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CHILD SNATCHING BY PARENTS: WHAT LEGAL REMEDIES FOR "FLEE AND PLEA"?

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In our highly mobile society, more and more unsuccessful parents in child custody proceedings are initiating "self-help" by kidnapping their own children.[1] The subsequent searches for the children are frequently nationwide, and occasionally international.[2] This may require expenditure of vast sums of money for private investigators, travel and attorney fees. In the absence of legal protection, the parent granted custody must resort to the same tactics by way of the "snatchback."[3] During these "search and snatch missions" the real losers are the children who have been used as both sword and shield by the combating parents. The children are not only the objects of their parents' love but also the victims of their parents' dislike for one another.

Legal rights become further obfuscated when one parent openly defies a custody order, takes the child to another state and files a petition for change of custody. If that court grants a change of custody, the respective parents will possess separate and conflicting custody decrees. In arriving at these decrees the courts of different states have relied upon a variety of inconsistent legal tests, doctrines and decisions. Consequently, the rights of such parents are in a state of confusion. The purpose of this article is to trace the decisional trend of custody awards and their recognition in other states, and to explore new legal tools at the disposal of lawyers and courts which are designed to deter and eliminate extralegal child snatching.

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1. *See, e.g., Moving to Stop Child Snatching*, TIME, Feb. 27, 1978, at 85; Peterson, *Child Snatching: The Extralegal Custody Battle After Divorce*, N.Y. Times, Oct. 17, 1977, at 36, col. 1.

2. *See* Bodenheimer, *The International Kidnapping of Children: The United States Approach*, 11 FAM. L.Q. 83 (1977).

3. *See* Molinoff, Chicago Sun-Times, Oct. 16, 1977 (Parade Magazine). *See also* Yuenger, *Child-Snatching: Tragic Outgrowth of Soaring Divorce*, Chicago Tribune, March 26, 1978, § 1 at 38, col. 1.

CHILD CUSTODY PROCEEDINGS

At early common law "custody" was considered a "property right" and thus was determined according to property laws. Since the wife's property vested with her husband upon the marriage, the father was generally awarded custody of the children when the marriage was dissolved.[4] The courts assigned little significance to the rights or ability of the mother or to the child's best interest. The father, viewed as the legal and natural guardian, could only be denied custody upon a showing of misconduct.[5]

Subsequent case law and statutes took cognizance of the mother's important role in child rearing and applied equitable considerations emphasizing the child's well-being rather than the father's property rights.[6] Thus, from court decisions the "best interest of the child" rule evolved.[7]

However, the trend to adopt the "best interest" rule did not result in equal consideration being given both parents. In Illinois, for example, the best interest test presumed, almost conclusively, that the mother should be awarded custody. In 1849, the Illinois Supreme Court in *Miner v. Miner*[8] adopted the "tender years" doctrine. In *Miner*, the court stated the existing principle that "[n]ext to the right of the father that of the mother must be recognized,"[9] but noted that their rights were not paramount because they must be weighed against "the best interest of the child [which] must be primarily consulted."[10] The court then assumed that a mother would give more love, affection and particularly, care to a young child.[11]

4. *Cf.* King v. Greenhill, 111 Eng. Rep. 922 (K.B. 1836) (where the Court of the King's Bench in six separate opinions adhered to the common law principle that "[t]he legal power over infant children is in the father, the mother has none," *id.* at 926, and that "when a father had the custody of his children, he is not to be deprived of it except under particular circumstances." *Id.* at 927); *Ex parte* Skinner, 27 Rev. R. 710 (C.P. 1824) (where the court refused to interfere with the father's right to his child who was born in wedlock).

5. *In re* Spense, 41 Eng. Rep. 937 (Ch. 1847).

6. *Ex parte* Badger, 286 Mo. 139, 226 S.W. 936 (1920) (construing MO. REV. STAT. § 8304 (1909) (current version at MO. REV. STAT. § 451.250 (1977)).

7. *See* Oster, *Custody Proceeding: A Study of Vague and Indefinite Standards*, 5 J. FAM. L. 21 (1965). For varying state decisions *see* 24 AM. JUR. 2d *Divorce & Separation* § 783 (1966).

8. 11 Ill. 43 (1849).

9. *Id.* at 49.

10. *Id.*

11. The *Miner* court reasoned:

> It is upon this consideration that an infant of tender years is generally left with the mother, (if no objection to her is shown to exist,) even when the father is without blame, merely because of his inability to bestow upon it that tender care which nature requires, and which it is the peculiar province of the mother to supply . . . .
>
> That he has the proper affection for her we may not doubt . . . . Notwithstanding this, it cannot be expected that he would bestow that personal care and attention upon a girl seven or eight years old, which may be expected from a mother . . . .

The tender years doctrine may have been dictated to the courts by reason of the cultural milieu of the nineteenth century. Unlike today, society was not service oriented. The father worked outside the home in a predominantly "man's world" while the mother labored on the domestic front, typically a "woman's world." Sexual roles and responsibilities were clearly demarcated with the mother cast as the "child rearer." Viewed in that attitudinal environment, the tender years doctrine did not appear to be the social anomaly it does today.

Illinois courts adhered to the tender years doctrine for over 100 years. Throughout that period many custody cases were decided by that doctrinal presumption under the guise that it was in the best interest of the child. The common law property discrimination in favor of the father had been replaced by the tender years bias in favor of the mother. The legal pendulum of presumptive discrimination had swung 180 degrees.

Recently, in light of rapidly changing sexual roles, courts have been striking down the tender years doctrine as contravening the best interest principle,[12] the equal protection clause of the fourteenth amendment to the United States Constitution,[13] and the equal rights clause in the Illinois State Constitution.[14] The best interest of the child has become the guiding star in custody cases, with the rejection of presumption in favor of either parent. Despite the present equality in the law, child snatching continues.

RECOGNITION OF THE CUSTODY DECREE

In part, the child snatching problem was stimulated by the United States Supreme Court decision in *New York ex rel. Halvey v. Halvey*,[15] which essentially held that the full faith and credit clause does not preclude modification of custody judgments. In that case, the Halveys had

Id. at 49-51.

12. Patton v. Armstrong, 16 Ill. App. 3d 881, 307 N.E.2d 178 (1974). The court awarded custody to the father despite the tender years doctrine. In child custody cases, the "guiding star is and must be, at all times, the best interest of the child." *Id.* at 882, 307 N.E.2d at 180 (quoting Nye v. Nye, 411 Ill. 408, 415-16, 105 N.E.2d 300, 304 (1952)).

13. U.S. CONST. amend. XIV. *See, e.g.*, State *ex rel.* Watts v. Watts, 77 Misc. 2d 178, 350 N.Y.S.2d 285 (Fam. Ct. 1973). *See also* Podell, Peck & First, *Custody—To Which Parent?* 56 MARQ. L. REV. 51 (1972); Foster & Freed, *Child Custody, Part I*, 39 N.Y.U. L. REV. 423 (1964); Potow, *Child Custody—The Law and Changing Social Attitudes*, 13 ABA FAM. L. NEWS 11 (Nov. 1972).

14. ILL. CONST. art. I, § 18. This section provides:

> The equal protection of the laws shall not be denied or abridged on account of sex by the State or its units of local government and school districts.

See, e.g., Lane v. Lane, 40 Ill. App. 3d 229, 352 N.E.2d 19 (1976); King v. Vancil, 34 Ill. App. 3d 831, 341 N.E.2d 65 (1975).

15. 330 U.S. 610 (1947).

resided in the state of New York during most of their marriage. One year prior to their divorce Mrs. Halvey moved to Florida with their child. She petitioned for divorce in Florida and served notice on Mr. Halvey by publication. One day before the decree granting a divorce and permanent custody was entered, Mr. Halvey "stole" the child and returned to New York. Mrs. Halvey filed a habeas corpus petition in New York for return of the child and cited the Florida decree as the basis for her plea. The trial court awarded custody to the mother.[16] This decision was affirmed by the appellate division[17] and the New York Court of Appeals.[18] The United States Supreme Court refused to confront the paramount issue of whether the state which has jurisdiction over the person of the child must grant full faith and credit to a custody decree rendered in another state. Justice Douglas, writing for the majority, set down the now famous statement that "[s]o far as the Full Faith and Credit Clause is concerned, what Florida could do in modifying the decree, New York may do."[19] The Court went on to say: "[I]t is clear that the State of the forum has at least as much leeway to disregard the judgment, to qualify it, or to depart from it as does the State where it was rendered."[20] Thus, the Supreme Court recognized the general principle that custody decrees are always modifiable when the best interest and general welfare of the child so require.[21]

The *Halvey* decision emphasized the ever-changing facts considered in applying the best interest test. The best interest of a child may change from day to day, week to week and month to month. It is only a matter of degree as to what facts may affect the best interest of a child. Sudden and aberrant behavior in the custodial parent may inimically affect the child and warrant an immediate change in custody. Such dramatic changes are easily discernible and the necessity for a change in custody would be subject to little disagreement among various courts. On the other hand, less severe changes in a parent's behavior are vulnerable to subjective and divergent judicial treatment.

Blind adherence to the best interest principle may well permit successive child custody hearings. If a parent receives an unfavorable de-

16. 185 Misc. 52, 55 N.Y.S.2d 761 (Trial Ct. 1945).
17. 269 App. Div. 1019, 59 N.Y.S.2d 396 (1945).
18. 295 N.Y. 836, 66 N.E.2d 851 (1946).
19. 330 U.S. at 614.
20. *Id.* at 615. In subsequent cases the Supreme Court has also avoided a definitive ruling on whether full faith and credit applies to custody judgments. *See* Ford v. Ford, 371 U.S. 187 (1962); Kovacs v. Brewer, 356 U.S. 604 (1958); May v. Anderson, 345 U.S. 528 (1953).
21. For Illinois cases following this principle *see* Nye v. Nye, 411 Ill. 408, 105 N.E.2d 300 (1952); Jingling v. Trtanj, 99 Ill. App. 2d 64, 241 N.E.2d 39 (1968); *In re* Guardianship of Nichols, 70 Ill. App. 2d 376, 216 N.E.2d 690 (1966).

cision, he might immediately flee to another state for an instant replay of the custody hearing. The process would only stop when that parent has received a favorable decision or has exhausted his time, energy or money. In addition, once this favorable determination has been obtained, the other parent might repeat the "flee and plea" process.

In order to discourage this "forum shopping," some jurisdictions have ignored the best interest test. When a defiant parent has brought the child before a foreign court for a change of custody, it has applied the "unclean hands" doctrine.[22] In doing so, the disobedient parent is denied a hearing on the merits. In effect, the court enforces the foreign decree. This doctrine, though it laudably punishes the wrongdoer, does not consider the child's welfare.

In the case of *People ex rel. Bukovich v. Bukovich*,[23] the Illinois Supreme Court rejected the doctrine of unclean hands and placed emphasis on the child's welfare by stating:

> While the conduct of the mother in flouting the Indiana order should be neither rewarded or condoned, the paramount consideration must be the welfare of the child, and we do not agree that rulings of the Indiana trial court and the Texas Supreme Court precluded the Illinois trial court from reaching a different conclusion.[24]

However, the *Bukovich* court limited the scope of this decision by further stating that:

> The courts of Illinois have both the responsibility and the power to inquire into the right to custody and concomitant best interests of a child within the jurisdiction where the *passage of time* since a prior custody determination of a sister State makes it possible that the circumstances . . . have substantially changed.[25]

Apparently the court has not precluded application of the unclean hands doctrine when there has not been a sufficient "passage of time."

Presumably after a short period of time, such as a day or a week, the circumstances would not have materially changed and a hearing on the petition would be unwarranted. While the "passage of time" doctrine eliminates the major drawback to the unclean hands doctrine—absolute prohibition of a hearing—it revives the "flee and plea"

22. *See* Leathers v. Leathers, 162 Cal. App. 2d 768, 328 P.2d 853 (1958); Crocker v. Crocker, 122 Colo. 49, 219 P.2d 311 (1950); *Ex parte* Mullins, 26 Wash. 2d 419, 174 P.2d 790 (1946); *In re* Leete, 205 Mo. App. 225, 223 S.W. 962 (1920).

23. 39 Ill. 2d 76, 233 N.E.2d 382 (1968).

24. *Id.* at 78, 233 N.E.2d at 383.

25. *Id.* at 79, 233 N.E.2d at 384 (emphasis added). *See* People *ex rel.* Koelsch v. Rone, 3 Ill. 2d 483, 121 N.E.2d 738 (1954); People *ex rel.* Stockham v. Schaedel, 340 Ill. 560, 173 N.E. 172 (1930).

problem. All that is required is that enough time has passed since the original hearing, that changed conditions are *possible*.

In some states the legislatures have noted the problem of forum shopping and have enacted statutes limiting the jurisdiction of their courts in custody cases. Traditionally, all that was required for a court to have jurisdiction was the physical presence of the child.[26] To combat this problem the states have slowly but inexorably moved to adopt the Uniform Child Custody Jurisdiction Act.[27]

The Uniform Child Custody Jurisdiction Act[28] was drafted in 1968 by the National Conference of Commissioners on Uniform State Laws and to date has been adopted by twenty-six states.[29] It attempts to resolve jurisdictional disputes between states on child custody issues. The purposes of the UCCJA are to:

> (1) avoid jurisdictional competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being;
>
> (2) promote cooperation with the courts of other states to the end that a custody decree is rendered in that state which can best decide the case in the interest of the child;
>
> (3) assure that litigation concerning the custody of a child take place ordinarily in the state with which the child and his family have the closest connection and where significant evidence concerning his care, protection, training and personal relationships is most readily available, and that courts of this state decline the exercise of jurisdiction when the child and his family have a closer connection with another state;
>
> (4) discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child;

26. *See generally* 50 C.J.S. *Judgments* § 889 (1947).

27. UNIFORM CHILD CUSTODY JURISDICTION ACT §§ 1-28 (9 UNIFORM LAWS ANN. 103 (1973)) [hereinafter referred to as the UCCJA].

28. *Id.*

29. ALASKA STAT. §§ 25.30.010-25.30.910 (1977); ARIZ. REV. STAT. §§ 8-401 to 8-424 (Supp. 1978-79); CAL. CIV. CODE §§ 5150-5174 (West Supp. 1977); COLO. REV. STAT. §§ 14-13-101 to 14-13-126 (1973); DEL. CODE tit. 13, §§ 1901-1925 (Supp. 1977); FLA. STAT. ANN. §§ 61.1302-61.20 (Supp. 1978); GA. CODE §§ 74-501 to 74-525 (Supp. 1978); HAW. REV. STAT. §§ 583-1 to 583-26 (1976); IDAHO CODE §§ 5-1001 to 5-1025 (Supp. 1978); IND. CODE §§ 31-1-11.6-1 to 31-1-11.6-24 (Supp. 1978); IOWA CODE ANN. §§ 598A.1-598A.25 (West Supp. 1978); KAN. STAT. §§ 38-1301 to 38-1326 (Supp. 1978); LA. REV. STAT. ANN. §§ 13:1700 - 13:1724 (West Supp. 1979); MD. FAM. LAW CODE ANN. §§ 184-207 (1978); MICH. COMP. LAWS ANN. §§ 600.651-600.673 (Supp. 1978); MINN. STAT. ANN. §§ 518A.01-518A.25 (West Supp. 1978); MONT. REV. CODES ANN. §§ 61-401 to 61-425 (Supp. 1977); N.Y. DOM. REL. LAW §§ 75-a to 75-z (McKinney Supp. 1978); N.D. CENT. CODE §§ 14-14-01 to 14-14-26 (1971); OHIO REV. CODE ANN. §§ 3109.21-3109.37 (Page Supp. 1977); OR. REV. STAT. §§ 109.700-109.930 (1978); PA. STAT. ANN. tit. 11, §§ 2301-2325 (Purdon Supp. 1978); R.I. GEN. LAWS §§ 15-14-1 to 15-14-26 (Supp. 1978); WIS. STAT. ANN. §§ 822.01-822.25 (West 1977); WYO. STAT. §§ 20-5-101 to 20-5-125 (1977).

(5) deter abductions and unilateral removals of children undertaken to obtain custody awards;

(6) avoid re-litigation of custody decisions of other states in this state insofar as feasible;

(7) facilitate the enforcement of custody decrees of other states;

(8) promote and expand the exchange of information and other forms of mutual assistance between the courts of this state and those of other states concerned with the same child; and

(9) make uniform the law of those states which enact it.[30]

While the UCCJA attempts to settle jurisdictional disputes, it leaves to the individual states the determination of the best interest of the child. As in any uniform act, the effectiveness of the UCCJA does not depend only on reciprocity, but also on the number of states that adopt it.[31]

The jurisdiction section of the UCCJA is the heart of the Act. It provides:

(a) A court of this State which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

(1) this State (i) is the *home state* of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within 6 months before commencement of the proceeding and the child is absent from this State because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this State; or

(2) it is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a *significant connection* with this State, *and* (ii) there is available in this State *substantial evidence* concerning the child's present or future care, protection, training, and personal relationships; or

(3) the child is physically present in this State and (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected (or dependent); or

(4) (i) it appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (1), (2), or (3), or another state has declined to exercise jurisdiction on the ground that this State is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiciton.

30. UCCJA, *supra* note 27, at § 1.

31. The UCCJA has been introduced in every session of the Illinois General Assembly since 1970. It has yet to pass both the House and Senate. As late as 1977, the UCCJA passed the Illinois House but failed to pass the Senate on third reading. H.B. 1197, 80th Gen. Ass. State of Ill., *reported in* [1977] LEGISLATIVE SYNOPSIS & DIGEST 1798-99.

(b) Except under paragraphs (3) and (4) of subsection (a), *physical presence in this State* of the child, or of the child and one of the contestants, *is not alone sufficient to confer jurisdiction* on a court of this State to make a child custody determination.

(c) Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody.[32]

The four general tests of jurisdiction are meant to guide courts by expressly limiting the exercise of jurisdiction in all custody proceedings. No longer is the mere physical presence of the child sufficient to confer jurisdiction. If the alternative tests produce concurrent jurisdiction with other states, sections 6 and 7 of the UCCJA insure that only one state hears the matter.[33]

Section 6 provides that a court shall not exercise its jurisdiction if there is a similar pending proceeding in which the court has jurisdiction substantially in conformity with the UCCJA. It further provides for informal communication between the courts where concurrent jurisdiction is being exercised in order to decide which is the more appropriate forum. Section 7 sets forth the doctrine of inconvenient forum and the factors a court should consider in applying the doctrine.[34] Its purpose is to encourage common sense restraints when it appears that another state is the home state of the child or would be in a better position to hear the custody case.[35]

The UCCJA also limits jurisdiction by incorporating the unclean hands doctrine in section 8(a).[36] Section 8(c) empowers the court to assess travel expenses, attorney and witness fees, and other expenses against the wrongdoer.[37] This section's "monetary sanctions" provision adds practical ramifications to an act which is otherwise an academic workpiece.[38]

32. UCCJA, *supra* note 27, at § 3.
33. *See* UCCJA, *supra* note 27, at §§ 6-7 (Commissioners' note).
34. UCCJA, *supra* note 27, at § 7(c). This section provides:

In determining if it is an inconvenient forum, the court shall consider if it is in the interest of the child that another state assume jurisdiction. For this purpose it may take into account the following factors, among others:

(1) if another state is or recently was the child's home state;

(2) if another state has a closer connection with the child and his family or with the child and one or more of the contestants;

(3) if substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state;

(4) if the parties have agreed on another forum which is no less appropriate; and

(5) if the exercise of jurisdiction by a court of this state would contravene any of the purposes stated in section 1.

35. *See* UCCJA, *supra* note 27, at § 7 (Commissioners' note).
36. UCCJA, *supra* note 27, at § 8(a).
37. UCCJA, *supra* note 27, at § 8(c).
38. *See also* UCCJA, *supra* note 27, at § 15(b). This section provides for attorney fees, wit-

In some states the UCCJA has been adopted only in part. For instance, in Illinois only section 3, the jurisdiction provision, has been enacted.[39] This section has been incorporated verbatim into Illinois' new Marriage and Dissolution of Marriage Act.[40]

Tanner v. Smith[41] was the first reported case in Illinois to interpret the "home state" restraint in the jurisdiction section.[42] In *Tanner*, a New Mexico divorce decree was entered on January 5, 1970, wherein the wife was granted custody. Shortly thereafter the husband moved to Illinois. On July 1, 1976, the husband took "informal" custody due to his ex-wife's purported illness. On August 19, 1976, the husband filed the New Mexico decree in Illinois under the Uniform Enforcement of Judgments Act[43] and petitioned for a change of custody. On November 1, 1976, the wife filed a special appearance attacking the jurisdiction and requested that the child be returned to her custody.

The trial court found that it had jurisdiction under section 601 of the Illinois Marriage and Dissolution of Marriage Act[44] but declined to entertain the petition by applying the doctrine of *forum non conveniens*.[45] The court reasoned that the wife had no contacts or connection with Illinois, the necessary witnesses were available only in New Mexico, and evidence of the circumstances that existed at the time the decree was entered was readily available in New Mexico.[46]

The appellate court upheld the trial court's dismissal of the husband's petition to register, but for different reasons.[47] It held that the trial court lacked jurisdiction and therefore its application of *forum non conveniens* was improper because it presumes that jurisdiction exists and also that an alternative forum exists. The appellate court directly held that under section 601 of the Illinois Marriage and Dissolution of Marriage Act, jurisdiction did not lie because on August 18, 1976, the

ness fees, necessary travel and other expenses to be levied against a person violating a custody decree of another state which must be enforced by the local forum.

39. ILL. REV. STAT. ch. 40, § 601 (1977).

40. *Id.* This section appears in the UCCJA, *supra* note 27, at § 3, and in the UNIFORM MARRIAGE AND DIVORCE ACT § 401 (9 UNIFORM LAWS ANN. 460 (1973)), from which the Illinois Marriage and Dissolution of Marriage Act is derived. Both of the uniform acts were drafted by the Commissioners on Uniform State Laws.

41. 61 Ill. App. 3d 456, 378 N.E.2d 166 (1978).

42. ILL. REV. STAT. ch. 40, § 601 (1977). *See* text accompanying note 31, *supra*.

43. ILL. REV. STAT. ch. 77, §§ 88-105 (1977); UNIFORM ENFORCEMENT OF FOREIGN JUDGEMENTS ACT OF 1948 §§ 1-18 (13 UNIFORM LAWS ANN. 181 (1975)).

44. ILL. REV. STAT. ch. 40, § 601 (1977).

45. *See generally* Barrett, *The Doctrine of Forum Non Conveniens*, 35 CAL. L. REV. 380 (1947); Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929).

46. 61 Ill. App. 3d at 457-60, 378 N.E.2d at 167-68.

47. *Id.* at 458-60, 378 N.E.2d at 167-69.

day before the father had filed under the Uniform Enforcement of Judgments Act, the child's "home state" was New Mexico. The court indicated that presence of the child in Illinois alone no longer confers jurisdiction.[48] Moreover, despite the failure of the Illinois Legislature to enact other sections of the UCCJA, the *Tanner* court referred to them extensively in its decision.[49]

Other courts have also relied on various provisions of the UCCJA although it had not been adopted by their legislature. In the case of *In re Gitlin*,[50] the Minnesota Supreme Court remanded an interstate custody dispute to the lower court with instructions to decide whether Minnesota or Illinois had proper jurisdiction by applying the provisions of the UCCJA notwithstanding prior contradictory holdings in Minnesota.[51] Thus, the Minnesota Supreme Court boldly rejected *stare decisis* and decisionally adopted the UCCJA for resolving jurisdictional disputes in custody cases.

The UCCJA is a solid proposal which should settle interstate custody disputes. However, its effect is limited to those cases where a parent actually files a petition for a change of custody. More often than not, a parent who has kidnapped his child does not file a subsequent petition for change of custody. The last building he wants to see is a courthouse. He merely sinks into the anonymity offered by the new community. In this typical case, private detectives earn their fees by tracking down the child and effectuating the "snatchback." But these recoveries are in themselves extra-legal. The legal tools a custodial

48. ILL. REV. STAT. ch. 40, § 601 (1977).

49. The court said:

> We note that section 601 of the Illinois Marriage and Dissolution of Marriage Act is section 3 of the Uniform Child Custody Jurisdiction Act verbatim. This uniform act has been adopted in seventeen states to date. The explanatory material contained in the Commissioner's [sic] Note to section 3 of the Uniform Act would construe section 3 consistent with the views we have herein expressed regarding the scope and intent of the jurisdictional standards in child custody determinations. We further note that section 7 of the Uniform Act provides for the application of the doctrine of *forum non conveniens* (entitled "Inconvenient Forum") by a court which has jurisdiction but which determines that a court of another state is a more appropriate forum. Although the uniform act has not been adopted in this state, it would appear that the provisions of section 601 of the Illinois Act evince a legislative intent to avoid painful interstate disputes on the issues of child custody.

61 Ill. App. 3d at 460, 378 N.E.2d at 168.

50. 304 Minn. 510, 232 N.W.2d 214 (1975).

51. The Minnesota Supreme Court's judicial legislating was an apparent attempt to bring conformity and predictability into these conflicts. The court made clear its intentions when it said:

> In deciding the matter before us we do not utilize our prior decisions on the subject. And, in effect, we do not decide the questions of jurisdiction put squarely before us. What we do is to hold that the principles and the appropriate provisions of the Uniform Child Custody Jurisdiction Act should be applied to this case.

Id. at 521-22, 232 N.W.2d at 221-22. For prior Minnesota decisions *see, e.g.*, Ray v. Ray, 299 Minn. 192, 217 N.W.2d 492 (1974); Barker v. Barker, 286 Minn. 314, 176 N.W.2d 99 (1970).

parent may have at his disposal are the criminal codes of the various states.

CRIMINAL SANCTIONS FOR CHILD SNATCHING

Historically, parents were excluded from kidnapping statutes.[52] Even today the Federal Kidnapping Act specifically excludes parents from its provisions.[53] Despite repeated attempts to expand the Federal Kidnapping Statute to include parents, Congress has steadfastly maintained a "hands off" policy.[54]

However, the recent rash of child abductions has caused some states to expand their kidnapping statutes to include parents.[55] California, for example, has supplemented its Child Custody Jurisdiction Act with a child abduction statute.[56] This statute makes it a felony to abduct a child from its parent or guardian or to conceal a child from a parent with rights of custody.[57] The California Legislature attacked not only custody right violations but also unlawful interference with visitation rights.[58]

The Illinois General Assembly passed a child abduction statute which was approved by the Governor on August 22, 1978. This statute provides in part that:

> A person commits child abduction when, with intent to violate a court order awarding custody of a child to another, he or she:
>
> (1) removes the child from Illinois without the consent of the person lawfully having custody of the child; or
>
> (2) conceals the child within Illinois.[59]

52. In Blackstone's commentaries on the Laws of England the offense of Child Stealing is described as being provided for by the "statute 9 Geo. IV, c.31, 21," which makes it a felony for "any person maliciously, either by force or fraud, . . . [to] take away, . . . entice away, or detain, any child under the age of ten years, with intent to deprive the parent . . . or any other person having the lawful . . . charge of such child, of the possession of such child . . . ." The statute does not extend to a person claiming "to be the father of an illegitimate child, or to have any right to the possession of such child, . . . on account of his getting possession of such child, or taking such child out of the possession of the mother, or any other person having lawful charge thereof." 4 W. BLACKSTONE COMMENTARIES, *Of Public Wrongs: Offences Against the Person*, 168 n.26 (1848).

53. 18 U.S.C. 1201(a) (1976).

54. *See generally* Foster & Freed, *Child Snatching and Custodial Fights: The Case for the Uniform Child Custody Jurisdiction Act*, 28 HASTINGS L.J. 1011 (1977); Stotter, *Child Stealing*, 18 FAM. L. NEWS LETTER 1 (1978).

55. *See, e.g.*, CAL. CIV. CODE §§ 5150-5158 (West Supp. 1977).

56. CAL. PENAL CODE §§ 278-278.5 (West Supp. 1978).

57. *Id.* at § 278.5(a).

58. *Id.*

59. Act of Aug. 22, 1978, Pub. A. No. 80-1393, § 10-5, 1978 Ill. Legis Serv. 954 (West). The child abduction statute provides:

> (a) Definitions.
> (1) "Court order," as used in this Section, means an order of an Illinois court having jurisdiction over the person of a child;

The statute also makes child abduction a class 4 felony which carries with it a sentence of one to three years.[60] More importantly, as a felon, a child abductor is subject to extradition if he flees the jurisdiction of Illinois.[61] He would find no sanctuary from legal recourse in another state. The statute, however, is not without its practical problems. The question remains unanswered whether the various states attorneys can or will honor all applications for extradition and whether they have sufficient manpower or funds to realistically pursue all requests. Also, prosecutors may be less inclined to extradite fathers or mothers who abduct their own children than hardened criminals. This attitude is evidenced by the moderate resolution adopted at the Twelfth Annual Conference of the National Association of Extradition Officials, which states:

> Each case [of child stealing] should stand on its own merits. Where appropriate, cooperative efforts should be made to accomplish the return of both the accused and the child to the demanding state for civil litigation of the custody dispute.[62]

With cooperation among litigants, prosecutors and judges, extradition will be a viable remedy for the snatch and run tactics of disgruntled parents. But if the moral force of the law breaks down and a parent is intent on violating a custody order, the legal tool available to prevent an abduction before it occurs may lie in a legal writ that is

(2) "Child", as used in Subsection (b)(1) and (b)(2) means a person under the age of 14 at the time the violation of this Section is alleged to have occurred.

(b) Offense. A person commits child abduction when, with intent to violate a court order awarding custody of a child to another, he or she:

(1) removes the child from Illinois without the consent of the person lawfully having custody of the child; or

(2) conceals the child within Illinois.

(c) Affirmative Defenses. It shall be an affirmative defense that:

(1) at the time the court order awarding custody of the child to another was entered, the defendant had custody over the child pursuant to a valid order of a court having jurisdiction over the person of that child; or

(2) after the court order awarding custody of the child to another was entered, the defendant obtained custody of the child pursuant to the order of a court which had jurisdiction over the person of that child, and which had been advised of the prior court order, and which court specifically found the prior court order to be invalid as a matter of law; or

(3) within 72 hours of the alleged violation of this Section, the defendant submitted the child to the jurisdiction of an Illinois court.

(d) Limitations. Nothing contained in this Section shall be construed to limit the court's civil contempt power.

(e) Penalty. Child abduction is a Class 4 felony.

60. ILL. REV. STAT. ch. 38, § 1005-8-1(a)(7) (Supp. 1978). *See also* the provision for an extended term, ILL. REV. STAT. ch. 38, § 1005-8-2(a)(6) (Supp. 1978). For criminal penalties in other states *see, e.g.*, ALA. CODE tit. 12, § 13-1-23 (1977); COLO. REV. STAT. § 18-3-301 (1973); ME. REV. STAT. tit. 17, § 2051 (1965); N.Y. PENAL LAW § 135.10 (McKinney 1975).

61. ILL. REV. STAT. ch. 60, §§ 12-49 (1977).

62. Rogers, *Is Child Stealing an Extraditable Offense?* Address to Thirteenth Annual Conference, National Assoc. of Extradition Officials, May 24, 1977.

seldom used but has been a part of English common law and American law for centuries.

WRIT OF *NE EXEAT REPUBLICA*

In English practice the writ of *ne exeat regno* is issued to restrain a person from leaving the kingdom or the realm.[63] It "was originally a high prerogative writ used by the King to prevent, for reasons of state, some person from availing himself of the privilege granted freemen by [the] Magna Charta of going beyond seas without interference . . . ."[64] Similarly, in American practice the writ of *ne exeat republica* is a process arising from chancery jurisdiction and issues on cause shown to restrain a party from leaving the state until bail is given.[65] The writ is an extraordinary remedy and actually is an ancillary proceeding to the main lawsuit.[66] Every petition for a writ of *ne exeat* must show a probable or threatened departure with the intent to evade the jurisdiction.[67] It must be the clearest showing because the writ carries with it the deprivation of one's liberty if he fails to make bail.

Writs of *ne exeat* may be issued pursuant to statutory authority and by virtue of the court's general chancery powers.[68] Illinois has a statute regulating *ne exeat* practice.[69] Because the statute fails to recite reasons for issuance of writs the courts have looked to common law and equitable principles which govern the remedy.[70] It has been held that the writ will issue to insure satisfaction of any legal duty by the defendant or rightful claim of the plaintiff which would otherwise be defeated if the defendant were to succeed with his intention to leave the state.[71] The writ also insures that the defendant will attend trial. These results are safeguarded by detaining the defendant in jail or by requiring him to post bail.[72]

Custody is a right enforceable by legal process.[73] If one parent

63. *See* 16 HALSBURY'S LAWS OF ENGLAND, *Equity* ¶ 1288 (4th ed. 1976).

64. Brophy v. Sheppard, 124 Ill. App. 512, 516 (1906).

65. Andersen v. Andersen, 315 Ill. App. 380, 387, 43 N.E.2d 176, 179 (1942).

66. Nixon v. Nixon, 39 Wis. 2d 391, 158 N.W.2d 919 (1968); Thomas v. E.C. Mutter Constr. Co., 405 Pa. 509, 177 A.2d 447 (1962); Earles v. Earles, 343 Ill. App. 447, 99 N.E.2d 359 (1951).

67. *See generally* Earles v. Earles, 343 Ill. App. 447, 99 N.E.2d 359 (1951); Andersen v. Andersen, 315 Ill. App. 380, 43 N.E.2d 176 (1942). However, the writ may issue upon showing probable cause. United States v. Robbins, 235 F. Supp. 353, 357 (E.D. Ark. 1964).

68. Nixon v. Nixon, 39 Wis. 2d 391, 158 N.W.2d 919 (1968).

69. ILL. REV. STAT. ch. 97, §§ 1-13 (1977).

70. Earles v. Earles, 343 Ill. App. 447, 99 N.E.2d 359 (1951).

71. *See, e.g.*, Tegtmeyer v. Tegtmeyer, 314 Ill. App. 16, 40 N.E.2d 767, *cert. denied*, 317 U.S. 689 (1942).

72. *See, e.g.*, Andersen v. Andersen, 315 Ill. App. 380, 43 N.E.2d 176 (1942) (dicta).

73. Szewczyk v. Szewczyk, 320 Ill. App. 562, 51 N.E.2d 801 (1943); ILL. REV. STAT. ch. 40, §§ 601(d)(1), 602(1) (1977); UCCJA, *supra* note 27, at § 2(1).

threatens to abduct the children and thereby defeat the other's right to custody, under equitable principles a writ should issue. Since notice of the petition would defeat the purpose of the writ, these proceedings are *ex parte*.[74] Courts therefore have been circumspect in issuing these writs. Courts require the supporting affidavit or oath with respect to the material facts and allegations to be more than mere suspicion or apprehension.[75]

Upon issuance, the sheriff serves the defendant and takes him into custody. If the defendant cannot make the bond endorsed on the writ he is imprisoned until he is brought before the court. The defendant is entitled to a full and speedy hearing. If he raises an issue of fact by denying the threatened abduction and intention to depart from the state, the writ should be quashed until there is a full hearing.[76]

Illinois *ne exeat* practice requires the petition to be supported by affidavit or sworn testimony.[77] If the evidence is sufficient, the judge must endorse on the petition and the writ the amount of defendant's bond so that the arresting sheriff and the defendant know the bail requirement. In order to protect against wrongful issuance, the judge must also set a bond for the plaintiff. If a writ has been improperly issued against the defendant, he then has an action against plaintiff's bond for damages and costs wrongfully sustained by reason of the writ.[78]

Writs of *ne exeat* have been widely utilized in divorce actions to restrain a party threatening to flee the jurisdiction in order to avoid payment of alimony or child support.[79] In view of the dearth of legal tools to combat child-snatching, a writ of *ne exeat* is a very effective legal weapon if the parent with custody has prior knowledge that the other parent intends to leave the state. Not only could a writ of *ne exeat* prevent the actual kidnapping, but it could also spare the custodial parent much time, money and emotional distress. More importantly, the child would not be subjected to the trauma of dislocation and concealment. If the courts are truly concerned with the best interest of the child, every available means should be used to bring all concerned parties before the court.

74. *See, e.g.*, Garden City Sand Co. v. Gettins, 102 Ill. App. 261, *aff'd*, 200 Ill. 268, 65 N.E. 664 (1902); McGee v. McGee, 8 Ga. 295 (1850).

75. *See generally* Brophy v. Sheppard, 124 Ill. App. 512 (1906).

76. Thomas v. E.C. Mutter Constr. Co., 405 Pa. 509, 177 A.2d 447 (1962).

77. ILL. REV. STAT. ch. 97, § 5 (1977).

78. *Id.*

79. *See, e.g.*, Andersen v. Andersen, 315 Ill. App. 380, 43 N.E.2d 176 (1942); Earles v. Earles, 343 Ill. App. 447, 99 N.E.2d 359 (1951).

Child snatching is a national (if not international) problem and must be solved among the states uniformly. Children should not be torn asunder by an unresponsive legal system or desperate parents lest the children grow up living the words of Oscar Wilde: "Children begin by loving their parents; as they grow older they judge them; sometimes they forgive them."[80]

CONCLUSION

Child snatching has become a major problem. The real losers, of course, are the children. They not only lose needed stability but may be losing their ability to discern rightful conduct. The extra-legal tactics of child stealing and the snatchback are incongruous with the child's lessons on right from wrong. Moreover, the legal tactics, at least in the past, have been inadequate to deal with this problem. The tests and doctrines applied to determine whether a child's welfare necessitates a change of custody have varied from state to state and have, in effect, encouraged a parent to forum shop for the most favorable jurisdiction. Uniform laws, such as the UCCJA, can remedy this "marketing," but are only as effective as the percentage of states which adopt them. Legal methods of punishing a disobedient child-stealing parent are limited by the boundaries of the state and the cooperation of foreign states. The only "preventive" legal remedy available to the custodial parent, the writ of *ne exeat*, is also short of being satisfactory. It is a fortunate, but rare parent who obtains the knowledge that the noncustodial parent intends to take the child and run. The only solution to this problem is concerted action among the states.

80. O. WILDE, *Dorian Grey*, in Works of Oscar Wilde 107 (1927).