PARENTAL KIDNAPPING: PREVENTION AND REMEDIES

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statutory and case law.

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I. Introduction

A. Parental kidnapping defined

The term "parental kidnapping" encompasses the taking, retention or concealment of a child by a parent, other family member, or their agent, in derogation of the custody rights, including visitation rights, of another parent or family member.

B. Incidence

In 1988, parents or family members abducted an estimated 354,100 children in the United States. Nearly half of these children were taken across state lines and concealed, or their abductors prevented contact with the other parent and/or intended to keep the children indefinitely or to have custody changed. *See* "National Incidence Studies, Missing, Abducted, Runaway, and Thrownaway Children in America," Washington, D.C.: U.S. Department of Justice, May 1990. An update of the survey ("NISMART II") is due to be completed in the near future.

C. Harmful effects on children

Abducted children suffer emotionally and sometimes physically at the hands of their abductors. Many children are told the other parent is dead or no longer loves them. Uprooted from family and friends, abducted children may have their names and appearances altered, and may be under strict instructions not to reveal their true identifies or circumstances. Indeed, abducted children may be taught to fear the very people who could help them: police, teachers, doctors, etc. They may be kept out of school to avoid detection through school records. Because of the harmful effects on children, parental kidnapping has been characterized as a form of child abuse.

For more information on the effects of parental kidnapping on parents and children, *see* When Parents Kidnap, Geoffrey L. Greif and Rebecca Hegar, New York: Free Press 1993.

II. The Legal Response to Parental Kidnapping

All fifty states, the District of Columbia, and Congress have enacted civil and criminal laws to address parental kidnapping and interstate and international child custody and visitation disputes. The United States is also party to a treaty aimed at resolving international child abduction cases. A summary of these laws follows.

A. Interstate custody disputes and parental kidnapping

Getting a custody determination that is entitled to enforcement nationwide—and getting it enforced – may be critical to recovering an abducted child in the United States. The laws governing custody jurisdiction and enforcement are the:

- Uniform Child Custody Jurisdiction Act (UCCJA), 9(1A) U.L.A. 271 (1999)
- Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), 9(1A)U.L.A. 657 (1999)
- Parental Kidnapping Prevention Act of 1980 (PKPA), 28 U.S.C. 1738A

1. UCCJA**.** Before 1968, parents who abducted their children stood an excellent chance of being rewarded with custody. Any court before which the abductor-parent appeared had the legal authority to issue a custody order based solely upon the abductor's physical presence in the state with the child.

The inherent unfairness to the left-behind parent, the psychological harm to the child in being shifted from home to home, and the inefficiency and judicial expense wrought by repetitious litigation over child custody in sister states, all led to the promulgation in 1968, and eventual adoption by all 50 states and the District of Columbia, of the Uniform Child Custody Jurisdiction Act. The UCCJA governs jurisdiction to make and modify child custody determinations and requires interstate recognition and enforcement of custody orders. (Many states have replaced the UCCJA with the UCCJEA, discussed below.)

a. Jurisdictional bases. The UCCJA provides four alternate jurisdictional grounds for making a custody determination: home state, significant connection/substantial evidence, emergency, and last resort. Because it is possible under this scheme for two or more states to have jurisdiction concurrently on different grounds, the UCCJA prohibits simultaneous proceedings and mandates interstate judicial communication and cooperation. The UCCJA permits a court to decline jurisdiction on inconvenient forum grounds, as well as when the petitioner has unclean hands. Under Section 23, adopted by nearly all of the states, the general principles of the UCCJA extend to international cases, which means that foreign custody orders are enforceable under the UCCJA in state courts.

b. Experience under the UCCJA. Interstate custody practice improved under the UCCJA, but some problems remained. For instance, courts in different states exercised jurisdiction over the same child at the same time, often issuing conflicting custody orders, and varying court interpretations undermined the uniformity of the law. And a few states were very slow to enact the UCCJA.

2. PKPA. In 1980, Congress enacted the PKPA to resolve persistent problems in

interstate child custody practice, and to address the growing problem of parental kidnapping. The PKPA governs the interstate effect that must be given to child custody determinations made by state courts that exercise jurisdiction consistently with its terms. Specifically, such custody determinations are entitled to full faith and credit in all states and cannot be modified except as provided for in the PKPA.

a. Home state priority. The promise of full faith and credit is the PKPA's inducement to state courts to comply with its jurisdictional terms. Under the PKPA, home state jurisdiction (when it exists) is the preferred basis of initial jurisdiction. This is designed to eliminate the possibility that exists under the UCCJA of two states exercising custody jurisdiction at the same time, one on home state grounds, and the other on significant connection grounds. The home state decree is entitled to full faith and credit in other states, including a state that has issued a custody determination on significant connection jurisdiction grounds.

b. Simultaneous proceedings prohibition. The PKPA prohibits courts from exercising jurisdiction when another court is already exercising jurisdiction consistently with its terms. Under this section, a significant connection state is barred from exercising jurisdiction when a home state court is exercising jurisdiction with respect to the same child.

c. Exclusive continuing jurisdiction. The PKPA further provides that the original decree state has exclusive continuing jurisdiction so long as (1) the initial custody order was made consistently with the PKPA's terms, (2) the original decree state continues to have a basis for exercising custody jurisdiction under state law (which need no longer be 'home state'), and (3) the state remains the residence of the child or of any custody contestant. Under the PKPA, once a 'home state' court enters a custody order, that state retains exclusive continuing jurisdiction to modify its order even if the custodial parent and child no longer live in the state, provided there is a basis under state law for custody jurisdiction (*e.g.*, significant connection) and the noncustodial parent remains in the state.

d. International cases. The PKPA does not apply in international cases.

e. Federal preemption. The PKPA's jurisdictional criteria are not identical to the UCCJA's, and some of the differences are significant, as described above. When there is a conflict, the provisions of the PKPA govern. Supremacy Clause, U.S. Const., Art.6, Sec.2. Because the UCCJEA (described below) was specifically written to conform to the PKPA, as a general rule custody determinations made by state courts consistently with the UCCJEA also comply

with the PKPA and therefore are entitled under the PKPA to full faith and credit in sister states.

3. UCCJEA**.** In 1997, the National Conference of Commissioners on Uniform State Laws unanimously approved a revised version of the UCCJA called the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). The UCCJEA replaces the UCCJA in states that adopt it. In states that have not adopted it, the UCCJA remains the law.

a. State enactments. As of December 2000, the UCCJEA has been adopted in 21 states: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Idaho, Iowa, Kansa, Maine, Minnesota, Montana, North Carolina, North Dakota, Oklahoma, Oregon, Tennessee, Texas, Utah, West Virginia. It has been introduced in numerous other state legislatures.

b. Home state priority & exclusive continuing jurisdiction. One of the main purposes of the UCCJEA is to establish jurisdictional rules that are consistent with the PKPA so that custody/visitation orders made by courts under state law are also entitled as a matter of federal law to full faith and credit. Toward this end, the UCCJEA makes 'home state' jurisdiction the preferred basis for initial custody jurisdiction, and confers exclusive continuing jurisdiction on the decree state under specified conditions.

c. Domestic violence concerns. Another goal of the UCCJEA is to address special concerns that arise when custody and family violence issues are intertwined. The UCCJEA expands emergency jurisdiction to cover family violence situations. It does this by expressly authorizing courts to exercise emergency jurisdiction to make temporary custody orders when the child, a sibling or a parent is subjected to or threatened with mistreatment or abuse. It also directs courts to consider domestic violence as a factor in inconvenient forum analyses. The UCCJEA also has a provision to safeguard against address disclosure when safety concerns exist.

d. Enforcement procedures. A major purpose of the UCCJEA is to provide procedures that streamline and expedite interstate child custody and visitation enforcement. Not only does the Act create a mechanism for almost immediate enforcement, it also gives prosecutors (or other designated public officials) discretionary authority to assist in the location and return of abducted children and in the civil enforcement of custody and visitation orders.

e. Declining jurisdiction. The UCCJEA, like the UCCJA, allows a court to

decline jurisdiction on unclean hands and inconvenient forum grounds, although the language in the two statutes is not identical.

f. International cases. The UCCJEA expressly provides that its jurisdiction and enforcement provisions apply in international cases, subject to a narrow exception.

g. The complete text of the UCCJEA act can be found on the Internet, http://www.nccusl.org. It is very important to read the law as enacted by the state in which you are seeking to obtain or to enforce a custody order, because the legislature may have varied the language of the Uniform Act.

4. Practice pointers for using the UCCJA, UCCJEA and PKPA**.**

a. *Initial custody cases*: File for custody in the child's home state, the preferred forum for making an initial custody determination. Do not seek a custody order based on significant connection/substantial evidence jurisdiction if another state has home state jurisdiction. If a custody action is filed in a significant connection state, the parent in the home state may seek dismissal of the suit on PKPA or UCCJEA grounds.

b. *Pre-decree abduction cases*: File promptly for custody in the child's home state even if the child has been abducted and is no longer in the state. The court can exercise jurisdiction notwithstanding the child's absence so long as the action is filed within six months, and notice has been given in accordance with the UCCJA or UCCJEA, and PKPA. The UCCJA and UCCJEA allow for notice by publication, which may be the only viable option when an abductor-parent willfully conceals his or her whereabouts.

c. *Modification actions*: Bring an action to modify an existing custody determination in the state with exclusive continuing modification jurisdiction under the PKPA or UCCJEA. Actions brought elsewhere are subject to dismissal.

d. *Simultaneous proceedings*: Do not file for custody or seek modification in a state that is prohibited either by the PKPA, UCCJA, or UCCJEA from exercising jurisdiction during the pendency of an action elsewhere. A motion to enjoin a state court from exercising jurisdiction will lie if the state is barred by any of these statutes from exercising jurisdiction. In the event of concurrent proceedings in two states, it is imperative for courts to communicate as directed by the UCCJA and UCCJEA.

e. *Domestic violence cases:* Parents who are subjected to physical or emotional abuse sometimes take their children and flee for safety, often before consulting an attorney or obtaining a custody order. Lawyers can help these parents by promptly seeking appropriate protection and custody orders.

If the battered parent seeks advice in the home state, the lawyer can file promptly for custody on home state grounds pursuant to the UCCJA or the UCCJEA, whichever is in effect. If the parent's first resort to court is in the haven state, the relief available will depend upon that state's law.

Under the UCCJEA, a parent may obtain a temporary emergency custody order in the safe haven state, which may ripen into a 'home state' custody determination in certain circumstances (*i.e.*, no prior custody order, no custody filing in the child's home state within six months of the child's departure, and the emergency order so specifies). If the home state's jurisdiction is invoked in a timely way, the parent who fled must litigate custody in that state. However, the home state court may decline jurisdiction on inconvenient forum grounds, and must consider domestic violence in its analysis.

The UCCJA does not expressly extend child custody emergency jurisdiction to situations where the emergency relates not directly to the child in question, but rather to the parent or to a sibling of the child. However, some courts have broadly construed the emergency jurisdiction provision to cover such situations. The resulting orders are temporary. The parent must then take steps to have a custody proceeding brought in the state with jurisdiction pursuant to the UCCJA, which in most instances will be the state from which the parent has fled—the child's home state. Circumstances may justify requesting that state to decline jurisdiction in favor of the state to which the battered parent has fled. *See* UCCJA §§ 7 & 8.

To protect the victim-parent, the lawyer should request the court to seal all records that contain the parent and child's address.

Prompt filing of a custody action will frequently help the victim-parent avoid prosecution for criminal parental kidnapping.

B. International parental kidnapping

1. The Hague Convention on the Civil Aspects of International Child Abduction (Convention). The Convention came into force in the United States in 1988 upon enactment of federal implementing legislation, the International Child Abduction Remedies Act, 42 U.S.C. 11601-11610. The Convention requires the prompt return of wrongfully removed or retained children, usually to their countries of habitual residence. Courts in the country to which the child is returned can then make substantive decisions concerning custody and visitation. So strong is the treaty mandate to return abducted children that courts retain discretion to order a child's return even if an exception to return is proved. The Convention also provides a remedy in 'access' cases (those involving international visitation), but this remedy has proven to be rather ineffective.

a. Central Authority. To implement the Convention, every party country must establish at least one Central Authority to process applications for return and access. In the United States, the Office of Children's Issues (OCI) in the Department of State serves as the Central Authority in outgoing cases (children removed from the U.S.). OCI has delegated Central Authority responsibility for incoming cases (children abducted to the U.S.) to the National Center for Missing and Exploited Children. The U.S. Central Authority can be contacted at (202) 736-7000.

b. U.S. treaty partners. Left-behind parents in the United States can invoke the Convention only if it is in force between the U.S. (as the child's country of habitual residence) and the country in which the child is located. As of December 2000, the Convention is in effect between the United States and 48 countries: Argentina, Australia (only for the Australian States and mainland Territories), Austria, Bahamas, Belgium, Belize, Bosnia and Herzegovina, Burkina Faso, Canada, Chile, China (Hong Kong and Macau, only), Colombia, Croatia, Cyprus, Czech Republic, Denmark (except the Faroe Islands and Greenland), Ecuador, Finland, France (for the whole of the territory of the French Republic), Germany, Greece, Honduras, Hungary, Iceland, Ireland, Israel, Italy, Luxembourg, former Yugoslav Republic of Macedonia, Mauritius, Mexico, Monaco, Netherlands, New Zealand, Norway, Panama, Poland, Portugal, Romania, Slovenia, South Africa, Spain, Saint Kitts and Nevis, Sweden, Switzerland, Turkey, United Kingdom of Great Britain and Northern

Ireland (Isle of Man, Cayman Islands, Falkland Islands, Montserrat, Bermuda), Venezuela, Zimbabwe.

(1) Updates on countries party to the Convention can be obtained from the U.S. Central Authority, (202) 736-7000, or visit the Web sites of the Department of State (http://www.travel.state.gov) and the Hague Conference on Private International Law (http://www.hcch.net).

(2) Compliance reports. Some countries do an excellent job of implementing the Convention; others do not. The State Department has submitted reports to Congress that identify countries with compliance problems. The Compliance Reports are available online at http://www.travel.state.gov.

c. Text of Convention. The complete text of the Convention, along with the State Department's legal analysis of the treaty, can be found in the Federal Register, 51 Fed. Reg.10494 et seq.(1986). These are also available online at the State Department's Web site, http://www.travel.state.gov. Click on "International Parental Child Abduction." An application for return is also available on the Web site.

d. Case law. For important case law involving the Hague Child Abduction Convention, visit two Web sites: http://www.incadat.com (created and maintained by the Permanent Bureau of the Hague Conference on Private International Law); and http://www.hiltonhouse.com (maintained by attorney William Hilton. In addition to Convention case law this site has other materials on interstate and international child custody disputes).

e. Abductions to non-Hague Convention countries. The laws of the country to which the child was abducted govern whether and how that child will be returned to the parent in the United States. In the absence of the Convention, criminal laws and extradition may be a possible means of returning the abductor, but not necessarily the child. Return from some countries may be difficult or impossible.

2. Alien Exclusion Act, 8 U.S.C. (a)(9)(C)(I). Any alien who, in violation of a custody order issued by a court in the United States, takes or retains a child out of the United States may be excluded from the United States. The exclusion applies only to aliens, not to U.S. citizens, and does not apply if the child is taken to or kept in a country that has ratified the Hague Child Abduction Convention. The exclusion ceases to apply when the child is surrendered. In

addition to parents who abduct their children, the exclusion also can be applied to relatives or friends who assist in keeping the child abroad. This section may give the U.S.-based parent some leverage in negotiating for the child's return if the alien parent needs to reenter the United States for business or personal reasons.

C. Criminal Laws

1. State laws

Every state has criminal penalties for parental kidnapping (often referred to as "custodial interference"). The elements of the offenses and the punishments vary from state to state. Contact the State Missing Children Clearinghouse (below) for a copy of the relevant state statute(s). *See* VI. D. for further information about pursuing criminal parental kidnapping charges.

2. Federal laws

- Parental Kidnapping Prevention Act (PKPA), 18 U.S.C. 1073 note
- International Parental Kidnapping Crime Act (IPKCA), 18 U.S.C. 1204 (Public Law 103-173, 107 Stat. 1998)
- Extradition Treaties Interpretation Act of 1998 (Title II, Public Law 105-323; *Federal Register*, Vol. 64, No.15, January 25, 1999, pp. 3735-36.)

a. PKPA. The PKPA clarifies that the federal Fugitive Felon Act applies to state felony parental kidnapping cases. This means that a federal Unlawful Flight to Avoid Prosecution ("UFAP") warrant may be issued upon request of a state prosecutor when an abductor is charged with a state felony offense and FBI assistance is needed to locate the fugitive-abductor. Once the abductor is located, federal charges are normally dropped and extradition and prosecution proceed under state law.

b. IPKCA**.** Enacted in 1993, this federal statute criminalizes international parental kidnapping.

(1) Offense. It a federal felony to wrongfully remove a child under 16 from the United States, or retain outside of the United States a child who has been in the United States, with the intent to obstruct the lawful exercise of "parental rights."

i. "Parental rights" are defined as the right to physical custody of the child, whether the right is joint or sole (and includes visitation rights), and whether the right arises by operation of law, court order, or legally binding agreement of the parties.

(2) Three affirmative defenses. It is an affirmative defense if defendant was acting within the provisions of a valid custody or visitation order; was fleeing an incidence or pattern of domestic violence; or failed to return the child due to circumstances beyond his/her control, notified or made reasonable attempts to notify the other parent within 24 hours, and returned the child as soon as possible.

(3) Punishment. Fine and/or imprisonment of up to three years.

(4) Civil remedy preferred. "Sense of the Congress" language in the law makes the Hague Child Abduction Convention the preferred remedy when it is in effect.

(5) Charging procedures. When IPKCA came into force in 1993, federal prosecutors were required to obtain approval from the Criminal Division of the Justice Department before initiating IPKCA prosecutions. Approval is no longer required.

c. Extradition Treaties Interpretation Act of 1998**.** This law authorizes the United States to interpret extradition treaties that list "kidnapping" as encompassing parental kidnapping. This means that the U.S. can request extradition for parental kidnapping under so-called 'list treaties.' However, the U.S. adopts this interpretation only when the other country shares it. Ultimately, the requested country decides whether to honor a request for extradition. Even if it does, the child is not subject to extradition.

D. Laws Relating to Missing Children

1. Missing Children Act , 28 U.S.C. 534(1982) (authorizes the entry of descriptions of missing children into the National Crime Information Center computer (NCIC) and directs the FBI to make these entries if local law enforcement fails to do so)

2. Missing Children's Search Assistance Act ,42 U.S. 5771(1984) (Pursuant to this law, the Office of Juvenile Justice and Delinquency Prevention established, *inter alia*, the National Center for Missing and Exploited Children.)

a. National Center for Missing and Exploited Children (NCMEC). NCMEC is a private, nonprofit organization that serves as a national clearinghouse and resource center in child abduction, missing children, and child sexual exploitation cases. It operates under a U.S. Congressional mandate and works in cooperation with the U.S. Department of Justice's Office of Juvenile Justice and Delinquency Prevention. NCMEC offers a variety of services to aid in the search for a missing child, including a toll-free hotline (1-800-THE-LOST), technical case assistance, computer linkage to 50 State clearinghouses plus the District of Columbia and various federal and international agencies, photograph dissemination, and photo age-enhancement. Many of NCMEC's publications, including
Family Abduction: How to Prevent an Abduction and What To Do If Your Child is Abducted, are available on the Center's Web site, **www.missingkids.com** . Since its inception in 1984, NCMEC has played a role in reuniting over 55,000 children with their families. The International Centre for Missing and Exploited Children (ICMEC) has recently been created to provide a coordinated, global response to the problems of international child abduction and child sexual exploitation.

3. National Child Search Assistance Act, 42 U.S.C. 5779(1990) (prohibits all law enforcement agencies in the country from establishing waiting periods before accepting a missing child report without regard to the child's custody status, and requires immediate entry of each report into the state law enforcement system and the NCIC)

4. Parental Kidnapping Prevention Act, 42 U.S.C. 653-655; 663 (allows 'authorized persons' to request address information from the Federal Parent Locator Service to locate abductors and children. Neither parents nor their attorneys are 'authorized persons;' however, law enforcement, prosecutors, and judges are authorized to request address information.)

5. State Missing Children Clearinghouses. All states have established missing children's clearinghouses to assist in the location, recovery and return of missing and parentally abducted children. The scope and extent of these programs vary, but may include statewide photo dissemination, assistance in obtaining information from state agency records, assistance in having a child entered into the FBI's National Crime Information-Missing Person File, law enforcement training programs, or technical assistance on case investigations. Information on state criminal parental kidnapping laws should be available from the clearinghouse.

   a. How to contact. Contact information for state missing children's clearinghouses may be obtained from NCMEC, 1-800-843-5678. A complete list of clearinghouses is available on NCMEC's Web site:
   http://www.missingkids.com/html/clearinghouses.html.

III. Preventing Parental Kidnapping

A. Identifying families at risk for abduction

If a parent expresses concern about a potential abduction, the parent's lawyer should ascertain the basis for these concerns.

1. Common 'red flags.' Although there are no foolproof warning signs or psychological profiles for abduction risk, there are some indicators that should not be ignored.

The likelihood of an interstate or international abduction may be increased where there is evidence that a parent has:

- previously abducted the child or threatened to do so;
- no strong ties to the child's home state;
- citizenship in another country and strong emotional/cultural ties to the country of origin
- friends or family living out of state or abroad;
- a strong support network;
- no financial reason to stay in the area, *e.g.*, the parent is unemployed, able to work anywhere, or is financially independent;
- engaged in planning activities (*e.g.*, quit a job, sold a home, terminated a lease, closed a bank account or liquidated other assets, hid or destroyed documents, applied for passport, birth certificate, school or medical records
- a history of marital instability, a lack of parental cooperation; domestic violence or child abuse
- a prior criminal record.

a. Case law. Some of these and other factors were present in the case of Soltanieh v. King, 826 P.2d 1076 (Utah App. 1992), in which an order modifying "reasonable visitation" rights to restricted visitation was affirmed. The father's visits with his child were restricted to within the county, and he was required to deposit his passport and visa with the Clerk of Court. The restrictions on visitation were based on the court's findings that (1) the father had translated the child's birth certificate into Farsi and filed it in Iran and made the mother believe that he would take the child to Iran; (2) the father had no respect for U.S. laws and did not want his daughter raised under U.S. standards of education, dress, social relations, political philosophy and religion; (3) the father viewed the mother and daughter as property and believed that he was justified in doing anything necessary to remove the child from the U.S. and (4) that the mother feared the father would take the child to Iran based on his

threats, and that she would be unable to obtain the child's return from that country. *Also see* Glover v. Tooley, 641 So. 2d 1032 (La. Ct. App. 1994) (trial court did not abuse its discretion by restricting mother's visitation instead of allowing her to post a bond, where she had quit her job, bought a new van, moved her things, and falsified her identify to obtain a Texas driver's license).

2. Risk profiles for abduction

a. A study entitled, *Prevention of Parent or Family Abduction through Early Identification of Risk Factors*, conducted by Dr. Janet Johnston (Judith Wallerstein Center for the Family in Transition) and Dr. Linda Girdner (ABA Center on Children and the Law), identified six personality profiles that may be helpful in predicting which parents may pose a risk of abduction.

The six profiles are:

- Parents who have threatened to abduct or abducted previously;
- Parents who are suspicious and distrustful due to a belief abuse has occurred and have social support for these beliefs;
- Parents who are paranoid-delusional;
- Parents who are sociopathic;
- Parents who have strong ties to another country and are ending a mixed-culture marriage;
- Parents who feel disenfranchised from the legal system (*e.g*., poor, minority, victim of abuse) and have family/social support.

b. How to obtain the study. Contact Howard Davidson, Director, ABA Center on Children and the Law, (202) 662-1740, or the Juvenile Justice Clearinghouse, (800) 638-8376. Two related articles may be found at: (1) Johnston, Janet and Girdner, Linda, *Early Identification of Parents At Risk For Custody Violations and Prevention of Child Abductions*, FAMILY AND CONCILIATION COURTS REVIEW, Vol. 36, No. 3, July 1998 392-409 and (2) Johnston, Janet R., L. Girdner, and I. Sagatun-Edwards, *Developing Profiles of Risk for Parental Abduction of Children from a Comparison of Families Victimized by Abduction with Families Litigating Custody*, Behav. Sci. Law 17:305:322 (1999).

B. Lawyer's role: Seek safeguards

When there are factors present that indicate a heightened risk of child abduction, the lawyer should petition the court for safeguards that are appropriate to the facts and circumstances of the case. Given the high incidence of child abduction, these cases are not rare occurrences and concerns about abduction should not be ignored. In fact, failure to heed a client's

concerns about abduction threats and to seek protective measures may result in malpractice litigation.

1. Case law. The case of Shehade v. Gerson, 500 N.E.2d 510 (Ill. App. Ct. 1987), is illustrative. In Shehade, the plaintiff-mother had been awarded temporary custody, and the defendant-Jordanian father had visitation rights. After the father failed to return the child from a visit, the mother contacted her attorney to ask him to obtain an order prohibiting unsupervised visits by the father. No action was taken. When the father repeated his refusal to return the child from a visit two weeks later, the mother immediately contacted her attorney, told the lawyer she believed the father was planning to abduct the child, and asked the attorney to take appropriate legal action to prevent the father from carrying out his threatened removal of the child from the U.S. The lawyer failed to act. One week later, the father abducted the child to Jordan.

The mother then sued her lawyer for his failure to seek an order barring unsupervised visitation by the father pursuant to her two requests. On appeal, the mother's malpractice claims against her lawyer were reinstated.

2. Prepare to meet a high burden of proof

a. Persuade the judge. Many judges lack experience with parental kidnapping cases and need to be educated about the problem and what they can do to prevent it. Be prepared to show the court why prevention provisions are needed.

b. Focus arguments on three factors: (1) the risk of abduction; (2) the potential harm the child would likely suffer if abducted; and (3) obstacles to locating and recovering the child if an abduction were to occur. Present all available evidence of the predictors set forth above, as well as any other relevant facts. When the risk of abduction is high, the child is likely to be harmed, and obstacles to recovery exist that would be difficult to overcome, strict preventive measures are needed. When the risk of abduction is low, the likelihood of recovery high, and there is little or no projected harm to the child, less restrictive measures should suffice.

(1) Case law. Judges may be wary about ordering protective measures absent a strong showing. The case of Al-Zouhayli v. Al-Zouhayli, 486 N.W. 2d 10 (Minn. App. 1992) is illustrative. In Al-Zouhayli, the Minnesota Court of Appeals refused to restrict visitation absent a showing by a preponderance of the evidence of a strong probability of abduction. In that case the court found that the plaintiff mother had not met her burden, despite evidence of the father's dual citizenship (U.S. and Syria), and the trial court's finding that if the father abducted the child to Syria or Saudi Arabia, where his

relatives lived, courts in those countries would not honor Minnesota's custody order and would award custody of the child to the father. However, these same risk factors were sufficient for the trial court to direct mother to retain the child's passport and to prohibit father from applying for a replacement passport without the written consent of the mother or the court, and to limit visitation to the city, on the condition that the father remain employed. Compare In re Joseph D., 19 Cal. App.4th 678 (1993) (Court temporarily suspends mother's custody rights upon finding that mother presents a risk of flight with the child).

c. International abductions. If an international abduction is likely and the probable destination country is known, the lawyer should discover that country's custody law in order to educate the judge about the difficulties the client would encounter if faced with having to recover the child from that country.

(1) Hague Convention countries. As a general rule, if the Child Abduction Convention is in force, chances of recovering the child are greatly improved. However, compliance problems have been identified in numerous countries. The State Department has submitted Compliance Reports to Congress as required by federal law. These reports are available on line at http://www.travel.state.gov (Click on "Parental Child Abduction").

(2) Non-Hague countries. If children are removed to, or retained in a country that is not party to the Hague Convention, the law of the foreign country dictates whether and how a U.S. custody determination would be honored. Foreign courts may grant comity to U.S. custody orders, but are under no legal obligation to do so.

d. Expert testimony. Expert witnesses may be needed to testify as to the noncustodial parent's state of mind and likelihood of abducting the child, the psychological consequences of abduction, and the degree of difficulty in recovering an abducted child based on the laws in effect in the foreign country.

IV. Key Provisions in the Custody Order to Prevent Abductions and Facilitate Enforcement

A. The provisions set forth in C, below, and others you may think of, may be used alone or in combination to prevent parental kidnapping and to facilitate interstate enforcement of custody determinations

B. Prevention provisions can be included in the original custody determination or in a modification order. If the risk of abduction arises before there is a custody order, in many

jurisdictions it is possible to seek emergency injunctive relief. As a general rule, any relief granted by a court on an emergency basis is temporary. (*See* the UCCJEA.) The next step is to get a custody determination that incorporates safeguards on a more permanent basis.

1. Case law. *See, e.g.*, People v. Beach, 240 Cal. Rptr. 50 (Ct. App. 1987) (threatened abduction presents an emergency sufficient for the exercise of jurisdiction under the UCCJA and the issuance of an interim custody order prohibiting removal of the child from the state).

C. Sample provisions

1. State the basis for the exercise of jurisdiction with supporting jurisdictional facts in the order.

Every custody order should state (1) the basis for the court's exercise of custody jurisdiction, with supporting facts and (2) the manner in which notice and opportunity to be heard were given. This should facilitate interstate enforcement of the custody order and reduce the likelihood of it being improperly modified by a sister state.

2. At the bottom of the first page of the order, in **BOLD FACE UPPER CASE LETTERS**, state the penalties for violating the order.

For example, "**VIOLATION OF THIS ORDER MAY SUBJECT THE PARTY IN VIOLATION TO CIVIL AND/OR CRIMINAL PENALTIES."** Judges should advise the parties while they are in court about the consequences of noncompliance.

a. Case law. See, e.g., Louis R. B v. Terry B, Fam. Ct. Del., New Castle 1993 (Del. Ch. LEXIS 122)(March 24, 1993)(Court strongly advised both parties that each could be prosecuted if the child was not made available as ordered).

3. Restrict removal of the child from the state or country

Include a provision limiting the right of the noncustodial parent to remove the child from the state and/or the country. If abduction to another country is of concern, the language should expressly restrict removal from the United States. Such language will enable a parent to prevent issuance of a passport for the child, thereby thwarting the other parent's ability to travel to another country with the child on a U.S. passport. *See* discussion of "Preventing Passport Issuance," below.

a. Drafting the removal restriction

The restriction may be absolute: the noncustodial parent shall not remove the child from the state or country. Or, the noncustodial parent may be prohibited from removing the child from the state or country without prior consent from the judge or written consent from the other parent.

(1) Case law

For cases restricting removal of children from the state or country, *see* People v. Beach, 194 Cal. App.3d 955, 240 Cal. Rptr. 50 (1987)(threatened abduction from state sufficient for exercise of emergency jurisdiction and "no removal from state" order); Mitchell v. Mitchell, 311 S.E.2d 456 (Ga. 1984) (Restrictions on removal of children from the country were upheld based on a finding that father would have no means of enforcing Georgia order if mother took children to United Arab Emirates, but restrictions on removal from state violated state case law); Soltanieh v. King, 826 P.2d 1076 (Utah App. 1992)(Risk of flight to Iran warrants order restricting father from removing the child from the country).

4. Restrict the custodial parent's right to relocate with the child

A noncustodial parent may seek to restrict the custodial parent's right to relocate with the child out of concern that the child will be moved so far as to obstruct meaningful access, or that the country that will not honor an American custody order. To protect visitation rights, a noncustodial parent may seek a provision requiring the custodial parent to give advance notice, or obtain the court's permission, before relocating with the child. Some courts have interpreted such provisions as giving the noncustodial parent 'custody rights' within the meaning of the Hague Child Abduction Convention, and thus the right to seek return under the Convention. Others have rejected this interpretation.

a. Case law

The case law concerning the right of a custodial parent to relocate with the child is evolving rapidly, with the trend in favor of allowing relocation. Review state law to determine applicable standards, tests and/or presumptions.

See, e.g., Love v. Love, 851 P.2d 1283 (Wyo. 1993); Taylor v. Taylor, 849

S.W.2d 319 (Tenn. 1993); In re Marriage of Burgess, 913 P. 2d 473 (Cal. 1996); companion cases Tropea v. Tropea and Browner v. Kenward, 665 N.E.2d 145 (N.Y. 1996); Condon v. Cooper, 73 Cal. Rptr. 2d 33 (Cal. App. 1998)(Custodial mother may to move to Australia if she agrees to concede to the continuing jurisdiction of the California court over custody matters and accepts imposition of sanctions should she violate the concession of jurisdiction. The court reviewed the evolving law governing disputes when a custody parent proposes to move away with the child, and explored the unique factors when the proposed relocation is to a foreign country: (1) cultural problems; (2) distance problems; and (3) jurisdictional problems.)

5. Specify visitation rights: Avoid "reasonable visitation" language

An award of "reasonable visitation" in a custody order is a predictable source of friction because of the vagueness of the language. For instance, just what is "reasonable? Who decides? When does a visit become a wrongful withholding of the child? When does the refusal to turn a child over for visitation become wrongful? The latter two questions have criminal law implications. Law enforcement officers are reluctant to intervene in vague custody/visitation situations. This could potentially deprive an aggrieved parent of invaluable law enforcement assistance when a child has been abducted or wrongfully retained.

A good way to avoid questions about visitation rights is to define them as precisely as possible in the court order. Set forth the start and end days, and times, for visitation. Allocate holidays and birthdays in the order. If telephone access is contemplated, this should be specified. When international visits are contemplated, the court order may include a provision specifying the date on which the child is to be returned, and that any retention beyond the stated date shall be deemed a wrongful retention within the meaning of the Hague Child Abduction Convention unless prior written consent is obtained from the custodial parent or the court.

a. Case law . S*ee* Soltanieh v. King, above.

6. Supervised visitation

Some situations warrant supervised visitation orders (unless the court suspends visitation altogether), *e.g.*, when an abduction has already occurred, or threats have been made to abduct the child; when there is evidence of domestic violence or child abuse; when there is a possibility the child will be abducted to or kept in a country from which recovery would be difficult or impossible.

Supervised visitation may take place at the home of the custodial parent, a supervised visitation center, or any other location designated by the court. The court should identify the person or agency responsible for supervising visits, such as a law enforcement officer, a social worker, a clergyman, a relative, agency.

a. Supervised Visitation Network. There is a growing network of supervised visitation centers. To obtain information, contact the Supervised Visitation Network (SVN), 2804 Paran Pointe Drive, Cookeville, Tennessee 38506, (931) 5370-3414; www.svnetwork.net, e-mail: info@svnetwork.net.

b. Case law

Abu-Dalbough v. Abu-Dalbough, 547 N.W.2d 700 (Minn. Ct. App. 1996) (finding that history of abuse compels Minnesota to provide the strongest protection for the mother and children, and seeking to reduce the danger of abduction by Jordanian father, appellate court modified district court's award of liberal, supervised visitation and instead required the strictest supervision for father's visits through court services, that father never be alone with the children, never be allowed to exercise visitation outside Minnesota, and must place his passport with the court administrator); Al-Silham v. Al-Silham, No. 94-A-0048, 1995 Ohio App. LEXIS 5159 (Ohio Ct. App. 1995)(upheld order requiring supervised visitation where noncustodial father had maintained his citizenship in Saudi Arabia, was not currently employed, and had threatened to abduct the child); Brewington v. Serrato, 336 S.E.2d 444 (N.C. Ct. App. 1985) (upheld severe restrictions on visitation—in custodial parent's home—based on trial court's specific findings of fact that the noncustodial parent had previously taken the child to Texas under false pretenses and refused to return the child to North Carolina). *But see* Mubarak v. Mubarak, 420 S.E.2d 225 (Va. Ct. App. 1992). In an earlier phase of the Mubarak case, the mother sought to have the father's visitation supervised following his threats to kidnap the couple's three children and remove them from the United States. The court denied supervised visitation. Subsequently, the father disappeared with the children, then ages 4, 3, and 1. The children were located in Jordan several months later and the mother regained physical custody through the intervention of the Jordanian government and army.

7. Bonds and writs ne exeat

Where there is a history of custodial interference or a likelihood of flight, lawyers may seek writs ne exeat, which prohibit a party from leaving the jurisdiction.
Bonds are a stronger abduction deterrent. They are often ordered in conjunction with writs ne exeat.

A court may order a parent to obtain a bond in an amount that would be a financial deterrent to abduction, taking into account that parent's financial circumstances. Typically, noncustodial parents may be ordered to obtain a bond, but similar requirements may be imposed on custodial parents who interfere with visitation. If the parent that posts the bond abducts the child (or otherwise violates the conditions of the bond), the bond proceeds generally go to the aggrieved parent, who may use the money to search for the child, hire legal counsel to enforce custody orders, etc.

In custody modification cases, the fact that the decree court has issued a writ ne exeat and/or ordered a parent to post a bond may be construed as evidence of that court's intention to exercise continuing jurisdiction.

a. Obtaining a bond. Information on obtaining child custody/visitation bonds may be obtained from the Professional Bail Agents of the United States (PBUS). Contact the Executive Director at 1-800-883-PBUS, (202) 783-4120; or visit the Web site, www.PBUS.com.

b. Case law. *See, e.g.:*
Alabama: Rayford v. Rayford, 456 So.2d 833 (Ala. Civ. App. 1984)(affirmed trial court order requiring noncustodial father to post $5,000 bond to insure compliance with visitation orders. Father had previously violated order and concealed children for three years)
Arkansas: Koroklo v. Koroklo, 787 S.W.2d 241 (Ark. 1990)(mother shall be required to post an additional $5,000 bond and ordered not to remove her child from the state if trial court allows mother visitation with her child during pendency of her appeal of a contempt order and jail sentence)
Colorado: In re Colorado, in the Interest of B.C., No. 99SA127, 1999 Colo. LEXIS 504 (Colo. 1999)(District court has authority to issue a writ ne exeat to ensure that the noncustodial father does not flee the court's jurisdiction and thereby evade the hearing on whether he should be held in contempt of the court's order for removing his child to Jordan)
Hawaii: Bullard v. Bullard, 647 P.2d 294 (Haw. Ct. App. 1982) (affirmed trial court's order requiring out-of-state father to execute a bond of $2,500 conditioned upon return of child to Hawaii after visitation. "We view such bond requirements with disfavor... courts should require such a bond only if...there is substantial likelihood that its order will be violated absent the bond. Additionally, the terms of the bond must be reasonable under the circumstances." at 301)
Idaho: Biggers v. Biggers, 650 P.2d 692 (Idaho 1982) (affirmed trial court's order requiring out-of-state custodial mother to post bond to ensure her return to state with children for hearing)
Louisiana: Fuge v. Uiterwyk, 653 So. 2d 708 (La. Ct. App. 1995) (Trial court had sufficient cause to require noncustodial father to post a $100,000 bond, based on

annual income of not less than $400,000, to ensure his compliance with the visitation order)
Michigan: Freier v. Freier, 969 F. Supp. 436 (E.D. Mich. 1996) (noting, in this Hague Convention case, that divorce decree between mother and ex-husband prohibited her from taking children abroad for more than sixty days at a time and required her to post a $30,000 bond to enforce this provision)
Mississippi: Ayers v. Ayers, No. 97-CA-01148-COA, 1999 Miss. App. LEXIS 14 (Miss. Ct. App. 1999) (Chancellor did not err by requiring mother to post a $1,000 ne exeat bond approved by the sheriff before removing the children from Mississippi because there was evidence that she had previously left the state and deprived father of seeing the children.); Roberts v. Fuhr, 523 So. 2d 20 (Miss. 1987) (Forfeiture of ne exeat bond and finding that out-of-state custodial father was in contempt were proper and required to enforce mother's visitation rights with child)
New York: Dennis W. v. Alice W., 579 N.Y.S.2d 154 (N.Y. App. Div. 1992) (affirmed trial court's order directing father to establish an escrow account in the amount of $15,000 to ensure the prompt return of the children to their mother at the end of each visitation period, where father had absconded with the youngest child out of the country for several months without mother's knowledge or permission, but modified automatic forfeiture provision, instead giving court authority to fashion appropriate remedy in case of violation personally responsible for the return of the child at the end of visit); David S. v. Zamira S., 574 N.Y.S. 2d 429, 430 (Fam. Ct. 1991) aff'd, Matter of Shnier, N.Y.L.J. Feb. 27, 1991 at 23, col.2 (N.Y. App. Div. 2d Dept.), 17 FLR 1237 (deposit of cash in lieu of bond); S. Frederick P. v. Barbara P., 454 N.Y.S.2d 202 (Fam. Ct. 1982) (Court denied custodial mother's request for bond, but made father's attorney personally responsible for the child's return at the end of visitation."[F]ailure to honor its terms will be actionable personally against counsel under the Code of Professional Responsibility." at 207)
Rhode Island: Goldstein v. Goldstein, 341 A.2d 51 (R.I. 1975) (affirmed trial court order giving custody to father who resided in Israel provided that he permit the mother four weeks of visitation and post a $1,000 bond to guarantee his compliance with the order)
Tennessee: Greene v. Greene, C.A. No. 89-392-II, 1990 Tenn. App. LEXIS 318 (Tenn. Ct. App. 1990) (father required to post $25,000 bond against the possibility that a Hague application might be needed to secure the return of children who would be visiting him in Canada, in order to defray all costs that mother might incur should he fail to abide by the custody decree. The court noted that there had not been any indication that the father was inclined to abduct the children, but because of the degree of bitterness between the parents, posting the bond was deemed appropriate)

8. Avoid joint custody orders when abduction is likely

While joint custody may be a desirable option for parents who agree to it and can

communicate and cooperate, it does not work in all family situations. If possible, joint custody should be avoided in cases involving family violence, a history of parental kidnapping, risk factors for abduction, friction between the parents, opposition by either parent, and parents who reside in different states or countries.

The American Bar Association Family Law Section adopted a Model Joint Custody Statute in August 1989. The Model Statute expressly states, "Joint custody is inappropriate in cases in which spouse abuse, child abuse, or parental kidnapping is likely to occur." *Section (1) Policy*. The Model Statute also requires the court to consider "any history of or potential for child abuse, spouse abuse, or parental kidnapping" and "the geographic proximity of the parents to each other as this relates to the practical considerations of joint physical custody" in determining whether a joint custody order is in the best interests of the child when the parties do not agree to joint custody. *Section 3(c) Factors Considered*.

When joint custody is ordered, the order should state clearly the child's residential arrangements. This is true even when the parents are on friendly terms. In the absence of specificity as to the child's residential arrangements, courts may find it difficult to enforce the order, police may be reluctant to intervene, and prosecutors may be wary about prosecuting parental kidnapping crimes.

a. Case law *See, e.g.*, Marzouki v. Marzouki, 572 N.W.2d 902 (Wis. Ct. App. 1997) (affirmed trial court's award of sole legal custody to mother, and ordering supervised visits, based on a finding that certain conditions exist that would substantially interfere with the exercise of joint legal custody, most notably that the parties do not live in the same country (mother feared father would abduct child to Tunisia), and are not able to cooperate in future decision-making); MC v. MC, 521 A. 2d 381 (N.J. Super. Ct. App. Div. 1986) (joint custody order would be inappropriate since cooperation between American mother and Irish father is virtually nonexistent).

9. Authorize law enforcement assistance

Many law enforcement officers are unclear about their role in preventing and responding to parental kidnapping cases. A provision in the custody order directing law enforcement officer to "accompany and assist" a parent to recover an abducted child may be helpful.

10. Prohibit unauthorized pick up of the child

The court order may prohibit the noncustodial parent from picking up the child from school, daycare centers, and babysitters, unless the custodial parent gives written permission.

11. International abductions

a. Prevent issuance of original and replacement passports

(1) Applying for a child's passport

Under current law, either parent, regardless of his or her citizenship, may apply for a U.S. passport on behalf of his or her minor child. The parent must sign the application if the child is under the age of 13; children 13 and older can execute their own passport applications. Issuance to one parent does not automatically preclude the other parent from obtaining, with the State Department's authorization, a second passport for the child. (A new law will go into effect in Spring 2001; it is described below.)

(2) Children's Passport Issuance Alert Program

The State Department operates a name check system (also known as the "Children's Passport Issuance Alert Program"), which searches files to determine if a passport for the child has already been issued, or an application is pending. Both parents can receive information about passport applications for their child regardless of their custodial status unless: (1) a court has ruled otherwise; (2) parental rights have been terminated, or (3) a mature child's privacy interests in the passport application are asserted.

A parent with concerns about a possible international abduction should take advantage of the name check system to find out if the other parent has applied for, or obtained, a passport for the child. Entry of a child's name into the Children's Passport Issuance Alert Program, however, does not necessarily mean that passports will be denied to that child.

(3) Denying issuance of child's passport

Under current law, when custody is in dispute, the State Department may deny issuance of a passport for a minor child if the parent, legal guardian, or an officer of the court provides the Office of Children's Issues with a complete copy of a temporary or permanent court order that contains the judge's signature, effective date, and provides for at least one of the following: (1) sole custody to the requesting parent; (2) joint legal custody to both parents (requires permission of both parents before passport issuance); or (3) a restriction on the child's travel (requires superseding court order allowing travel; or permission of both parents before passport issuance).

The State Department reserves the right to withhold passports for minor children until the custody conflict is resolved by an appropriate court, and may issue a passport notwithstanding the restrictions noted above if compelling humanitarian or emergency

reasons exist. The State Department will accept a court order from a state court in the U.S. as well as from a foreign court in the child's country of habitual residence.

i. Case law

The clearer the court order, the easier it is for the State Department to comply with the court's intent regarding passport issuance, thereby safeguarding against the child's removal from the country. For instance, a provision in the court order that prohibits the noncustodial parent from applying for U.S. and/or foreign passports for the child will support a request to deny passport issuance. *See e.g.*, Al-Zouhayli v. Al-Zouhayli, 486 N.W.2d 10 (Minn. Ct. App. 1992). In some cases the noncustodial parent might seek a similar restriction against the custodial parent. In Mitchell v. Mitchell, 311 S.E.2d 456 (Ga. 1984), the court upheld an order enjoining both parents from procuring a passport for the children or applying for passports for the children without the written agreement of the other parent.

(4) How to contact the Office of Children's Issues for passport services

A parent who seeks to prevent issuance of an original or replacement passport for a minor child, or to have the child's name entered in the Children's Passport Issuance Alert Program, should contact the Department of State, Bureau of Consular Affairs, Overseas Citizens Services, Office of Children's Issues, 2401 E Street, Room L127, Washington, D.C. 20037, (202) 736-7000. The request, along with a copy of the custody order, can be faxed to (202) 663-2674.
A form for requesting entry of the child's name into the Children's Passport Issuance Alert Program is available online at http://www.travel.state.gov .

(5) New rules for applying for a child's passport to take effect in Spring 2001.

A recent change in the law is intended to help prevent parental kidnapping. Under Section 236 of the Admiral James W. Nance and Meg Donovan Foreign Relations Authorization Act Fiscal Years 2000 and 2001 (Pub L. 106-113, 113 Stat. 1937-422; 18 U.S.C. 1621(a)(2)), the Secretary of State is required to publish new regulations providing that both parents must execute a passport application on behalf of a minor under age 14. If only one parent executes the application, that parent must provide documentary evidence that he/she has sole custody of the child; has the consent of the other parent to the issuance of the passport; or is in loco parentis and has the consent of both parents, of a parent with sole custody over the child, or of the child's legal guardian. The law further provides that implementing regulations may provide for exceptions in exigent circumstances, such as those involving the health or welfare of the child, or when the Secretary of State determines that issuance of a passport is

warranted by special family circumstances.

A proposed rule implementing the law was published in the Federal Register: October 10, 2000 (Vol. 65 No. 196) at pp. 60132-60136. The final regulations are expected before the end of the year, but will not take effect until March. Until that time, existing laws and regulations governing issuance of passports to minors remain in effect.

(6) Passports and dual national children

A child who is a U.S. citizen may also be a citizen of another country. Dual national children may be eligible to hold or be included in a foreign passport in addition to holding a U.S. passport. While the Department of State may deny issuance of a U.S. passport for the child (see above), it cannot prevent foreign governments from issuing passports to children who are also their nationals. *See immediately below.*

b. Prohibit application for a new or replacement passport for the child. Prohibit the noncustodial parent from applying for new or replacement passports for the child without prior written consent of the custodial parent or the court. *Caveat:* As discussed above, foreign governments are not bound by U.S. court orders and may issue passports to children who are their nationals. However, a court order may be persuasive and the foreign government may comply voluntarily.

> (1) Case law. Mitchell v. Mitchell, 311 S.E. 2d 456 (Ga. 1984) (affirmed court order prohibiting both parents from removing the children from the country and from applying for or procuring a passport for their sons without the consent of the other parent or by court order, based on a finding that the U.S.-citizen father would have no means of enforcing a Georgia custody order if the Lebanese mother took the children to the United Arab Emirates. The court distinguished between restricting child's removal from the country, which is justified, from restricting removal from the state, which is not.)

c. Notify foreign consulate of passport restrictions. The court may direct the foreign-national parent to notify his/her embassy or consulate of the order prohibiting that parent from applying for a new or replacement passport for the child, and further require the parent to furnish the court with an acknowledgment letter from the foreign embassy or consulate.

d. Surrender passports prior to visits. The court may direct the noncustodial parent to surrender all passports in his or her possession (belonging to the parent and the child) to a designated person or entity designated prior to visiting the child.

(1) Case law

In McEnvoy v. Helikson, 562 P.2d 540 (Or. 1977), the Oregon Supreme Court recognized the right of a father to sue his ex-wife's lawyer for malpractice and negligence for conduct which allegedly resulted in the removal of his daughter from the country in violation of his custody rights. In McEnvoy, the defendant-attorney returned passports to his Swiss client (the plaintiff's ex-wife) before she had returned the child to the father, who was legally entitled to custody. The premature return of the passports violated a stipulation incorporated into the court order. Passports in hand, the plaintiff's ex-wife left Oregon with their child and returned to Switzerland, contrary to the purpose of the court order and stipulation. The father sought $500 in damages for the attorney's negligence, and $1,750,000 for the loss of companionship, love and affection of his child, for anguish and mental suffering due to the loss of his child, and for the continuing nature of these wrongs. *Comment:* This lawsuit and the child's abduction to Switzerland were both avoidable. The lawyer entrusted with holding passports should not have returned the passports to the Swiss mother until after the child had been restored to the custodial father.

Also see Economou v. Economou, 274 Ca. Rptr. 473, 486 (Cal. App. 1990) (upheld order requiring noncustodial father to deposit his U.S. and Greek passports with the Clerk of Court prior to visitation, and limiting visitation to the local area); Farrell v. Farrell, 351 N.W.2d 219 (Mich. Ct. App. 1984) (father residing in Ireland required to surrender passports); Klien v. Klien, 533 N.Y.S.2d 211 (1988) (following pre-decree abduction of children to Israel, father ordered to return children and surrender all passports to mother); Anonymous v. Anonymous, 503 N.Y.S. 2d 466 (App. Div. 1986) ("In light of [noncustodial father's] prior threats to take the child to Algeria and [his] ability to remove the child on [his] passport, a temporary surrender of the passport was reasonably necessary to prevent removal of the child."); David S. v. Zamira S., 575 N.Y.S.2d 429 (Fam. Ct. 1991) (noting that mother was to place $10,000 in escrow, subject to forfeiture to father, if she and/or children fled the jurisdiction, and that mother and both children's passports were to be surrendered and placed in escrow); Soltanieh v. King, 826 P.2d 1076 (Utah App. 1992)(based on trial court finding of risk that father would take child to Iran, father required to deposit his passport and visa with clerk of court, to get a court order to remove them, and not to remove the child from the country).

e. Obtain mirror image order. As a condition prerequisite to allowing a child to travel abroad for visits, the court may require the noncustodial parent to obtain an order from a court in the country where visits are to occur with terms identical to the U.S. custody order. *Caveat:* In some countries, it may not be possible to obtain such an order. Moreover, the foreign court may change the underlying order or ignore provisions that

conflict with their internal laws. Also be aware that some countries lack the legal mechanisms to enforce even their own orders.

(1) Case law. Tichendorf v. Tichendorf, 321 N.W. 2d 405 (Minn. 1982) (affirmed trial court's decision to permit father to visit with his son in Germany for three weeks in the summer, but remanded to trial court to include in the order requirements that father must give a letter of credit to mother for more than $10,000, furnish round-trip transportation for an adult to accompany the child to Germany, and obtain an order from an appropriate German court recognizing the exclusive jurisdiction of the American courts over custody and acknowledging a duty to enforce the mother's right to custody).

f. Provide assurances of return from foreign visits. In conjunction with allowing visits in another country, a court may require a noncustodial parent to give assurances that the child will be returned. For instance, a court may order a noncustodial parent to provide the custodial parent with the child's travel itinerary (*e.g.*, copies of round-trip airline tickets), a list of addresses and telephone numbers where the child can be reached at all times, and an open airline ticket for the custodial parent in case the child is not returned.

(1) Case law. *See, e.g.*, Tichendorf v. Tichendorf, 321 N.W. 2d 405 (Minn. 1982), above.

g. Define terms to facilitate use of the Hague Child Abduction Convention. Include a provision in the custody order declaring the United States to be the child's country of habitual residence. Provide supporting facts. Though not binding on a foreign court applying the Convention, such a statement may be persuasive. Where possible, describe custody rights in terms of "the right to determine the child's place of residence." Again, while not binding, this may help clarify for a foreign court that the person seeking return has "custody rights" which give rise to the return remedy under the Convention.

V. Prevention Tips for Parents

Lawyers can help parents prevent abductions by advising them to take the following steps:

A. Ask the police or prosecutor to intervene. If a parent threatens to abduct a child, it sometimes helps to ask the local police or prosecutor to contact the parent and warn him/her of the criminal consequences of child abduction.

B. Notify schools, day care centers and babysitters of custody orders. Certified copies of custody orders should be on file with the school office, and given to teachers, day care providers, and babysitters, with instructions not to release the child to anyone else without the custodial parent's permission. The custodial parent should ask to be contacted immediately if the noncustodial parent attempts to pick up the child without explicit authorization.

C. Teach the child how and when to call home.

D. Keep lists of identifying information about the other parent and the child, including Social Security Numbers, current photographs, license plate numbers, bank and credit card account numbers, etc. Consider getting the child fingerprinted at the local police department; the parent, not the police, retain the prints.

E. File or register a certified copy of custody order in the noncustodial parent's state. This notifies the courts that a valid order has been made and must be enforced and not modified.

F. If no decree has been entered, consider custody mediation. This dispute resolution technique may produce a custody order that both parents will be more willing to abide by than one made by a judge who is less familiar with the family. Mediation is considered inappropriate in families with a history of domestic violence or notable power imbalances between the partners.

G. Consider counseling. Child Find of America, Inc., a nonprofit organization, offers telephone counseling for parents who are considering abducting their children or who want to end an abduction situation. The telephone number is 1-800-A-WAY-OUT.

H. Call the National Center for Missing and Exploited Children for a prevention packet . The telephone number is 1-800-843-5678. The Center is discussed, infra.

VI. Implementing Legal Remedies in Parental Kidnapping Cases

The following list summarizes the steps to take if a child is abducted.

A. Report the child missing

The parent should be advised promptly to file a Missing Persons Report on the child with the local police. Ask the police to enter the child's description into the National Crime Information Center (NCIC) Missing Person File. (The FBI maintains the NCIC.) The police are obligated to take the report and enter it into the NCIC without a waiting period. If the police do not make this entry, seek assistance from the state missing children clearinghouse or the National Center for Missing and Exploited Children.

B. Contact the National Center for Missing and Exploited Children (NCMEC)

The parent should call the NCMEC to report the missing child and request all available assistance. The toll-free hotline is 1-800-843-5678. Ask for a free copy of NCMEC's family abduction booklet, *Family Abduction: How to Prevent an Abduction and What to Do If Your Child Is Abducted*, or download it from their Web site, www.missingkids.com. NCMEC can assist in identifying other nonprofit groups that provide emotional support and guidance to parents of abducted children.

C. Contact the State Department, Office of Children's Issues

If the child has been taken out of the country (or is en route), the parent should contact the State Department, Office of Children's Issues without delay and request assistance. The telephone number is (202) 736-7000. Ask for a free copy of their booklet, *International Child Abduction*, or download it from the Web site, http://www.travel.state.gov.

D. File for custody

The lawyer should file for custody in the state that has subject matter jurisdiction consistent with the PKPA. Custody jurisdiction is discussed above.

E. Consider criminal charges and other help from the prosecutor

1. The lawyer should explore with the left-behind parent the pros and cons of seeking criminal charges against the abductor. It is important for parents to understand that the prosecutor's traditional job with respect to criminal law is to prosecute the offender-parent and not to secure the child's return. A parent who wants to pursue criminal charges against an abductor should meet with the prosecutor, alone or with the lawyer, to discuss the possibility of

prosecution.

a. Despite widespread passage of criminal parental kidnapping statutes, many prosecutors remain reluctant to charge these offenses. The Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, funds a project to assist prosecutors with the effective implementation of these laws. The American Prosecutor Research Institute (APRI) of the National District Attorneys Association ((703) 549-4253) can provide information about their "Prosecution and Investigation of Parental Child Abduction Cases Project," and may have suggestions for coordinating with local prosecutors on abduction cases. Check these web sites for information about the project: http://www.ndaa-apri.org and http://ojjdp.ncjrs.org/pubs/trngcatalg/apri-pi2.html.

b. One reason why prosecutors are not quick to prosecute parents who perpetrate abductions is their perception that complainant parents are apt to drop charges once the abducted child is recovered. Before filing a criminal complaint, parents should consider whether they would assist in the prosecution of the abductor-parent once the child is returned if the prosecutor needs their testimony.

2. Prosecutors and law enforcement may become increasingly involved in the civil aspects of interstate and international abduction and custody cases in states that have enacted the 'public officials' provisions of the UCCJEA. The UCCJEA authorizes (but does not require) the prosecutor (or other designated public official) and law enforcement to assist with the location and recovery of abducted children without regard to criminal charges. If a particular state has enacted the applicable UCCJEA provisions, the lawyer or parent should consider requesting help from the local prosecutor's office. At the same time, the parent and lawyer should continue private efforts to obtain a custody order and to locate and recover the child.

F. In international cases, contact FBI; ask law enforcement to contact INTERPOL

If the child has been taken or kept abroad, the parent should consider reporting the abduction to the local FBI office. The FBI has jurisdiction to investigate alleged violations of the federal International Parental Kidnapping Crime Act of 1993 (IPKCA) (18 U.S.C. 1204). If an international abduction is in progress, urge law enforcement to contact the U.S. National Central Bureau-INTERPOL (800-743-5630) immediately for help in intercepting the abductor.

G. Seek UFAP warrant

If the abductor is charged with a state felony, verify that that the felony is entered into the NCIC and cross-referenced to the Missing Person Report on the abducted child. Also ask the

prosecutor to apply for a federal UFAP warrant pursuant to 18 U.S.C. 1073. The FBI will undertake an investigation to find the abductor upon issuance of a UFAP warrant.

H. Locate the child

Encourage the left-behind parent to search for the child. NCMEC and support groups can provide useful information to help guide a parent's search efforts. The list of resources (VII, below) may also be helpful. The lawyer's role in the search may include, *inter alia*, seeking subpoenas for bank and telephone records of the abductor, and asking the court to request the Federal Parent Locator Service to search its computer files for address information on the abductor. This is authorized in the PKPA (see above).

1. Attorney disclosure of address information. Courts have compelled attorneys to disclose their clients' whereabouts, notwithstanding the attorney-client privilege, in child abduction and other family law cases. See, e.g., Jafarian-Kerman v. Jafarian-Kerman, 424 S.W.2d 333 (Mo. Ct. App. 1968); Matter of Jacqueline F., 391 N.E.2d 967 (N.Y. 1979); Dike v. Dike, 448 P.2d 490 (Wash. 1968); Bersani v. Bersani, 565 A.2d 1368 (Conn. Super. Ct. 1989).

I. Victims' Assistance

The parent should contact the state crime victims' assistance office, as well as the federal Office for Victims of Crime (OVC), to find out if any assistance is available to help locate and recover the child. OVC's Web site is http://www.ojp.usdoj.gov/ovc. The telephone number is (202) 307-6383.

J. Consider a tort suit

Another possible avenue for relief, which may also produce leads in the search for the child, is a tort action for damages stemming from the wrongful removal, retention or concealment of a child. Causes of action include intentional infliction of emotional distress, outrageous conduct, and interference with custody or visitation. Cases have been successfully maintained against the abductor-parent, friends, relatives, lawyers and others in many federal and state courts. *See, e.g.*, Lloyd v. Loeffler, 539 F. Supp. 998 (E.D. Wis. 1982), aff'd, 694 F.2d 489 (7th Cir. 1982); Pankratz v. Willis, 744 P.2d 1182 (Ariz. Ct. App. 1987); Wood v. Wood, 338 N.W.2d 123 (Iowa 1983); Kramer v. Leineweber, 642 S.W.2d 364 (Mo. Ct. App. 1982); Raftery v. Scott, 756 F.2d 335 (4th Cir. 1985); Fuller CATV Construction, Inc., v. Pace, 780 P.2d 520 (Colo. 1989). Only a few courts have rejected a separate cause of action for custodial interference. See, e.g., Larson v. Dunn, 460 N.W.2d 39 (Minn. 1990)(Supreme Court refused to create a tort of intentional interference with custodial rights); Zaharias v. Gammill, 844 P.2d 137 (Okla. 1992)(Court refused to recognize father's claim against his in-laws for tort of custodial interference, but allowed his cause of action for intentional infliction of emotional distress on same facts).

K. Enforce the custody order

Once the child is located, promptly seek enforcement of the child custody determination. Follow the law of the state where the child is located. If the UCCJA is in effect, send a certified copy of the custody determination for filing with the Clerk of the Court. The UCCJA provides that an out-of-state decree, once filed, is entitled to be enforced as if it were a local order. If the UCCJEA is in effect in the state where the child is found, the parent may use the streamlined procedures in that law to register and/or promptly enforce the custody order. The local prosecutor also may be able to assist.

Local law enforcement may assist with child recovery pursuant to the UCCJEA in some states, or based on custom and practice or written guidelines in others. However, in many jurisdictions, local law enforcement will not help recover an abducted child without a local court order. In that case, a lawsuit must be filed to enforce the custody determination.

If an enforcement action is filed in court, the lawyer in the original state may be required to associate with local counsel, or the client may retain new counsel in the enforcement state for that purpose. The PKPA establishes a federal duty to enforce and not modify sister state custody determinations made consistently with its terms. The UCCJEA and UCCJA similarly require enforcement of sister state orders that meet their standards.

1. Pick up orders. If it is likely that the abductor-parent will flee the jurisdiction upon receipt of notice of an enforcement hearing, seek a "pick-up order," pursuant to which local law enforcement officers take physical custody of the child and serve notice on the abductor of the enforcement hearing, which is held soon thereafter. Law enforcement officers are typically directed to bring the child before the court, or to place the child with the custodial parent or other designated party, pending the enforcement hearing.

2. The perils of self-help. The safest way to recover an abducted child is through legal process, not self-help. This is the message of California v. Superior Court of California, San Bernardino County (Smolin, et al.), 716 P.2d 991 (Cal. 1986), rev'd, 484 U.S. 400, 107 S.Ct. 2433 (1987), an interstate extradition case. The Supreme Court refused to block extradition of a California father to Louisiana to stand charges there for simple kidnapping, stemming from his self-help recovery of his children. The father had argued that he was the childrens' lawful custodian pursuant to a California custody order that was entitled under the PKPA to full faith and credit in Louisiana, and as such he could not be charged with simple kidnapping under the Louisiana statute. The court held that under the Extradition Act, the place for the father to assert defenses to the underlying criminal charge was in Louisiana, not California.

Based on Smolin, parents should be advised of the perils of self-help recovery: A parent who recovers a child from another state pursuant to a custody order entitled by the PKPA to full faith and credit is not immune from extradition to face criminal charges stemming from the recovery.

L. Counseling

Once the child is returned to the custodial parent, counseling may be beneficial for the child, the left-behind parent, and other family members.

M. Modify custody

It may be necessary to seek modification of the original custody order to include safeguards to prevent a reabduction. The child's feelings about the abductor-parent should be considered.

VII. Useful Web Sites and Telephone Numbers

- National Center for Missing and Exploited Children (NCMEC), 1-800-843-5678, www.missingkids.com.

- Association of Missing and Exploited Children's Organizations Inc. (AMECO), (781) 878-3033, e-mail: ameco@dreamcom.net. AMECO is a national association of missing and exploited children's organizations that work together to serve and protect missing children and their families. AMECO can make referrals to helping organizations.

- Project Hope, 1-800-306-6311. Project Hope is a national support network that can match parents with parent-volunteers who have experienced abductions in their families and who have been trained to provide support and assistance. OJJDP's Missing and Exploited Children's Program established the network.

- State Missing Children's Clearinghouses. Missing children's clearinghouses may assist in the location, recovery and return of missing and parentally abducted children. Contact NCMEC, 1-800-843-5678, for the telephone number of the clearinghouse in your state. State clearinghouse contact information is also posted on NCMEC's Web site: www.missingkids.com.

- Parent Locator Service. The State Parent Locator Service may be contacted for information and guidance on using the Federal Parent Locator Service to locate an abductor parent and child. The Locator Service is within the Office of Child Support Enforcement. The Federal Parent Locator Service may be contacted at (202) 401-9267.

- Department of Justice, Missing and Exploited Children's Program, (202) 616-3637, http://ojjdp.ncjrs.org/missing

- Department of State, Office of Children's Issues (OCI), (202) 736-7000, fax: (202) 663-2674. The U.S. Central Authority for the Hague Child Abduction Convention may be contacted at the same telephone number. The Web site is http://www.travel.state.gov.

- Department of Defense Worldwide Locator Services, http://www.defenselink.mil/faq.pis/PC04MLTR.html.

- American Prosecutor Research Institute (APRI), Prosecution and Investigation of Parental Child Abduction Cases Project, (703) 549-4253). Check these Web sites for information about the project: http://www.ndaa-apri.org and http://ojjdp.ncjrs.org/pubs/trngcatalg/apri-pi2.html.

- FBI. Contact information for the local FBI office is in the front of local telephone books. The FBI Office of Crimes Against Children can be reached at (202) 324-3666.

- INTERPOL, U.S. National Central Bureaus (USNCB). INTERPOL provides a global communications network to enable police around the world to coordinate international criminal investigations. Contact numbers (for law enforcement) are (202) 616-9000, 1-800-743-5630, NLETS: DCINTER00.

- Congressional Missing and Exploited Children's Caucus, c/o Congressman Nick Lampson, Chair, (202) 225-6565, http://www.house.gov/lampson.

- Office for Victims of Crime, (202) 307-6383, http://www.ojp.usdoj.gov/ovc

- American Bar Association Center on Children and the Law, (202) 662-1720; http://www.abanet.org/child.