimized parent.⁴⁷ It supplements the UCCJA by mandating that every state shall enforce and refuse to modify an existing custody decree issued by another state pursuant to the provisions of the UCCJA.⁴⁸ This provision closed the doors of non-enacting UCCJA states to forum-shopping child snatchers.⁴⁹ This effectively awards full faith and credit to any existing custody decree.

The PKPA adds federal criminal sanctions for a child snatcher who flees the state. Although federal law enforcement authorities will not prosecute a parental kidnapper, the PKPA provides that any state that has classified parental kidnapping as a felony may request the assistance of the F.B.I. in locating the abducting parent and child.⁵⁰ This is authorized under the federal Fugitive Felon Act which gives the F.B.I. a jurisdictional basis for assisting state law enforcement authorities in the location and apprehension of fugitives from state justice.⁵¹

The PKPA also authorizes use of the Parent Locator Service (PLS) in locating the abducting parent and child.⁵² The PLS is a federal registry used to locate missing parents and was originally established to enforce child support obligations.⁵³ The registry locates a missing parent through computer-based statistics. For instance, social security numbers or un-

45. SANFORD N. KATZ, CHILD SNATCHING: THE LEGAL RESPONSE TO THE ABDUCTION OF CHILDREN 89 (1981) [hereinafter KATZ, CHILD SNATCHING]. For a discussion of the habeas corpus remedy, see *infra* text accompanying notes 71-72.

46. See *supra* text accompanying notes 19-21 (discussion of forum shopping).

47. For the full text of the act, see Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, 94 Stat. 3568 (1980) (codified in scattered sections of 18, 28 and 42 U.S.C.).

48. 28 U.S.C. § 1738A (1988).

49. All 50 states and the District of Columbia have passed statutes similar to the UCCJA. See *supra* note 36 and accompanying text.

50. 18 U.S.C. § 1073 (1988). For a discussion of whether a state classifies parental kidnapping as a felony or lesser infraction, see *infra* notes 66-68 and accompanying text.

51. 18 U.S.C. § 1073 (1988). The penalty for violations of the Fugitive Felon Act is a fine or imprisonment. *Id.*

52. 42 U.S.C. § 653 (1988).

53. *Id.* § 653(a).

employment compensation numbers may be used to pinpoint the abducting parent's most recent address and employer. The PLS is useless, however, if the abducting parent changes his name and social security number.

Like the UCCJA, the PKPA also suffers from limitations which prevent it from becoming the solution to the parental kidnapping problem. First, the federal kidnapping statute continues to exempt parents from criminal sanctions and the PKPA authorizes federal assistance under the Fugitive Felon Act only if the domicile state treats parental kidnapping as a felony.⁵⁴ Not every state does so.⁵⁵ The Fugitive Felon Act also does not apply if the abducting parent fails to leave the state.⁵⁶ Consequently, the F.B.I. is unable to render assistance to every parent and child victimized by a parental kidnapping.

Second, the F.B.I. has always been reluctant to get involved in parental abductions. Before passage of the PKPA, the F.B.I. interpreted the federal kidnapping statute, which exempts parents, to infer a congressional intent that the F.B.I. stay out of such controversies.⁵⁷ Since the passage of the PKPA, which includes a congressional intent that federal authorities apply the Fugitive Felon Act to parental kidnapping, the F.B.I. has been reluctant to devote full attention and resources to the problem.⁵⁸ It is reluctant to stretch its limited manpower in order to concentrate on what it still sees as a domestic dispute, thereby ignoring more important crimes.⁵⁹ Partial blame can also be directed at local law enforcement authorities who sometimes fail to extradite the abducting parent once found or to drop any criminal charges once the child is returned to the custodial parent.⁶⁰ This lack of cooperation among federal and state authorities adds to the F.B.I.'s reluctance to devote full attention to instances of parental kidnapping.

The Fugitive Felon Act requires that state law enforcement authorities request assistance. The victimized parent alone cannot do so.⁶¹ It also

54. The federal kidnapping statute is codified at 18 U.S.C. § 1201 (1988). See *supra* note 22.

55. See *infra* notes 66-68 and accompanying text.

56. 18 U.S.C. § 1073 (1988) (applies only to those fleeing across state lines).

57. 1983 Hearings, *supra* note 17, at 10 (statement of Lawrence Lippe).

58. Pub. L. No. 96-611, § 10(a), 94 Stat. 3573 (1980) (codified at 18 U.S.C. § 1073 (1988)) (express congressional intent that Fugitive Felon Act be applied to acts of parental kidnapping).

59. See 1979 Hearings, *supra* note 26, at 36 (statement of Lawrence H. Stotter); Katz, *Remedies*, *supra* note 23, at 106.

60. The F.B.I. only provides assistance to local law enforcement personnel in locating the child snatcher. Federal authorities do not have a prosecutorial function. 1983 Hearings, *supra* note 17, at 9. Thus, if the location of the abducting parent is known to local authorities, no federal assistance is forthcoming. *Id.* at 10.

61. *Id.* at 12.

does not authorize the F.B.I. to locate and return the child, only the abducting parent.⁶² Thus any reluctance on the part of local law enforcement officials renders the Fugitive Felon Act useless.

Third, the federal PLS is not available to everyone who may need it. Again, the victimized parent or her attorney cannot request assistance directly. The request must come from a representative who, under state law, has the authority to enforce a child custody determination.⁶³ In addition, the state must contractually subscribe to the PLS.⁶⁴

The primary purpose of the PKPA is to preclude a court from exercising jurisdiction to modify or issue custody decrees in instances of child snatching, as well as to provide federal assistance in locating the abducting parent and child. The PKPA also allows a custodial parent to recover expenses incurred in locating and procuring the return of the child.⁶⁵ Its effectiveness is limited, however, by a lack of uniformity in state kidnapping laws and the indifference of local and federal law enforcement officials.

C. Criminal Sanctions

State kidnapping statutes were historically aimed at third parties. Due in part to the attention of the PKPA, states have recently begun to address the problem of parental kidnapping in the criminal statutes. Special statutes directed solely at parental kidnapping have been passed in several states, and parents can now be held criminally responsible for kidnapping their own child in many others.⁶⁶ Parental kidnapping itself is a felony in many states.⁶⁷ Others make it a felony if the child is removed from the state.⁶⁸ However, many of the state statutes require the existence of a valid custody decree before the child snatching is considered a crime.⁶⁹ Otherwise, both parents are considered equally

62. *Id.*

63. Court officials, law enforcement officials, and federal or state prosecutors are all able to request assistance. However, this is not a mandatory duty. Katz, *Remedies*, *supra* note 23, at 138.

64. See Sue T. Bentsch, Comment, *Court-Sponsored Custody Mediation to Prevent Parental Kidnapping: A Disarmament Proposal*, 18 ST. MARY'S L.J. 361, 375-76 n.86 (1986) (effectiveness of PLS limited by nonadopting states).

65. 42 U.S.C. § 653 (1988) (travel expenses, attorney fees, witness fees, and costs of private investigations).

66. For a complete list of each state's kidnapping or custodial interference statute, see Katz, *Remedies*, *supra* note 23, at 106 app. B.

67. For a listing of those states making parental kidnapping a felony, see Campbell, *supra* note 10, at 238 n.67.

68. *Id.* at 238 n.68.

69. Nearly 70% of parental kidnappings occur before a final custody decree is adjudicated. 1979 *Hearings*, *supra* note 26, at 27 (statement of Bob Westgate).

entitled to custody. A few states have closed this loophole by including in the criminal statute an act of parental kidnapping which occurs before a final custody decree is entered.⁷⁰

Despite tougher criminal laws, parental kidnapping is not effectively addressed by many states' statutes. Too many abductions slip through the loopholes of the very statute which is supposed to deter such conduct. In addition, criminal sanctions do not guarantee the return of the child which is the foremost concern once the abduction occurs.

D. Judicial Remedies

1. *Habeas Corpus*.—The writ of habeas corpus is recognized as the primary remedy for persons who claim that they are legally entitled to the custody of a child.⁷¹ If the custodial parent is able to locate the child, the parent can file a writ of *habeas corpus* in the jurisdiction where the child is physically present. The writ requires the person wrongfully holding the child to turn the child over to the legal custodian. Because the writ allows the petitioner to enforce his current legal rights to the child, the writ requires a valid custody order.⁷² Consequently, the device is useless if final custody has yet to be determined, if the parents are awarded joint custody, or if the custodial parent is unable to locate the child.

2. *Civil Contempt of Court*.—Any violation of a court's custody determination is an act in contempt of court.⁷³ Contempt proceedings are widely used in parental kidnapping situations against not only the abducting parent, but also against anyone who interferes with the administration and enforcement of the custody decree.⁷⁴ A contempt citation offers little relief, however, if the abducting parent flees the state with the child because the citation is only as broad as the jurisdiction of the court that issues it.⁷⁵ Under the UCCJA and PKPA, a court in a second state must recognize an existing custody decree from another state, which

70. See, e.g., TEX. PENAL CODE ANN. § 25.03(a)(2) (Vernon 1989) (includes conduct if custody determination pending); WIS. STAT. ANN. § 948.31(3)(a) (West Supp. 1990) (crime to conceal child from other parent, regardless of legal custody). In addition, both the courts and state criminal laws have denied an abducting parent the defense that a joint custody decree continues to vest both parents with an equal right to custody. See WIS. STAT. ANN. § 948.31(2)(b) (West Supp. 1990) (joint custody does not preclude a finding of a criminal violation); *People v. Harrison*, 402 N.E.2d 822, 824 (Ill App. 1980) (father guilty of child abduction despite joint custody arrangement).

71. KATZ, CHILD SNATCHING, *supra* note 45, at 108.

72. *Id.* at 113.

73. *Id.* at 102.

74. *Id.*

75. *Id.* at 103.

gives it the power to issue a contempt citation over a fleeing child snatcher.⁷⁶ However, the original state court which issued the custody decree has no power over an absent party.⁷⁷ Moreover, a contempt citation provides no relief when the child is kidnapped before custody has been determined.⁷⁸

E. Tort Recovery

The foregoing legal responses are directed at deterring a parental kidnapping or returning the child after he has been kidnapped. These remedies do not provide any compensatory relief to the custodial parent. The victimized parent's primary means of recovering damages has been through the use of various tort claims.⁷⁹ The early common law permitted a father to sue for the loss of a child's services.⁸⁰ Over time, the loss of a child's services was no longer implicitly required in some states and a victimized parent could recover for damage to the relationship between parent and child. The alternative theories of relief are discussed below.

1. False Imprisonment.—False imprisonment is the unlawful detention of another, for any length of time, whereby he is deprived of his personal liberty.⁸¹ This cause of action has been used by a custodial mother to recover damages from the father of her minor child after the father abducts the child.⁸² However, when one parent does not have a sole legal right to the child, as in the situation in which custody has not been determined or the parents are awarded joint legal custody, presumably this cause of action will not be allowed.⁸³ Both compensatory and punitive damages are available to the victimized parent.⁸⁴

76. See *Miller v. Superior Ct.*, 587 P.2d 723 (Cal. 1978) (upholding custody decree issued in Australia and issuing contempt citation against noncustodial mother who had fled to California).

77. KATZ, CHILD SNATCHING, *supra* note 45, at 104.

78. *Id.*

79. Three basic requirements must be met to recover in tort: (1) a duty owed to the victim by the tortfeasor; (2) breach of that duty; and (3) compensable harm to the victim. See WILLIAM L. PROSSER ET AL., PROSSER & KEETON ON THE LAW OF TORTS 4 (5th ed. 1984). For a discussion of the harm suffered by the custodial parent in a parental kidnapping, see *supra* notes 25-26 and accompanying text.

80. The early common law did not recognize a woman as being independent of her husband; thus, a wife could not sue on behalf of herself. The passage of the Married Women's Acts abolished this legal fiction. PROSSER, *supra* note 79, at 916.

81. See *Kajtazi v. Kajtazi*, 488 F. Supp. 15, 18 (E.D.N.Y. 1978).

82. *Id.*

83. *Id.*

84. A showing of malice is required to collect punitive damages. *Id.* at 19.

2. *Negligence*.—The Court of Appeal of Louisiana, in *Spencer v. Terebelo*,⁸⁵ allowed a tort action based on the general tort law doctrine of negligence per se, which holds that violation of a statute is considered proof of a tort.⁸⁶ The noncustodial parent had violated the state parental kidnapping statute, thus she had breached a duty of recognizing legal custody owed to the custodial parent.⁸⁷ The court awarded general damages as well as travel expenses incurred by the custodial parent.⁸⁸ Sole legal custody is apparently required under this viewpoint. The same court has denied causes of action to a noncustodial parent complaining of interference with visitation rights⁸⁹ and to a parent with joint legal custody.⁹⁰

The Oregon Supreme Court allowed recovery against a third party for simple negligence. In *McEvoy v. Helikson*,⁹¹ the noncustodial mother's attorney was ordered by the court to hold the mother's passport while she had temporary custody of the child during visitation. The attorney breached his duty to the custodial father when he gave the mother her passport while she had physical custody of the child.⁹² The mother subsequently abducted the child and fled to Switzerland in defiance of the court order, and the father was allowed to recover damages from the attorney.⁹³

3. *Alienation of Affections*.—Attempts to recover damages for the alienation of a child's affections have generally been unsuccessful. Nearly all states have either judicially or statutorily abolished this cause of action because such a tort is subject to abuses.⁹⁴ In the parental kidnapping context, courts have often construed an action as being one for alienation of the child's affections if the parent does not have sole legal custody⁹⁵ or if the defendant is a

85. 373 So. 2d 200 (La. Ct. App. 1979).

86. See RESTATEMENT (SECOND) OF TORTS § 874A (1977).

87. *Spencer*, 373 So. 2d at 202.

88. *Id.* at 204.

89. *Owens v. Owens*, 471 So. 2d 920 (La. Ct. App. 1985).

90. *Johns v. Johns*, 471 So. 2d 1071 (La. Ct. App. 1985).

91. 562 P.2d 540 (Or. 1977).

92. *Id.* at 543.

93. *Id.* at 544.

94. See *Bartanus v. Lis*, 480 A.2d 1178, 1181 (Pa. Super. Ct. 1984) (child becomes the object of intrafamily disputes and becomes a strategic tool for use by one family member against another); RESTATEMENT (SECOND) OF TORTS § 699 (1977). For a complete listing of court decisions based on this tort, see Jeffrey F. Ghent, Annotation, *Right of Child or Parent to Recover for Alienation of Other's Affections*, 60 A.L.R.3d 931 (1974).

95. *McGrady v. Rosenbaum*, 308 N.Y.S.2d 181 (N.Y. Sup. Ct. 1970) (father denied relief for deprivation of custody and visitation rights when mother gained legal custody of child in unilateral divorce action and moved to Israel), *aff'd mem.*, 324 N.Y.S.2d 876 (N.Y. App. Div. 1971).

relative.⁹⁶ These courts use strong language to support their decisions, stating that an action for damages is the least useful technique for the resolution of custody disputes,⁹⁷ and a damages award does not necessarily advance the best interests of the child.⁹⁸ The presence or absence of legal custody seems to be a fine line in determining whether a victimized parent can recover damages and consequently, precludes a large number of parents from doing so.⁹⁹

4. *Civil Conspiracy*.—To recover under this cause of action, the plaintiff must prove the existence of an agreement between two or more individuals to commit an unlawful act, that one or more of the conspirators committed an overt, tortious act in furtherance of the conspiracy, and that the plaintiff suffered damages caused by acts committed pursuant to the conspiracy.¹⁰⁰ In a North Carolina case, the custodial mother sued her child's father as well as his family for damages resulting from the child's abduction.¹⁰¹ Even though the whereabouts of the child and his father were unknown, the mother was allowed to recover against her former in-laws who had managed the abducting parent's business affairs while he was away and made contact with the abductor, yet had refused to cooperate in locating the child. These acts were sufficient to implicate the father's family in a conspiracy to unlawfully abduct the child.

5. *Intentional Infliction of Emotional Distress*.—One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability.¹⁰² Thus, a victimized parent of a parental kidnapping may be able to recover damages under this tort theory. To do so, the court must be convinced that the child snatching is extreme and outrageous. One court stated that parental kidnapping is outrageous because it exceeds all boundaries of behavior usually tolerated by society.¹⁰³ Therefore, most abductions resulting in separation of custodial parent and child would presumably be considered outrageous. One advantage this cause of action has over other tort remedies is that other, lesser interferences with the parent-child relationship may also meet the outrageous standard. It is clear that superior custody rights

96. *Meikle v. Van Biber*, 745 S.W.2d 714 (Mo. Ct. App. 1987) (mother denied relief against grandparents who enticed child away from mother).

97. *McGrady*, 308 N.Y.S.2d at 190.

98. *Meikle*, 745 S.W.2d at 716.

99. See *supra* note 72 and accompanying text.

100. *Coleman v. Shirlen*, 281 S.E.2d 431, 433 (N.C. Ct. App. 1981).

101. *Id.*

102. RESTATEMENT (SECOND) OF TORTS § 46 (1977).

103. *Kajtazi v. Kajtazi*, 488 F. Supp. 15, 20 (E.D.N.Y. 1978).

are not required in all states in order to recover.¹⁰⁴ However, not every state allows an action for intentional infliction of emotional distress to proceed regardless of the custody situation. Several jurisdictions have refused to recognize the cause of action when brought by a noncustodial parent for interference with his visitation rights.¹⁰⁵ The stated reasons for this refusal include the danger of encouraging claims for petty infractions, the existence of other effective remedies, and, most importantly, the belief that a claim for damages would not be in the child's best interests.¹⁰⁶

From the custodial parent's viewpoint, the tort of intentional infliction of emotional distress has a distinct advantage over other remedies especially in those states where it is recognized regardless of the custody situation. However, this cause of action neither provides a strong deterrent to a future kidnapping nor guarantees the return of the child.

6. *Custodial Interference*.—Many courts have allowed a victimized parent of a parental kidnapping to recover damages using the tort of custodial interference. The remainder of this Article focuses on this tort's elements, applications, and weaknesses. The tort of custodial interference does not provide a complete remedy. In fact, the practical effects of a tort action outweigh the benefits to the extent that it should not be recognized at all as a remedial measure for parental kidnapping.¹⁰⁷ Finally, alternatives to a tort action will be considered which may exact a lesser toll on the victims of parental kidnapping.

III. TORT OF CUSTODIAL INTERFERENCE

A. *Application to Parental Kidnapping*

The tort of custodial interference is based on the Restatement (Second) of Torts § 700 which reads:

104. See *Raferly v. Scott*, 756 F.2d 335 (4th Cir. 1985) (father allowed to recover damages for emotional harm resulting from custodial mother's refusal to follow scheduled visitation); *Pankratz v. Willis*, 744 P.2d 1182 (Ariz. Ct. App. 1987) (father allowed to recover damages when custodial mother disappeared with the child depriving the father of his court ordered visitation rights); *Sheltra v. Smith*, 392 A.2d 431 (Vt. 1978) (defendant's conduct rendered it impossible for any personal contact or communication to take place between the plaintiff and her daughter for about four weeks and was found to be outrageous and compensable).

105. See *Owens v. Owens*, 471 So. 2d 920 (La. Ct. App. 1985); *McGrady v. Rosenbaum*, 308 N.Y.S.2d 181 (N.Y. Sup. Ct. 1970), *aff'd mem.*, 324 N.Y.S.2d 878 (N.Y. App. Div. 1971); *Gleiss v. Gleiss*, 415 N.W.2d 845 (Wis. Ct. App. 1987).

106. See *Gleiss*, 415 N.W.2d at 846-47.

107. All tort actions have many of the same weaknesses as the custodial interference action. This Note focuses on custodial interference because it is the cause of action most often used by a victimized parent of a parental kidnapping when he or she is attempting to recover damages.

One who, with knowledge that the parent does not consent, abducts or otherwise compels or induces a minor child to leave a parent legally entitled to its custody or not to return to the parent after it has left him, is subject to liability to the parent.¹⁰⁸

Courts rely on this language in allowing the custodial parent to recover damages from the noncustodial parent who kidnaps his own child.¹⁰⁹ The kidnapping need not be motivated by ill will toward the custodial parent or anything other than affection toward the child in order for a cause of action to lie.¹¹⁰ It does not matter whether the child consents to the abduction.¹¹¹ It is enough that the noncustodial parent deliberately interferes with the custodial parent's legal right to the custody of the child. There is a complete defense; however, no liability exists if the noncustodial parent rescues the child from what it reasonably believes is imminent physical harm.¹¹²

Only a parent with a superior right of custody to the child may recover damages because the tort action is based on the interference with a parent's legal right to custody of the child.¹¹³ Unless one parent is vested with a superior right to custody, courts infer that both parents have equal rights in the child's custody.¹¹⁴ Thus, a parent who abducts his child before final custody is awarded or after joint custody is awarded is immune from tort liability.¹¹⁵

The tort of custodial interference provides various damages to a custodial parent victimized by a parental kidnapping. Once the custodial parent has sustained his burden of proving damages, he can recover for the loss of the child's society and companionship.¹¹⁶ Expenses incurred in searching for the child, including legal fees, can be recovered.¹¹⁷

108. RESTATEMENT (SECOND) OF TORTS § 700 (1977).

109. *D & D Fuller CATV Constr., Inc. v. Pace*, 780 P.2d 520, 524 (Colo. 1989); *Kipper v. Vokolek*, 546 S.W.2d 521, 525 (Mo. Ct. App. 1977); *Plante v. Engel*, 469 A.2d 1299, 1302 (N.H. 1983); *Silcott v. Oglesby*, 721 S.W.2d 290, 292 (Tex. 1986).

110. RESTATEMENT (SECOND) OF TORTS § 700 comment b (1977); PROSSER, *supra* note 79, at 925.

111. RESTATEMENT (SECOND) OF TORTS § 700 comment a; PROSSER, *supra* note 79, at 925.

112. RESTATEMENT (SECOND) OF TORTS § 700 comment e.

113. *Id.* § 700 comment c (no action can be brought against one parent when both are jointly entitled to custody of the child).

114. *See Kipper v. Vokolek*, 546 S.W.2d 521 (Mo. Ct. App. 1977).

115. *See id.* at 527 (plaintiff did not show lawful custody of child at the time of the abduction); RESTATEMENT (SECOND) OF TORTS § 700 comment c (no liability when both parents jointly entitled to custody of child).

116. *See Lloyd v. Loeffler*, 539 F. Supp. 998, 1005 (E.D. Wis. 1982), *aff'd*, 694 F.2d 489 (7th Cir. 1982); *Silcott v. Oglesby*, 721 S.W.2d 290, 292 (Tex. 1986).

117. *See Lloyd*, 539 F. Supp. at 1005; *Plante v. Engel*, 469 A.2d 1299, 1302 (N.H. 1983).

Damages for mental distress and emotional harm suffered by the custodial parent can also be recovered.¹¹⁸ Any reasonable expenses incurred in treating either the child or custodial parent for bodily or emotional harm suffered as a result of the childsnatching are often recoverable.¹¹⁹ Finally, some courts have imposed punitive damages against the abducting parent.¹²⁰

Liability for custodial interference may also be extended to third parties who aid and abet in the parental kidnapping.¹²¹ Oftentimes, family and relatives of the abducting parent actually participate in the kidnapping or offer aid and support to the abducting parent following the parental kidnapping.¹²² Third parties not directly related to the abducting parent and child have also been found liable.¹²³ One court held a third party liable for providing assistance in a parental kidnapping even though the abducting parent was immune from liability.¹²⁴

Third party liability is usually based on a theory of civil conspiracy which consists of a combination of two or more persons accomplishing an unlawful task.¹²⁵ Recovery under a civil conspiracy theory is vital to many custodial interference actions because courts hold a conspirator

118. See *Fenslage v. Dawkins*, 629 F.2d 1107, 1109 (5th Cir. 1980). *But see* *Plante v. Engel*, 469 A.2d 1299, 1302 (N.H. 1983) (claim for severe emotional distress is separate cause of action).

119. See *Lloyd*, 539 F. Supp. at 1003, 1006 (psychologist fees incurred by custodial parent recoverable); RESTATEMENT (SECOND) OF TORTS § 700 comment g (1977) (expenses incurred in caring for child who suffered physical harm recoverable).

120. See *Lloyd*, 539 F. Supp. at 1005 (plaintiff can recover punitive damages upon a showing that the defendant acted with wanton, willful, or reckless disregard for his rights). See also *Campbell*, *supra* note 10, at 256 (large punitive damages awards will deter future parental kidnappings).

121. See *Fenslage v. Dawkins*, 629 F.2d 1107 (5th Cir. 1980) (grandparents, aunts, uncles, cousin); *Lloyd v. Loeffler*, 539 F. Supp. 998 (E.D. Wis. 1982) (grandparents, stepfather), *aff'd*, 694 F.2d 489 (7th Cir. 1982); *Kajtazi v. Kajtazi*, 488 F. Supp. 15 (E.D.N.Y. 1978) (grandfather, uncle).

122. See *Fenslage*, 629 F.2d at 1109 (relatives gave false testimony in court proceedings regarding their knowledge of child's whereabouts and provided financial support to abducting parent); *Lloyd*, 539 F. Supp. at 1001 (grandparents provided financial assistance to abducting parent even though they knew abduction was illegal).

123. *Cramlet v. Multimedia, Inc.*, 9 Fam. L. Rep. (BNA) 2452 (D. Colo. May 11, 1983) (producers of the Phil Donahue Show found liable when they had a parental kidnapper on the show as a guest, but refused to divulge the guest's whereabouts to custodial parent). *But see* *Campbell*, *supra* note 10, at 247 (courts have not extended liability to professional child snatchers who aid the abducting parent).

124. *Rosefield v. Rosefield*, 34 Cal. Rptr. 479 (Cal. Ct. App. 1963) (abducting parent was immune because the abduction took place before a final custody order was issued).

125. See *Fenslage*, 629 F.2d at 1110; *Kipper v. Vokolek*, 546 S.W.2d 521, 525 (Mo. Ct. App. 1977). *But see* *Pankratz v. Willis*, 744 P.2d 1182, 1186-87 (Ariz. Ct. App. 1987) (civil conspiracy is not actionable in Arizona; third parties are liable because they are joint tortfeasors).

jointly and severally liable for his own actions as well as his co-conspirators'.¹²⁶ This means that if the judgment against an abducting parent cannot be satisfied, the third party can be held accountable for providing support to the abducting parent as well as for the abduction itself. Some commentators have espoused this strategy as a form of leverage in compelling the abducting parent to return the child.¹²⁷ The tort of custodial interference compensates the custodial parent of an abducted child in the form of money damages. The tort action's weaknesses, however, prevent it from being a satisfactory remedy for parental kidnapping.

B. *Limitations Inherent in the Cause of Action*

One element of recoverable damages in an action for custodial interference is the loss of companionship or society of the abducted child.¹²⁸ Courts and commentators have long debated whether the non-pecuniary loss which arises out of the interference to the parent-child relationship should be compensable.¹²⁹ The following policy considerations are cited when a parent is refused the right to recover for the loss of a child's companionship and society: (1) the intangible character of the loss, which can never be compensated by money damages; (2) the difficulty of measuring damages; and (3) to a lesser extent, the dangers of multiple claims and liability.¹³⁰ Whether the allegations are attributed to negligent or intentional behavior, the amorphous qualities of this nonpecuniary loss are equally present.

A major weakness of the tort of custodial interference is that only the victimized parent who has been awarded sole custody of the child is able to recover damages.¹³¹ This prerequisite precludes most victimized parents from instituting a lawsuit because the vast majority of parental

126. See *Fenslage v. Dawkins*, 629 F.2d 1107, 1110 (5th Cir. 1980); *Lloyd v. Loeffler*, 539 F. Supp. 998, 1005 (E.D. Wis. 1982), *aff'd*, 694 F.2d 489 (7th Cir. 1982).

127. See *Campbell*, *supra* note 10, at 258 (full judgment levied against abducting parent's relatives may provide bargaining chip for return of the child).

128. See *supra* note 116 and accompanying text.

129. See Jean C. Love, *Tortious Interference with the Parent-Child Relationship: Loss of an Injured Person's Society and Companionship*, 51 IND. L.J. 590 (1976). See generally Annotation, *Parent's Right to Recover for Loss of Consortium in Connection with Injury to Child*, 54 A.L.R.4TH 112 (1987).

130. *Baxter v. Superior Ct. of Los Angeles County*, 563 P.2d 871, 873 (Cal. 1977) (action for loss of filial consortium resulting from negligent injury to child). The court distinguished a parent's right of action for an intentional interference with the parent-child relationship by stating that it already existed according to precedent, it posed no danger of multiplication of claims, and it provided a possible deterrent. *Id.* at 874.

131. See *supra* text accompanying notes 113-15 and accompanying text.

kidnappings occur before a final custody decree has been awarded.¹³² Similarly, a parent who has been awarded joint custody is barred from recovering damages in a custodial interference action.¹³³ Any remedy that prevents so many victimized parents from availing themselves of its relief is limited relief indeed.

In addition, courts in some states bar one spouse from suing the other for personal injuries.¹³⁴ This interspousal immunity is based on the policy arguments that tort actions between spouses would either be fictitious (for purposes of defrauding the insurance carrier) or would destroy the peace and harmony of the home.¹³⁵ There are exceptions to this general rule. Some courts do not recognize interspousal immunity when the tort occurred before the marriage, if the action is brought after a divorce, or if the tort was intentional.¹³⁶ Despite these exceptions and the general trend towards abolishing interspousal immunity, a victimized parent may be barred from bringing a custodial interference suit in many states if the abduction occurred before the divorce was final.

A custodial interference action has little effect on a judgment proof defendant. There are examples of ridiculously large damage awards generated out of a sense of outrage at the abducting parent.¹³⁷ Awards of this size have little hope of ever being collected. A lawsuit is also of little use when the defendant-abductor parent cannot be located. A judgment against a parental kidnapper whose whereabouts are unknown provides little solace to a parent who wants her child returned.

Third party liability for custodial interference may have certain inequitable results. When the abducting parent is judgment proof or cannot be located, a custodial interference action often proceeds against any third party who may have aided the abducting parent during or after the child abduction.¹³⁸ Third party participation may range from providing the abducting parent with financial assistance to refusing to cooperate with authorities in the investigation. Because courts often hold third parties jointly and severally liable for any judgment, a third party could be held responsible for satisfying a huge damage award even

132. See *supra* note 69.

133. See *Johns v. Johns*, 471 So. 2d 1071, 1076-77 (La. Ct. App. 1985); RESTATEMENT (SECOND) OF TORTS § 700 comment c (1977).

134. PROSSER, *supra* note 79, at 903. See generally Wayne F. Foster, Annotation, *Modern Status of Interspousal Tort Immunity in Personal Injury and Wrongful Death Actions*, 92 A.L.R.3RD 901 (1979).

135. PROSSER, *supra* note 79, at 902.

136. *Id.* at 903-04.

137. One jury awarded a victimized parent \$53 million as compensation for her injuries. See Steve McGonigle, *Custody-Fight "Kidnap" Spurs \$53M Verdict*, NAT'L L.J., Sept. 9, 1985, at 9, col. 1.

138. See *supra* text accompanying notes 121-24.

though the party is, arguably, less culpable than the abducting parent.¹³⁹ In addition, courts have failed to expressly clarify what third party conduct will result in liability.¹⁴⁰ Third parties could therefore be held liable for conduct undertaken without the intent to separate the custodial parent from the child. Finally, estimated figures show that the majority of abducting parents are never located.¹⁴¹ Consequently, limited judicial resources are used to recover money damages from less culpable third parties rather than to return the child to the custodial parent.

Some commentators have argued that the possibility of a custodial interference suit against a parental kidnapper provides a deterrent effect on child abductions which other remedies lack.¹⁴² This possible deterrent effect is limited by two factors. First, most parental kidnappers do not act as a result of a rational decisionmaking process. They act out of bitterness, revenge, or a fear of being separated from their child.¹⁴³ When emotions run this high, a parent will not stop to consider tort liability before snatching his child.¹⁴⁴ Secondly, parental kidnapping is already considered criminal behavior in almost every state.¹⁴⁵ If a parent who is considering abducting his child is not deterred by the threat of a jail term and a criminal record, the possibility of a civil lawsuit weighing on his decision is negligible.

The tort of custodial interference has several weaknesses inherent in both its elements as well as its application. These include the problems of damages to the relationship in general, the sole custody requirement, interspousal immunity, a parental kidnapper who is judgment proof or impossible to locate, and the tort action's lack of a deterrent effect on child abductions. As a result, the tort of custodial interference is not available to many who could benefit from it and has no effect on those whose actions should be punished or deterred in the future.

C. *Best Interests of the Child*

Courts have consistently held that the governing consideration in matters of child custody is the best interests of the child.¹⁴⁶ However,

139. See *supra* text accompanying note 126.

140. Compare *Lloyd v. Loeffler*, 539 F. Supp. 998 (E.D. Wis. 1982) (parents of abducting parent liable for untruthfully denying any knowledge of the child's whereabouts), *aff'd*, 694 F.2d 489 (7th Cir. 1982) with *Larson v. Dunn*, 449 N.W.2d 751 (Minn. App. 1990) (refusal to cooperate with investigation and untruthful denials concerning child's whereabouts not enough to incur liability), *rev'd*, 460 N.W.2d 39 (Minn. 1990).

141. See 1985 *Hearings*, *supra* note 13, at 1 (statement of Sen. Arlen Specter).

142. See *Campbell*, *supra* note 10, at 256 (punitive damages awards in custodial interference suits will deter future parental kidnappings).

143. See *supra* notes 15-18 and accompanying text.

144. See *Larson v. Dunn*, 460 N.W.2d 39, 46 (Minn. 1990) (family ties are normally stronger than money damages).

145. See *Katz*, *supra* note 23, at 106 app. B.

146. HOMER CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 788

too few courts have recognized that the goal of a custodial interference action is not the best interests of the child, but the vindication of one parent against the other.¹⁴⁷ Some courts reason that the goal of tort law is to compensate a victim for a direct interference with his or her legally protectible interest.¹⁴⁸ This legally protected interest is the sole custody of the child. Yet, as one astute court recognized, "When the judicial system becomes involved in family matters concerning the relationships between parent and child, simplistic analysis and the strict application of absolute legal principles should be avoided."¹⁴⁹

Several courts have determined that a custodial interference suit between parents is not in the best interests of the child and have refused to recognize the cause of action.¹⁵⁰ Criticism has also come from judicial commentators who were powerless to change the existing law in their respective states.¹⁵¹ These dissenting voices espouse a concern for prolonging family bitterness and providing an additional means of escalating intrafamily warfare. The practical limitations of a tort action have also been recognized, notably that an action for damages is probably the least useful technique for the resolution of custody disputes¹⁵² and that money damages are no relief at all when the child is not returned.¹⁵³

Recognition of the right of one family member to recover money compensation from another exacerbates the damage already inflicted on the child victim of a parental kidnapping. Instead of encouraging the return of a normal relationship between parent and child, a civil tort

(1988). One court took this consideration to an extreme when it allowed the abducting parent to retain custody once the custodial parent located the children after nearly two years. *In re Marriage of Settle*, 556 P.2d 962 (Or. 1976) (court was concerned with disrupting any newly gained sense of security, stability, and continuity).

147. *Politte v. Politte*, 727 S.W.2d 198, 200 (Mo. Ct. App. 1987).

148. *See Siciliano v. Capitol City Shows, Inc.*, 475 A.2d 19, 23 (N.H. 1984) (distinguishing the tort of custodial interference from the tort of loss of consortium arising from negligently inflicted injury); PROSSER, *supra* note 79, at 3.

149. *Collins v. Gilbreath*, 403 N.E.2d 921, 923 (Ind. Ct. App. 1980).

150. *See Mantooth v. Richards*, 557 So. 2d 646 (Fla. Dist. Ct. App. 1990); *Larson v. Dunn*, 460 N.W.2d 39 (Minn. 1990); *Friedman v. Friedman*, 361 N.Y.S.2d 108 (N.Y. Sup. Ct. 1974). Courts have also refused to recognize other tort causes of action on the basis of the best interests of the child. *See supra* note 106 and accompanying text.

151. *See Wood v. Wood*, 338 N.W.2d 123, 127 (Iowa 1983) (Wolle, J., dissenting) (Restatement rule will have unacceptable practical consequences and is unlikely to be in the best interests of the child); *Politte v. Politte*, 727 S.W.2d 198, 200 (Mo. Ct. App. 1987) (goal of custodial interference tort is vindication of one parent against the other, not the best interests of the child).

152. *McGrady v. Rosenbaum*, 308 N.Y.S.2d 181, 190 (N.Y. Sup. Ct. 1970), *aff'd mem.*, 324 N.Y.S.2d 876 (N.Y. App. Div. 1970).

153. *Bennett v. Bennett*, 682 F.2d 1039, 1045 (D.C. Cir. 1982) (Edwards, J., dissenting).

action prolongs the child's suffering by forcing him to relive the entire traumatic experience. The child becomes the object of what is certain to be a bitter, intense litigation between family members which can only place additional stress on the emotional psyche of a young child.¹⁵⁴ A custodial interference action requires the child to choose sides for one parent and against the other. A tort action could also have long-term consequences. A judgment which takes years to satisfy will be a constant reminder to a child of the pain and suffering endured by all the parties.¹⁵⁵ The child may be resented by family members who unfairly hold the child responsible for the damage caused by the parental kidnapping and subsequent litigation.

The family dissolution process is already known to have a severe effect on children.¹⁵⁶ Significant emotional and behavioral problems are common among children of divorce.¹⁵⁷ Further animosity resulting from turbulent intrafamily lawsuits will only increase the detrimental consequences to the child. The best interests of the child should outweigh the right of a custodial parent to recover money compensation. Allowing the healing process to begin as soon as possible is in the child's best interest.

D. Alternatives to a Tort Action

1. *Statutorily Reimbursed Expenses.*—One of the functions of the custodial interference action is to reimburse the custodial parent for the costs of locating and returning the child.¹⁵⁸ Due to the destructive nature of a tort action, these costs should be collected through other procedures.¹⁵⁹ Several states have statutorily provided for the reimbursement

154. See RICHARD NEELY, *THE DIVORCE DECISION* 78 (1984) (preeminent among the harmful effects of custody litigation per se are uncertainty, psychological probing, e.g., "Who do you love more, Mommy or Daddy?," and competitive parental bribery); Rena K. Uviller, *Fathers' Rights and Feminism: The Maternal Presumption Revisited*, 1 HARV. WOMEN'S L.J. 107, 126 (1978) (making the child the center of a "vitriolic and extended court battle" may be worse than custody with the less desirable parent).

155. Many children feel guilty and believe that they caused the abduction itself. See GILL, *supra* note 15, at 150.

156. See Andrew Schepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 TEX. L. REV. 687, 703-04 (1985).

157. *Id.*

158. These costs include travel expenses, attorney fees, witness fees, and costs of private investigations. See *supra* note 119 and accompanying text. The search for an abducted child can cost an enormous amount of money. See *supra* note 26.

159. See Jon Elster, *Solomonic Judgments: Against the Best Interests of the Child*, 54 U. CHI. L. REV. 1, 24 (1987) (citing social and medical reports that show that the child bears the largest cost in litigation); Kim J. Landsman & Martin L. Minow, Note, *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce*, 87 YALE L.J. 1126, 1129-34 (1978) (noting dangers posed to the child by the litigation process).

of reasonable expenses incurred by the custodial parent.¹⁶⁰ This provision is usually located in the statute criminalizing parental kidnapping.¹⁶¹ A criticism of this alternative method of reimbursement is that a court is under no obligation to order the parental kidnapper to reimburse the custodial parent.¹⁶² A simple answer to this is that the legislature has ensured that the mechanism exists. The courts must now be persuaded to take full advantage of this remedial measure whenever it is deemed equitable to do so. Not every state legislature has included a similar provision in its criminal code. Yet, it is a preferable alternative to a tort action and should be included in every state parental kidnapping statute.

A contempt of court action is another available means of recovering costs without resorting to a tort action. A court has a certain amount of flexibility to award costs in a contempt of court action.¹⁶³ Once a parental kidnapper is found to be in contempt of court, the court has the discretion to tax the defendant with the costs of recovering the abducted child.¹⁶⁴

Another form of damages available in a custodial interference action is the cost of treating either the child or custodial parent for bodily or emotional harm suffered as a result of the abduction.¹⁶⁵ This reimbursement could easily be provided for in a state's parental kidnapping statute, as are the reimbursement of search-related expenses.¹⁶⁶

The victims of a parental kidnapping should not be forced to bear the pecuniary costs which are the result of another's wrongful conduct.

160. See MINN. STAT. ANN. § 609.26, subd. 4 (West 1987) (criminal custodial interference statute allows court to assess any expense incurred in returning the child against any person convicted of the violating statute); IND. CODE ANN. § 35-42-3-4(e) (West Supp. 1991) (criminal custodial interference statute imposes reasonable costs incurred by parent because of the taking, detention, or concealment of the child on abducting parent); WIS. STAT. ANN. § 948.31(6) (West Supp. 1991) (court may order violator of criminal custodial interference statute to reimburse any person or governmental entity for reasonable expenses).

161. See *supra* note 160.

162. See *Larson v. Dunn*, 460 N.W.2d 39, 51 (Minn. 1990) (Popovich, C.J., dissenting) (although statute expresses policy that such costs be borne by the wrongdoer, the provision is discretionary and not always enforced).

163. For a discussion of the contempt of court action, see *supra* text accompanying notes 73-78.

164. See *Rayford v. Rayford*, 456 So. 2d 833 (Ala. Civ. App. 1984) (charging parental kidnapper with costs of attorney fees, travel expenses, and private investigators).

165. See *supra* note 119 and accompanying text.

166. See MINN. STAT. ANN. § 609.26, subd. 4 (West 1987) (court may direct appropriate county agency to provide counseling services to the child); WIS. STAT. ANN. § 948.31(6) (West Supp. 1991) (statute provides for restitution to be made to victims of parental kidnapping).

Courts may rely on their discretionary power to assess costs against a parental kidnapper in a contempt of court proceeding. Courts in those states that statutorily provide for the reimbursement of costs may do so as part of the criminal proceeding undertaken against the abducting parent. The judicial system should use its inherent powers to reimburse the reasonable expenses incurred by the victims of a parental kidnapping as an alternative to a tort action.

2. *Tougher Enforcement of Criminal Laws.*—The tort of custodial interference does not provide a sufficient deterrent to parental kidnapping.¹⁶⁷ The best deterrent is consistently enforced laws which impose tough criminal sanctions on the abducting parent. Eliminating the parental exemption from the federal kidnapping statute would provide a uniform law on the federal level to combat this crime. This would permit the resources of the federal government to be applied more frequently than they are now.

Many states must also amend their custodial interference laws to eliminate the loopholes and impose stricter penalties against a parent who abducts his own child. Too many state statutes fail to designate parental kidnapping as a felony or only do so in those instances in which the child is taken out of state,¹⁶⁸ exposed to danger,¹⁶⁹ or taken in violation of an existing custody decree.¹⁷⁰ To be truly effective, any statutory definition of parental kidnapping should include abductions which occur before as well as after custody has been determined. "Custody" should include not only sole physical custody, but also temporary and joint custody arrangements. Furthermore, every statute should provide for the prosecution of any parent who hires another to abduct his child.¹⁷¹

Finally, strict enforcement of parental kidnapping statutes is crucial. Law enforcement authorities on both the federal and state levels must overcome any bias they may have against parental kidnapping complaints. The sheer volume of abductions as well as the tumultuous harm caused to the victims demands that a parental kidnapping be given the same diligence and zealous attention received by other devastating crimes. Once located, a parental kidnapper must be vigorously prosecuted so that the message is clear — parental kidnapping will not be tolerated.

In short, a complete parental kidnapping statute should effectively eliminate any loopholes and impose tough criminal sanctions. Vigorous enforcement of state criminal statutes, coupled with the complimentary

167. See *supra* text accompanying notes 142-45.

168. See, e.g., IND. CODE ANN. § 35-42-3-4 (West Supp. 1991).

169. See, e.g., MASS. GEN. LAWS ANN. ch. 265, § 26A (West 1990).

170. See, e.g., NEB. REV. STAT. § 28-316 (1989).

171. See, e.g., FLA. STAT. ANN. § 787.03 (West Supp. 1990).

effect of the PKPA and UCCJA, will provide an extensive deterrent to parental kidnapping.

3. *Reducing Animosity Between the Parents.*—Further action must be taken to help alleviate the problems which lead to parental kidnapping. The problems should be dealt with before they culminate in a situation from which no real winner can emerge.

One possible approach is a nonadversarial dispute resolution process. A few states require mandatory court-sponsored mediation in all custody cases.¹⁷² Parents are encouraged to consider the best interests of their child when settling the custody determination before the divorce action ever gets to court. If neither parent considers themselves a loser in the custody determination, then parental kidnapping will be drastically reduced.¹⁷³

Another possibility is to permit a non-judicial mediation organization to handle the dissolution process, thereby removing it from the courtroom. These organizations work to instill an atmosphere of cooperation instead of competition between parents, easing the emotional damage on all those affected by a family dissolution.¹⁷⁴

The goal of the mediation process is to minimize the adversarial relationship between divorcing parents, reducing the potential of a child abduction and sparing the child the emotional trauma of being used as a pawn between warring parents.¹⁷⁵ The judicial system should also promote cooperation among parents after a divorce is final. This includes increasing the use of joint custody awards, liberalizing visitation guidelines, and formulating equitable child support guidelines. Diverting parents from a win-lose situation and promoting continual cooperation after divorce will eliminate many of the causes of parental kidnapping.

IV. CONCLUSION

Parental kidnapping is a national epidemic. Unfortunately, the judicial system has historically been at the root of the problem. Congress has responded by enacting the UCCJA and PKPA, thereby eliminating a giant incentive for a bitter, noncustodial parent to abduct his child. State legislatures must continue to enact tougher criminal laws that eliminate existing loopholes for a parent who abducts his own child.

172. For a comprehensive discussion of this alternative, see Sue T. Bentch, Comment, *Court-Sponsored Custody Mediation to Prevent Parental Kidnapping: A Disarmament Proposal*, 18 ST. MARY'S L.J. 361, 386 (1986).

173. *Id.* at 388-90.

174. See Christopher Carlson et al., *Law, Social Change and Child Snatching*, 14 LOY. U. CHI. L.J. 677, 703 (1983).

175. See Bentch, *supra* note 172, at 390.

Once a child is abducted, better cooperation among state and federal authorities is needed in locating and prosecuting the parental kidnapper.

Several states have also made a tort remedy available to a victimized parent. Although they compensate a bereaved parent with money damages, tort actions fail to account for the best interests of the child who is caught in the middle of intrafamily warfare. The welfare of the child should be the dominant consideration once that child is abducted by one of his parents. A tort action ignores the vulnerability of these children and ultimately increases the psychological costs of a child abduction.

The judicial system should direct its resources towards prospective remedies for parental kidnapping instead of allowing the emotional wounds to fester as a result of a retrospective tort action. Increasing the use of pre-divorce mediation, joint custody awards, liberal visitation, and equitable support decrees should help defuse the situation before it explodes in a parental kidnapping. The best interests of the child demand this. The real victims of a child abduction should expect no less.

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