PARENTAL KIDNAPING

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ISSUE DEFINITION

Parental kidnaping may be defined as the act of one parent taking, stealing, abducting, kidnaping, decoying, detaining, or enticing a child away from the other parent or guardian who has lawful custody or control over the child. This act may occur either prior to a custody determination in a divorce action or after custody has been awarded to the other spouse. The spouse who either has lost custody already, or fears that such loss of custody is imminent, simply transports the child to another jurisdiction. There is no question that the child caught in the middle of such a protracted struggle can suffer deleterious consequences. Child-snatching cases are increasing rapidly in the United States to perhaps 25,000 to 100,000 a year, but presently there are no Federal remedies available.

BACKGROUND AND POLICY ANALYSIS

Federal Statute

The Federal Kidnaping Act, 18 U.S.C. 1201, explicitly exempts parents from its sanctions. This Act, also known as the Lindbergh Act, was adopted originally by Congress in 1932, and made it an offense to knowingly transport in interstate or foreign commerce a person who had been kidnaped for ransom or reward, and was amended in 1934 to extend its application to the transport of persons kidnaped for any reason, not just for ransom or reward. At the same time, Congress provided for the parent exemption.

The sparse legislative history on this issue shows that the parent exemption was inserted very deliberately. The original 1932 law made it an offense to transport in interstate or foreign commerce any person who had been unlawfully seized, kidnaped, etc., by any means and held for ransom, reward, or any other unlawful purpose. Rep. L.C. Dyer proposed to amend the bill to delete the words "or any other unlawful purpose" for the reason that unless the words were deleted, parental kidnaping would be included, and "there is not anybody who would want to send a parent to the penitentiary for taking possession of his or her own child, even though the order of the court was violated and it was a technical kidnaping." (See entry in Congressional Record, June 17, 1932, in REPORTS.)

In 1934 the Lindbergh Act was amended by an Act of May 18, 1934, to apply to the knowing transport of persons kidnaped not only for reward or ransom, but for any reason except, specifically, parental kidnaping. The committee report on the bill, as amended (H.Rept. 1457, 73d Congress, 2d session (1934)), did not explain the purpose of the parental kidnaping provision, merely stating that "this amendment will extend Federal jurisdiction under the act to persons who have been kidnaped and held, not only for reward, but for any other reason, except that a kidnaping by a parent of his child is specifically exempted."

The foregoing is an encapsulation of the legislative history of the Federal Kidnaping Act, particularly as it pertains to the parent exemption provided by the 1934 amendment. The history, such as it is, reflects the desire of Congress to explicitly exclude parents from the criminal sanctions of the law. This exemption was recognized in Miller v. United States, 123 F.2d 715, 716 (8th Cir. 1941), aff'd. 138 F.2d 258 (8th Cir. 1943), where the

Court of Appeals stated " t he records of the domestic relations courts throughout the Nation are replete with instances where, when domestic difficulty arises, parents, because of affection for their children, inveigle or spirit them away. In absence of the exception, such person might suffer the condemnation of the statute if interstate commerce were involved. It may be that Congress was primarily concerned with this class of cases when the exception was framed."

The Issue

Parental kidnaping is a problem, but not just because of the potential psychological scarring of the people involved. In the past, the State courts could not cope with the demands for redress by the parent from whom the child is taken for several reasons: (1) many States did not have laws on the books available to cover the situation; (2) the State where the child was taken did not have to recognize the custody decree of the first State and could award its own custody decree as it saw fit; and (3) the laws that existed then often proved unenforceable. Presently, the Federal courts offer no help to the bereft parent because the Federal Kidnaping Act contains a specific exemption for parental kidnaping.

Many States, however, are now equipped with an entire spectrum of statutes, applicable or inapplicable, as the case may be, ranging from the basic kidnaping statute, which sometimes incorporates the offense into the definitional section of "restraint," to prohibitions against child stealing, to statutes providing for the imposition of criminal penalties for violation of or interference with lawful custody orders. A substantial number of States have enacted legislation to deal with this problem, the most common approach being the use of a custodial interference statute. Although there is often no violation of a custodial interference statute where a parent absconds with the child in anticipation of an adverse custody decree, statutory provisions prohibiting related offenses such as child snatching, false imprisonment or unlawful restraint may apply. In a few jurisdictions, parents are specifically exempted from the application of the statutes prohibiting kidnaping or related offenses. Where there is no applicable statute at all, the States, the courts, and the parents are left without a legal remedy.

The fact that State laws vary so widely is also one of the problems surrounding this issue, exacerbated by the fact that even where two States approach the situation in a similar fashion, the penalties may differ. For example, custodial interference may be a "Class D" or "Class E" felony in one State and a gross misdemeanor in another State. The importance of this distinction lies in the use of the various statutes to invoke Federal extradition and Federal fugitive felon provisions. For example, both the Uniform Criminal Extradition Act (Section 2) and Federal law, 18 U.S.C. 3182, speak in terms of "treason, felony or other crime" as providing grounds for extradition. Although the cases suggest that misdemeanor charges may form the basis for extradition, see e.g., Glover v. State, 257 Ark. 241, 515 S.W.2d 641 (1974); and Graham v. State, 231 Ga. 820, 204 S.E.2d 630 (1974), some States may be more inclined to utilize extradition in felony cases. Most of the child stealing statutes apply only to children under a certain age, resulting in a legal gap if the abducted child is an older adolescent.

Another complicating factor is the hesitancy of the Supreme Court to apply the Full Faith and Credit Clause to custody decrees. The Full Faith and Credit Clause, found in Article IV, Section 1 of the Constitution, provides

in part that "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state." However, this clause has been construed to require a State to recognize only final orders of the courts of other States, and custody orders are not considered final orders, being nearly always subject to modification in the interest of the child's welfare.

The few Supreme Court decisions even touching on the subject of parental kidnaping turn on the full faith and credit issue. In Halvey v. Halvey, 330 U.S. 610 (1947), which involved a custody battle over the abduction of a child by the father from Florida to New York, the Court, through Mr. Justice Douglas, "declared to do as little as possible," and held that since the decree was modifiable in Florida, it also could be modified in New York, stating that "a judgment has no constitutional claims to a more conclusive or final effect in the state of the former than it has in the state where rendered." (See also Kovacs v. Brewer, 356 U.S. 604 (1958).) In May v. Anderson, 345 U.S. 528 (1953), the Court dealt with the extent of recognition required to be given a custody decree rendered by another State without personal jurisdiction over the defendant mother. The majority opinion, sidestepping the full faith and credit issue, held that parental custody was a personal right that could not be taken without in personam jurisdiction over the parent. The Supreme Court's most recent effort was Ford v. Ford, 371 U.S. 187 (1962), in which a Virginia dismissal of a custody case pursuant to a parental agreement was held not binding on a South Carolina court, where one of the parents sought to modify the agreement.

There are a number of proposed solutions to the problem of parental kidnaping, but they are all limited or inadequate in some way, either legally or practicably.

One method, involving neither the passage of new legislation nor movement by the Federal Government into an area traditionally left to the States, is for the State courts to apply the "clean hands" doctrine to any person appearing before them seeking to obtain custody over a child. This common law doctrine would preclude anyone from obtaining a custody decree from a court if that person has gained control of the child in violation of a custody order issued in another State. The obvious limitation to this method is its unenforceability. As long as it is in the judge's discretion whether to grant jurisdiction, there will be some use of that discretion, resulting in the denial of certain protection for the custodial parent.

A second means of combating the problem is for States to give full faith and credit to sister States' custody decrees. Although Congress has enacted a law requiring such recognition in certain circumstances, basic policy questions are still left unresolved, such as the desirability of non-modifiable custody decrees, which would conflict with the doctrine asserted by the Supreme Court in the aforementioned cases that non-modifiability may not be in the best interests of the child because there is always a possibility of changed circumstances. This law also represents further Federal intrusion upon matters traditionally left to the States.

A third solution, already enacted in 47 States, is adoption of the Uniform Child Custody Jurisdiction Act. (Texas has passed an equivalent statute; however, it is not identical to the UCCJA.) This uniform law, adopted by over four-fifths of the States, provides under Section 8 of the Act, that one who has abducted a child from another State or has indulged in other reprehensible conduct is precluded from obtaining an order modifying the extant custody order from another State, thus embodying the "clean hands"

doctrine. The operational difficulty of this provision is that the court may decline to exercise jurisdiction only if it is "just and proper under the circumstances," and therefore, the court is still permitted a wide range of discretion under a vague and ambiguous standard. Although such discretion may be necessary due to the nature of the interest involved, vagueness and ambiguity do not serve the purpose of uniform application of the Act. Section 13 of the Act makes mandatory the recognition and enforcement by a sister State of a custody decree of a foreign court which had assumed jurisdiction under the provisions of the Act or has issued it under standards similar thereto, in effect, declaring that full faith and credit will be given to a valid out-of-state decree as long as the requirements of notice and opportunity to be heard are met.

This Act goes a long way towards achieving a workable solution, particularly since its acceptance and recognition rate by the States has speeded up. However, it contains provisions allowing for a great deal of latitude and flexibility, thus, at times making it less than fully effective and contains no criminal sanctions to be applied to the parents.

A fourth possible solution is to amend the Federal Kidnaping Act by either eliminating the exemption that now exists for parents or inserting a provision making parental kidnaping a separate offense.

The consitutionality of the existing statute is well established as coming under the power of Congress to regulate interstate commerce. The statute creates a presumption of transporting in interstate or foreign commerce where the abductor fails to release the kidnap victim within 24 hours after he shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away (18 U.S.C. 1201(b)).

Any legislation that merely repeals the parental exemption may lead to anomalous results. If the child is taken from a parent with judicially awarded custody, the abducting parent might still be able to gain lawful custody in a non-UCCJA State through a modification of the award, while being charged with the Federal criminal offense of kidnaping. If there has been no court-awarded custody, application of the Lindbergh Act completely contravenes the general rule that in absence of a custody decree, such takings are not considered kidnapings. Perkins, Criminal Law, p. 181 (2d ed. 1969).

Amending the Act to make parental kidnaping a separate offense does not leave the statute open-ended, and allows the framers to define the offense as narrowly or broadly as desired, according to the prevailing policy.

Although a number of conflicting policies surrounded the enactment of Federal legislation a widespread belief existed that the issue needed to be addressed by the country's lawmakers because of the potential damage to the mental and emotional well-being of anyone involved in a kidnaping incident. Parental kidnaping interferes with the custodial rights of the parents, infringes upon the personal liberty of the child, and obstructs the administration by the courts of lawfully ordered custody decrees. Abduction by a parent inflicts emotional trauma on the other parent as does kidnaping by a third party, and the gravity of the offense is reflected in those State statutes prohibiting child stealing and interference with custody. In most instances violation of either type of statute is a felony, unless there are extenuating circumstances, such as returning the child or never leaving the State. An excellent example of a State law governing child-snatching is North Carolina General Statutes Sec. 14-320-1. This section specifically

states that anyone who transports, or causes to be transported, a child under the age of sixteen outside the boundaries of North Carolina with the intent to violate a custody order issued by a North Carolina court shall be guilty of a felony. Such crime is punishable by imprisonment for not more than three years. The statute also stipulates that keeping a child outside of North Carolina in violation of a custody order for an excess of 72 hours is prima facie evidence of an intent to violate that order.

On Dec. 13, 1980, in the final hours of the 96th Congress, the House of Representatives concurred in the Senate's amendments to H.R. 8406, a bill to provide for Medicare coverage of pneumococcal vaccine. One of these amendments, attached as sections 6 to 10 of the bill, was the "Parent Kidnaping Prevention Act of 1980." This legislation, introduced earlier as S. 105 by Senator Wallop, mandates that full faith and credit be given to prior custody orders having jurisdiction under provisions of the Uniform Child Custody Jurisdiction Act. Enacted as P.L. 96-611, it also authorizes a State court that meets specified conditions to modify a custody determination of another State court which no longer has, or has declined to exercise, jurisdiction.

In addition, the Act amends title IV (Child Support and Establishment of Paternity) of the Social Security Act to include as a function of the Parent Locator Service the provision of information to authorized persons about any absent parent or child for the enforcement of a child custody determination or with regard to parental kidnaping.

Finally, the Act expressly declares the congressional intent that 18 U.S.C. 1073 (The Fugitive Felon Act) apply to cases involving parental kidnaping and interstate or international flight to avoid prosecution under applicable State felony statutes. This section will have the effect of allowing the FBI to help apprehend parental abductors by giving Federal law enforcement authorities the power to investigate child stealing cases. For example, where a child has been taken from one State to another, the first State may apply to a United States attorney's office for a Federal fugitive felon warrant. The Act took effect on July 1, 1981.

With respect to applying the Fugitive Felon Act to state felony parental kidnaping cases, a question has been raised as to whether the Department of Justice is properly complying with the expression of congressional intent. Under Justice Department guidelines, "independent credible information establishing that the child is in physical danger or is being seriously abused or seriously neglected" is required before intervention will be authorized in parental kidnaping cases. On Oct. 21, 1981, Senator Wallop introduced S. 1759, which would require elimination of any such guidelines and would prohibit otherwise limiting the application of 18 U.S.C. 1073 to State felony parental kidnaping cases in a manner that might frustrate congressional intent as expressed in the Parental Kidnaping Prevention Act of 1980.

With respect to proposed criminal sanctions, the conventional justifications for maintenance of the status quo in the Federal area appear to dominate, since the criminal sanctions of the original bill, S. 105, were not adopted as part of P.L. 96-611. S. 105 would have amended 18 U.S.C. 1201 to make interstate child snatching by parents and others a Federal criminal offense. This provision was not enacted on the theory that Federal criminal sanctions may not act as a deterrent to a determined parent anymore than a comparable State statute. From the perspective of law enforcement authorities, the maintenance of familial peace through enforcement of

criminal prohibitions may be best left to the States, which have greater and more immediate access to the needed facts.

LEGISLATION

S. 1759 (Cranston and Wallop)

Amends the Parental Kidnapping Prevention Act of 1980 (P.L. 96-611) by adding a declaration that 18 U.S.C. 1073, the Fugitive Felon Act, applies to all State felony parental kidnaping cases without restriction and in the same manner as to all other state felony cases. In addition, the Justice Department shall eliminate all guidelines that require information that the child is in physical danger or is neglected, corroboration or prior approval, or otherwise limit the application of section 1073 in State felony parental kidnapping cases.

H.R. 5019 (Hughes)

Comparable to S. 1759.

HEARINGS

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U.S. Congress. House. Conference Committee, 1980. Domestic Violence Prevention and Services Act. Washington, U.S. Govt. Print. Off., 1980. (96th Congress, 2d session. House. Report no. 96-1401) See title III.

U.S. Congress. House. Committee on the Judiciary. To amend the Kidnaping Act; report to accompany S. 2252. (73d Congress, 2d session 1934 . House. Report no. 1457, 73d Congress)

U.S. Congress. Senate. Committee on the Judiciary. To amend the Act forbidding the transportation of kidnapped persons in interstate commerce; report to accompany S. 2252. (73d Congress, 2d session 1934 . Senate. Report no. 534, 73d Congress)

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