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Legislation: Child Abduction by a Relative: Maryland Enacts a Misdemeanor Offense to Deter Parental Child-Stealing

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LEGISLATION

CHILD ABDUCTION BY A RELATIVE: MARYLAND ENACTS A MISDEMEANOR OFFENSE TO DETER PARENTAL CHILD-STEALING

I. INTRODUCTION

An equity court decrees that one parent to a divorce proceeding shall be the lawful custodian of the children. Displeased with the arrangement, the non-custodial parent takes the children and moves to another state. Absent extraordinary circumstances indicating that the act was committed to protect the safety or welfare of the children, the authority of the court decree presumably should invoke some legal process to effect an immediate return of the children to their lawful custodian. Unfortunately, courts and law enforcement personnel have been ill-equipped to effectuate an immediate return of parentally abducted children, which has led to a seriously high incidence of parental child abductions.

For instance, one Maryland mother was awarded legal custody in seven different states, but de facto custody remained with the father who abducted the child following each custody award.[1] Furthermore, a recent study indicates that as many as 100,000 children are abducted or detained by parents each year.[2] In 1978, the Maryland General Assembly reacted to this problem[3] by enacting a misdemeanor statute proscribing parental child abductions.[4] This article will analyze this legislation after reviewing the legal problems which led to its enactment.

II. THE LEGAL PROBLEMS

A. The Civil Law

A lawful custodian has two civil courses of action to follow in attempting to regain actual custody of a parentally abducted child.

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1. Mouat, *When Parents Kidnap Their Own Children,* The Christian Science Monitor, Jan. 4, 1979, at 17, col. 1.
2. Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications,* 65 CALIF. L. REV. 978, 979 n.5 (1977).
3. Maryland's first legislative step occurred in 1975 with the adoption of the Uniform Child Custody Jurisdiction Act. MD. ANN. CODE art. 16, §§ 184-207 (Supp. 1978). This legislation was designed to remedy the civil side of the problem but included no criminal sanctions. See text accompanying notes 31-35 *infra.*
4. Act of May 16, 1978, ch. 435, 1978 Md. Laws 1581 (codified as MD. ANN. CODE art. 27, § 2A (Supp. 1978)). Although this article concentrates on the problems associated with the taking of a child out-of-state by the non-custodial parent, the new statute also applies to in-state abductions. In fact, if law enforcement personnel can use the law to apprehend abducting parents while they are in the state, the major problems in this area would be solved.

First, he may institute a constructive,[5] civil[6] contempt proceeding in the court that rendered the custody decree.[7] Second, if the child has been removed to another state, the lawful custodian generally must institute habeas corpus proceedings in that state in order to obtain the child's return.[8]

The Court of Appeals of Maryland has held that the taking of a child in violation of a custody decree constitutes actionable constructive, civil contempt.[9] Maryland Rule P4 provides that a lawful custodian may petition the court that rendered the custody decree for a contempt order.[10] The court must then issue a show cause order[11] and serve it upon the abducting parent pursuant to Maryland Rule 104.[12] If the abducting parent fails to answer the charge, the case may be heard ex parte.[13] Once an abducting parent is held in contempt of court for violating the custody decree, a court may issue a bench warrant or writ of attachment directing a sheriff to take the abducting parent into custody until the contempt is purged by returning the child to the lawful custodian.[14]

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5. Contempts are classified as to the place of their commission: a direct contempt is "committed in the presence of the court, or so near to the court as to interrupt its proceedings," Md. Rule P1 a; whereas a constructive contempt is committed out of the presence of the court. Md. Rule P1 b. *See generally* 17 C.J.S. *Contempt* §§ 3, 4 (1963).
6. Contempts are also classified as civil or criminal. Civil contempt proceedings are brought to preserve the rights of private parties and to aid in the enforcement of the court's decree, State v. Roll, 267 Md. 714, 728, 298 A.2d 867, 876 (1973); whereas criminal contempt proceedings vindicate the dignity and authority of the court and the state is generally the prosecutor. *Id.* at 727, 298 A.2d at 875. A civil contempt need be proved only by a preponderance of the evidence and, because it is remedial in nature, it must provide that the defendant may purge himself. *Id.* at 728, 298 A.2d at 876. A criminal contempt must be proved beyond a reasonable doubt, and because it is intended to punish for past misconduct, it may be purely punitive without provision for purging. *Id.*

   The determination of whether a contempt proceeding is civil or criminal can be difficult. The Court of Appeals of Maryland has delineated five factors which generally point to a civil contempt:

   > (1) the complainant is usually a private person as opposed to the State; (2) the contempt proceeding is entitled in the original action and filed as a continuation thereof as opposed to a separate and independent action; (3) holding the defendant in contempt affords relief to a private party; (4) the relief requested is primarily for the benefit of the complainant; (5) the acts complained of do not of themselves constitute crimes or conduct by the defendant so wilful or contumelious that the court is impelled to act on its own motion.

   Winter v. Crowley, 245 Md. 313, 317, 226 A.2d 304, 307 (1967).
7. See text accompanying notes 9–14 *infra*.
8. *See* 39 Am. Jur. 2d *Habeas Corpus* § 99 (1968); 39 C.J.S. *Habeas Corpus* § 124 (1976). See text accompanying notes 19 & 20 *infra*.
9. Winter v. Crowley, 245 Md. 313, 226 A.2d 304 (1967).
10. Md. Rule P4(a).
11. *Id.* at P4(b)(1)(a).
12. *Id.* at P4(b)(1)(c).
13. *Id.* at P4(c).
14. *Cf. In re* Lee, 170 Md. 43, 53, 183 A. 560, 564, *cert. denied*, 298 U.S. 680 (1936) ("If, on the other hand, the accused does not, by his answer, fully deny or justify the acts charged against him, he may be fined and imprisoned, or such terms

A contempt proceeding may be futile, however, where the abducting parent has fled the state.[15] Although an abducting parent who submitted to the jurisdiction of the court in the original custody proceeding cannot defeat the court's jurisdiction over the child custody matter for purposes of issuing orders to aid in the enforcement of its decree,[16] leaving the state will negate any practical effect to the subsequent exercise of jurisdiction because the court's process does not run beyond the territorial limits of the state.[17] Some courts, in fact, may decline to act on the theory that "the court will not do a futile thing"[18] when it appears that the abducting parent has left the state and is unlikely to return.

Absent criminal process, habeas corpus proceedings may be the only means, other than self-help, to obtain custody of an abducted child who is removed to another state. Locating the child and applying to the foreign state for habeas corpus, however, does not guarantee return of the child. First, abducting parents have contested the custody issue in habeas corpus proceedings and have been awarded legal custody.[19] Second, even if the court rules in favor of the petitioning parent, the abducting parent may remove the child to yet another state.

The problematic results of those cases that have awarded custody to an abducting parent raise the issues of jurisdiction, full faith and credit, and res judicata. The resolution of these issues has worked, at times, to the detriment of the original lawful custodian, and unfortunately has promoted parental child-stealing, forum-shopping, and relitigation of the custody issue in other states.[20]

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imposed upon him as the justice of the case may require."); Hare v. Hare, 21 Md. App. 71, 75, 318 A.2d 234, 236 (1974) (abducting parent's confinement should have been terminated once the children were returned to the custodial parent because the contempt was purged).

15. *Cf.* Winter v. Crowley, 245 Md. 313, 226 A.2d 304 (1967) (abducting parent who removed children out-of-state is immune from service of process, which includes a writ of attachment directing a sheriff to take the parent into custody until the contempt is purged, while attending and participating in an unrelated action in the state). The futility of civil contempt proceedings in this type of case and the need for criminal penalties to invoke criminal process has long been recognized. *See, e.g.,* Lee v. People, 53 Colo. 507, 127 P. 1023, 1025 (1912).
16. *See* Michigan Trust Co. v. Ferry, 228 U.S. 346, 353 (1913); Policastro v. Policastro, 5 FAM. L. REP. (BNA) 2427, 2428 (N.Y. Sup. Ct. 1979). *See generally* Rheinstein, *The Constitutional Bases of Jurisdiction,* 22 U. CHI. L. REV. 775 (1955). Compliance with Maryland Rules P4 and 104, however, constitutes due process of law in the prosecution of constructive contempts. Reamer v. Reamer, 246 Md. 532, 229 A.2d 74 (1967).
17. See note 15 *supra.*
18. Pelz v. Pelz, 182 A.D. 923, 169 N.Y.S. 430 (1918).
19. *See, e.g., In re* Wise, 14 Ariz. App. 125, 481 P.2d 296 (1971); Wagner v. Torrence, 94 Colo. 47, 27 P.2d 1038 (1933); Brown v. Walls, 38 Ill. App. 2d 385, 187 N.E.2d 288 (1962); White v. White, 214 Ind. 405, 15 N.E.2d 86 (1938); Sheehy v. Sheehy, 88 N.H. 223, 186 A. 1 (1936); Sprague v. Bucher, 38 Tenn. App. 40, 270 S.W.2d 565 (1953).
20. *See* R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 194-98 (1971) [hereafter cited as WEINTRAUB].

The modern rule recognizes three bases of jurisdiction in child custody cases: the state of the child's domicile, the state where the child is physically present (the *parens patriae* approach), and the state that has personal jurisdiction over those contesting the custody issue (normally the parents).[21] As a result, two or more states may have concurrent jurisdiction to grant, deny, or modify a child custody award.[22] The abducting parent, therefore, may shop around for another forum in which to relitigate the custody issue.

A sister state, furthermore, is not required to afford full faith and credit to the original custody decree.[23] Although the United States Supreme Court has avoided the issue whether the full faith and credit clause applies to child custody decrees,[24] the Court has held that a custody decree which is subject to modification by the court which rendered it may be modified by a sister state court.[25] In Maryland, as in all jurisdictions,[26] a child custody decree is based on existing circumstances and is subject to modification on a showing of changed circumstances.[27] As a result, courts generally have held that the facts upon which a custody award is based are res judicata and cannot be re-examined by another state court; but, a later court may examine any facts that have occurred since the original decree and modify the decree when in the best interests of the child.[28]

The net result is that time is a crucial factor operating against the searching parent. The longer the abducting parent can retain de facto custody of the child, the stronger the case that changed circumstances require that legal custody be changed for the best

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21. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 79 (1969). Prior to the late 1940's, the assumption was that one state must have exclusive jurisdiction over the child. The general rule was that the domicile of the child was the only jurisdictional basis for a child custody order. *See* RESTATEMENT, CONFLICT OF LAWS § 117 (1934); WEINTRAUB, *supra* note 20, at 194. However, non-domiciliary states exercised jurisdiction as *parens patriae* when the child was physically present in the state. *See, e.g.*, Titcomb v. Superior Court, 220 Cal. 34, 29 P.2d 206 (1934); Wear v. Wear, 130 Kan. 205, 285 P. 606 (1930).
22. *See, e.g.*, Perry v. Superior Court of Contra Costa Cty., 7 Cal. App. 3d 236, 240, 86 Cal. Rptr. 607, 609 (1970); Sami v. Sami, 29 Md. App. 161, 175, 347 A.2d 888, 896 (1975); Potter v. Rosas, 111 N.H. 169, 171, 276 A.2d 922, 923 (1971); WEINTRAUB, *supra* note 20, at 194-96.
23. *See, e.g.*, Wagner v. Torrence, 94 Colo. 47, 52, 27 P.2d 1038, 1040 (1933); WEINTRAUB, *supra* note 20, at 196-97.
24. *See* Ford v. Ford, 371 U.S. 187 (1962); Kovacs v. Brewer, 356 U.S. 604 (1957); May v. Anderson, 345 U.S. 528 (1953); Halvey v. Halvey, 330 U.S. 610 (1947).
25. Halvey v. Halvey, 330 U.S. 610 (1947).
26. *See* WEINTRAUB, *supra* note 20, at 197.
27. MD. CTS. & JUD. PROC. CODE ANN. § 3-602(a)(5) (Supp. 1978). *See* Schwartz v. Schwartz, 26 Md. App. 427, 431, 338 A.2d 386, 388-89 (1975).
28. *See, e.g.*, Perry v. Superior Court of Contra Costa Cty., 7 Cal. App. 3d 236, 240, 86 Cal. Rptr. 607, 609 (1970); Kruse v. Kruse, 150 Kan. 946, 948, 96 P.2d 849, 850 (1940); Mathews v. Mathews, 24 N.C. App. 551, 211 S.E.2d 513 (1975); Griffin v. Griffin, 95 Or. 78, 83, 187 P. 598, 601 (1920); *In re* Saucido, 85 Wash. 2d 653, 657, 538 P.2d 1219, 1222 (1975).

interests of the child.[29] Conversely, the viability of civil relief for the victimized parent declines as the length of time required to locate the child increases. Eventually, self-help may become the only possible method of regaining actual custody, precipitating an unstable tug-of-war environment for the child.

The Maryland General Assembly initially responded to the problem in 1975 by adopting the Uniform Child Custody Jurisdiction Act.[30] A major concern of the Act is the deterrence of parental child-stealing and the elimination of forum-shopping and repeated litigation over the custody issue.[31] The Act is designed to: (1) codify the concept that one state should have exclusive jurisdiction over the child,[32] thereby avoiding multiple jurisdiction conflicts, (2) counteract judicial decisions denying full faith and credit to custody decrees by "facilitat[ing] the enforcement of custody decrees of other states,"[33] and (3) deny the abducting parent a court in which to relitigate the custody issue,[34] thereby avoiding forum-shopping by the abducting parent.

Maryland's adoption of the Uniform Child Custody Jurisdiction Act cannot in itself eliminate the problem of parental child abductions.[35] Even in cases where the courts have rigidly applied full faith and credit and attempted to enforce child custody decrees, which, in effect, conforms to the dictates of the Uniform Child Custody Jurisdiction Act, non-custodial parents have retained de facto custody by removing the child to yet another state or another

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29. *Compare In re* Wise, 14 Ariz. App. 125, 481 P.2d 296 (1971) (change of custody to abducting father upheld notwithstanding unlawful taking from another state — five and one-half year period had elapsed and psychiatric evidence indicated that custody by the abducting father would be in the best interests of the child) *with* Deatrick v. Galligan, 18 Ariz. App. 171, 500 P.2d 1159 (1972) (temporary custody award to abducting father reversed — mother brought habeas corpus proceeding immediately and court held to have exceeded its jurisdiction in making custody award).
30. Law of April 22, 1975, ch. 265, 1975 Md. Laws 1338 (codified as MD. ANN. CODE art. 16, §§ 184-207 (Supp. 1978)).
31. *Id.* § 184(a)(1), (a)(4)-(a)(7).
32. *Id.* §§ 186, 188.
33. *Id.* §§ 184(a)(7), 195, 197.
34. *Id.* § 190.
35. To date, only 31 states have adopted the Uniform Child Custody Jurisdiction Act. *See* [1979] 5 FAM. L. REP. (BNA) 2454 (noting that North Carolina and Virginia adopted the Act); [1979] 5 FAM. L. REP. (BNA) 2435 (noting that Arkansas adopted the Act); [1978] 4 FAM. L. REP. (BNA) 2592 (listing the following states as having adopted the Act: Alaska, Arizona, California, Connecticut, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Maryland, Michigan, Minnesota, Missouri, Montana, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Wisconsin, and Wyoming); [1978] 4 FAM. L. REP. (BNA) 2610 (noting that Kansas and Louisiana adopted the Act). Thus, there are a number of jurisdictions where the Act may be avoided.

country.[36] In addition, many non-custodial parents abduct their child with no intention of relitigating the question of custody. A recent article indicates that these parents have become "so adept at hiding and covering all traces that nationally only about 10 percent of all such children are found again."[37]

Employing the use of law enforcement personnel to track, extradite and deter this unlawful conduct appears mandated. The Maryland General Assembly and other state legislatures have attempted to solve the problem by enacting criminal statutes specifically targeted at parental child abductions.[38] As indicated in one commentary, a chief objective of the child abduction offense is to encourage the child's return to the jurisdiction whose contempt power can then be used to enforce its custody award.[39]

B. The Criminal Law

The taking, detention, or carrying away of a child by a parent against the will of a court-ordered custodian has been defined variously as criminal conduct under three related offenses which had their origin in the English law.[40] False imprisonment and kidnapping were common law offenses.[41] The third, child-stealing, was originally made a crime by Parliament.[42]

False imprisonment involves the unlawful detention or confinement of a person.[43] It is a statutory crime in some states;[44] but, generally, these statutes are merely declaratory of the common law.[45] In Maryland, false imprisonment is a common law offense.[46]

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36. *Cf.* Kajtazi v. Kajtazi, [1978] 4 FAM. L. REP. (BNA) 2703 (E.D.N.Y. 1978) (child unlawfully taken from mother in California by father and removed to New York, then Yugoslavia).
37. Mouat, *When Parents Kidnap Their Own Children,* The Christian Science Monitor, Jan. 4, 1979, at 17, col. 1-2.
38. *E.g.,* CAL. PENAL CODE § 278.5 (West 1978); COLO. REV. STAT. § 18-3-304 (1973); MD. ANN. CODE art. 27, § 2A (Supp. 1978); N.Y. PENAL LAW, §§ 135.45, 135.50 (McKinney 1975); OHIO REV. CODE ANN. § 2905.04 (Page 1975); TEX. PENAL CODE ANN. tit. 6, § 25.03 (Vernon 1974); WYO. STAT. §§ 6-4-203, 6-4-204 (1977).
39. *See* TEX. PENAL CODE ANN. tit. 6, § 25.03 note (Vernon 1974).
40. *See, e.g.,* People v. McGinnis, 55 Cal. App. 2d 931, 132 P.2d 30 (1942) (child-stealing); Lee v. People, 53 Colo. 507, 127 P. 1023 (1912) (kidnapping); *In re* Peck, 66 Kan. 693, 72 P. 265 (1903) (false imprisonment and kidnapping); State v. Farrar, 41 N.H. 53 (1860) (kidnapping).
41. 4 W. BLACKSTONE, COMMENTARIES *218.
42. 4 & 5 PHIL. & M., c. 8 (1557). Although child-stealing was not a common law crime, the common law did provide a civil action for damages. 3 W. BLACKSTONE, COMMENTARIES *140. The action was in trespass *per quod servitium amisit* (for loss of services) and is still a viable cause of action. *See* Kajtazi v. Kajtazi, 4 FAM. L. REP. (BNA) 2703 (E.D.N.Y. 1978).
43. 3 W. BLACKSTONE, COMMENTARIES *127.
44. *E.g.,* CAL. PENAL CODE § 236 (West 1970); N.Y. PENAL LAW, §§ 135.05, 135.10 (McKinney 1975); TEX. PENAL CODE ANN. tit. 5, § 20.02 (Vernon 1974).
45. J. MILLER, CRIMINAL LAW, § 102 (1934).
46. Midgett v. State, 216 Md. 26, 38-39, 139 A.2d 209, 216 (1958).

Kidnapping is false imprisonment aggravated by a carrying away of the victim to another place.[47] All jurisdictions today have kidnapping legislation.[48] Some jurisdictions, however, have rendered their kidnapping statutes inapplicable to cases involving the unlawful taking of a child by a parent.[49] Maryland did so in 1949.[50]

In contrast to false imprisonment and kidnapping, which are normally crimes only when committed against the will of the person taken,[51] the consent, or non-consent, of the child is immaterial in a child-stealing prosecution.[52] Child-stealing statutes generally proscribe the taking of a child under a specified age with the intent to deprive the parent or lawful custodian of custody.[53] The age used in these statutes varies from twelve to eighteen.[54]

In 1876, the Maryland General Assembly enacted a child-stealing statute [hereafter referred to as the 1876 Child Abduction Act] that provides criminal sanctions for "[a]ny person who shall without the color of right" abduct, take or carry away by force or persuasion, or knowingly secrete or harbor any child under the age of twelve, or act as an accessory to any of said acts, with the intent to deprive the parent or lawful custodian of custody.[55] The Maryland appellate courts have never interpreted the "without the color of

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47. *Id.*; J. MILLER, CRIMINAL LAW, § 103 (1934). The common law required a forcible taking and a carrying out of the country. 4 W. BLACKSTONE, COMMENTARIES *219. American statutes expanded coverage of the offense to include fraudulent takings and a carrying within or without the state. *E.g.*, MD. ANN. CODE art. 27, § 337 (1976).
48. Note, *A Rationale of The Law of Kidnapping*, 53 COLUM. L. REV. 540, 541 (1953).
49. *E.g.*, 18 U.S.C. § 1201(a) (1952); MD. ANN. CODE art. 27, §§ 337, 338 (1976); N.Y. PENAL LAW, §§ 135.15, 135.30 (McKinney 1975).
50. Law of March 4, 1949, ch. 4, §§ 385, 386, 1949 Md. Laws 7 (now codified as MD. ANN. CODE art. 27, §§ 337, 338 (1976)).
51. *See, e.g.*, Floyd v. State, 12 Ark. 43 (1851); People v. Marin, 48 Ill. 2d 205, 210, 269 N.E.2d 303, 305 (1971); People v. Cohoon, 315 Ill. App. 259, 42 N.E.2d 969 (1942); Thompson v. State, 215 Ind. 129, 19 N.E.2d 165 (1939).
52. *See, e.g.*, People v. Marin, 48 Ill. 2d 205, 210, 269 N.E.2d 303, 305 (1971); Drury v. State, 253 Ind. 392, 395, 254 N.E.2d 335, 336 (1970); Guggenheimer v. Southern Seminary, Inc., 141 Va. 139, 145, 126 S.E. 72, 74 (1925).
53. *See* R. PERKINS, CRIMINAL LAW, ch. 2, § 7 (2d ed. 1969). As originally formulated, child-stealing consisted of the taking of an unmarried female under the age of sixteen from her parents. Note, *A Rationale of the Law of Kidnapping*, 53 COLUM. L. REV. 540, 551 (1953). Modern statutes, however, have broadened the offense to include any child regardless of sex. *Id.* at 552.
54. *E.g.*, COLO REV. STAT. § 18-3-302, 18-3-304 (1973) (under 18 years); IND. CODE ANN. § 35-42-3-3 (Burns 1979) (under 14 years); MD. ANN. CODE art. 27, §§ 2, 2A (Supp. 1978) (under 12 years); N.Y. PENAL LAW, § 135.45 (McKinney 1975) (under 16 years); OHIO REV. CODE ANN. § 2905.04 (Page 1975) (under 14 years); UTAH CODE ANN. § 76-5-303 (1978) (under 16 years). Some statutes merely say any minor child. *E.g.*, CAL. PENAL CODE § 278 (West 1979).
55. Law of April 18, 1876, ch. 324, § 2, 1876 Md. Laws 557 (now codified as MD. ANN. CODE art. 27, § 2 (1976)). Prior to enactment of the 1978 Child Abduction Act, the Maryland Commission on Criminal Law indicated that the 1876 Child Abduction Act was applicable to parental child abduction cases. MARYLAND COMM'N ON CRIMINAL LAW, REPORT AND PART I OF THE PROPOSED CRIMINAL CODE 196 (1972).

right" language of the statute. Other state courts, however, have held that a parent ousted of custody by a court order has no right to take a child in violation of such order and cannot avail himself of a color of right defense in a child-stealing prosecution.[56]

In practice, however, this conduct has rarely been prosecuted.[57] One theory for the lack of prosecution is that the sanctions provided by child-stealing statutes have been generally too severe to warrant use against a parental offender.[58] For instance, Maryland's 1876 Child Abduction Act carries a maximum sentence of twenty years imprisonment.[59] Mitigating factors, such as the affection motivating the natural parent and the absence of any physical threat of harm to the child, probably have resulted in the bypass of this criminal sanction in parental child abduction cases.[60] The Maryland General Assembly reacted by creating a new misdemeanor offense, child abduction by a relative, which was enacted in 1978 [hereafter referred to as the 1978 Child Abduction Act].[61]

III. MARYLAND'S CHILD ABDUCTION ACT OF 1978

The 1978 Child Abduction Act provides as follows:

> A relative,[62] who is aware that another person is a lawful custodian[63] of a child, may not:
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> (1) abduct, take, or carry away a child under 12 years of age from the lawful custodian;

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56. *See, e.g.*, Lee v. People, 53 Colo. 507, 509-510, 127 P. 1023, 1024 (1912); State v. Farrar, 41 N.H. 53, 58 (1860); State v. Rhoades, 29 Wash. 61, 69, 69 P. 389, 390 (1902).
57. *See* Foster & Freed, *Child Snatching and Custodial Fights: The Case for the Uniform Child Custody Jurisdiction Act*, 28 HASTINGS L.J. 1011, 1016 (1977) [hereafter cited as FOSTER & FREED].
58. *Id.* at 1016.
59. MD. ANN. CODE art. 27, § 2 (1976).
60. *See generally* Note, *The Problem of Parental Kidnapping*, 10 WYO. L.J. 225, 226 (1956).
61. Law of May 16, 1978, ch. 435, 1978 Md. Laws 1581 (codified as MD. ANN. CODE art. 27, § 2A (Supp. 1978)).
62. " '[R]elative' means a parent, other ancestor, brother, sister, uncle, or aunt, or one who has at some prior time been a lawful custodian." MD. ANN. CODE art. 27, § 2A(b) (Supp. 1978).
63. "[L]awful custodian" means a person authorized, either alone or together with another person or persons, to have custody and exercise control over a child less than 12 years of age at the time and place of an act to which any provision of this section is, or may be alleged to be, applicable. The term shall include any person so authorized:
    (1) By an order of a court of competent jurisdiction of this State.
    (2) By an order of a court of competent jurisdiction of another state, territory, or the District of Columbia. However, when there has been a designation of a lawful custodian by an order of a court of this State and there appears to be a conflict between that order and a custody order issued by the court of another state or jurisdiction qualifying some other person as the custodian of the child, the "lawful custodian" is the person

(2) detain a child under 12 years of age away from the lawful custodian for more than 48 hours after return is demanded by the lawful custodian;

(3) harbor or secrete a child under 12 years of age knowing that the physical custody of the child has been obtained or retained in violation of this section; or

(4) act as an accessory to any of the actions forbidden in this section.[64]

Subsections (1), (3) and (4) prohibit a parent or relative from committing the same acts proscribed by the 1876 Child Abduction Act.[65]

A problem unique to the parental child-stealing case is created by the non-custodial parent's legal right to obtain temporary possession of the child as a result of exercising visitation privileges. The 1978 Child Abduction Act added subsection (2), which prohibits a subsequent detention for more than 48 hours after return is demanded by the lawful custodian. Presumably, the demand would be made following the expiration of the time allotted for visitation as set forth in the custody decree.

Although a parent with visitation rights may be held criminally responsible for detaining a child after expiration of the visitation period (provided a return is demanded by the lawful custodian), a custodial parent who violates a custody decree by denying a parent's visitation rights is not subject to the new statute.[66] The parties in

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appointed by order of a court of this State unless the order of the other state or jurisdiction:

(i) Is later in date than the order of a court of this State; and

(ii) Was issued in proceedings in which the person appointed by a custody order of a court of this State either consented to the custody order entered by the court of the other state or jurisdiction, or participated therein personally as a party.

Id. at § 2A(a).

In construing the word "person," the Maryland Annotated Code directs that it is to include a corporation, "unless such a construction would be unreasonable." MD. ANN. CODE art. 1, § 15 (1976). *See* Wesbecker v. State, 240 Md. 41, 48, 212 A.2d 737, 741 (1965). Therefore, the term "lawful custodian" should be construed broadly to include, for instance, state agencies, hospitals, or private agencies. *Cf.* MD. CTS. & JUD. PROC. CODE ANN. § 3-801(j) (Supp. 1978) ("Custodian" means a person or agency to whom legal custody of a child has been given by order of the court, other than the child's parent or legal guardian.). This construction is reasonable given the power of the juvenile courts to issue shelter care orders, *id.* at § 3-815, order emergency medical treatment in appropriate circumstances, *id.* at § 3-822, and award custody to a public or private agency. *Id.* at § 3-820(b)(2).

64. MD. ANN. CODE art. 27, § 2A(c) (Supp. 1978).

65. See text accompanying note 55 *supra.*

66. This result follows from the language of the 1978 Child Abduction Act, which prohibits the taking or detention of a child away from the "lawful custodian." See text accompanying notes 62-64 *supra.* "Lawful custodian" is defined by the statute as a person authorized to have "custody." See note 63 *supra.* The term "custody" connotes more than the mere right of "visitation." *E.g.,* Trompeter v. Trompeter, 218 Kan. 535, 545 P.2d 297 (1975); McFadden v. McFadden, 206 Or. 253, 261, 292 P.2d 795, 799 (1956).

these two situations obviously are not similarly situated, and the state's interest in preserving a stable environment for the child with the custodial parent may have caused the disparity in treatment. At least two jurisdictions, nevertheless, have provided criminal penalties for the violation of a parent's visitation rights that are coextensive with the penalties for violating the custodial parent's right to custody.[67]

In addition to adding a new prohibited act under subsection (2), the 1978 Child Abduction Act has changed the *mens rea* element of the child-stealing offense when a relative is involved. It relaxes the burden shouldered by the prosecution in cases involving parents or relatives by requiring only that the court find beyond a reasonable doubt that the offender was "*aware* that another person is lawful custodian of [the] child" when the unlawful taking, detention, or harboring took place.[68] Under the 1876 Child Abduction Act, however, the prosecution must prove beyond a reasonable doubt that the accused had the *intent* to deprive the parent or lawful custodian of custody of the child.[69]

The new *mens rea* element, however, does afford a relative or parent who is unaware of a court order designating another person as the lawful custodian a defense to any prosecution under the 1978 Child Abduction Act. Court decisions are in conflict as to whether this defense is available under statutes similar to Maryland's 1876 Child Abduction Act when a parent takes the child without reason to know that custody had been judicially awarded to another.[70]

Two major changes have been wrought into Maryland's child-stealing legislation by the 1978 Child Abduction Act. The first results by statutory construction. The second is by express provision.

First, the 1978 Child Abduction Act will put theory to practice by removing parents and relatives from the severe criminal sanctions of the 1876 Child Abduction Act.[71] An issue arises as to whether a relative is subject to both statutes because the particular enactment of 1978, which is limited to relatives, does not expressly remove relatives from the general enactment of 1876, which applies to any person. The answer is mandated by a well-settled rule of statutory

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67. CAL. PENAL CODE § 278.5(a) (West Supp. 1979) ("every person who has custody of a child pursuant to an order, judgment or decree of any court which grants another person rights to custody or visitation of such child, and who detains or conceals such child with the intent to deprive the other person of such right . . . shall be punished" to the same degree as one who takes, retains or conceals the child from its lawful custodian in violation of a custody decree); UTAH CODE ANN. § 76-5-303(2) (Supp. 1978) (a similar provision).
68. MD. ANN. CODE art. 27, § 2A(c) (Supp. 1978) (emphasis added).
69. See text accompanying note 55 *supra*.
70. *E.g.*, State v. Taylor, 125 Kan. 594, 598, 264 P. 1069, 1071 (1928) (defense not allowed); Hicks v. State, 158 Tenn. 204, 12 S.W.2d 385 (1928) (defense allowed).
71. See text accompanying notes 58-60 *supra*.

construction. When there is a particular enactment and a general enactment which would include what is embraced in the particular, the particular enactment is operative and is considered an exception to the general enactment.[72] As applied to criminal statutes, "a subsequent statute impos[ing] a different penalty for the same, or practically the same, offense . . . repeals the earlier [statute to the extent of any overlapping inconsistency] . . . whether the penalty is increased or diminished."[73] The result is that the penalties for this conduct are substantially reduced where the offender is a parent or relative. Whereas a non-relative offender is subject to a felony conviction and a maximum sentence of twenty years,[74] a parent or other relative found guilty of the same act is now subject to a misdemeanor conviction and a maximum penalty of thirty days in jail and a fifty dollar fine.[75]

The second major change is the provision that affords a "complete" defense to a parent or relative where the following conditions are met: (1) a petition is filed within 96 hours of the unlawful act with a Maryland equity court[76] explaining the circumstances and seeking a modification of the custody order;[77] and (2) the defendant establishes in the criminal court that the action was taken to protect the child from a "clear and present danger" to its health, safety or welfare.[78] The statute employs the nondescript term "complete" to designate the defense. The critical determination is whether it is a general or an affirmative defense which will then shift the burden of proof.

A general defense denies an element of the offense. A parent who takes a child unaware that a court has judicially awarded custody to another has a general defense under the 1978 Child Abduction Act because the parent can assert that the *mens rea* element of the offense is missing. In such a case, the accused need merely come forth with some evidence to controvert the prosecution's effort to establish all elements of the offense beyond a reasonable doubt.[79]

An affirmative defense, on the other hand, does not controvert an element of the offense but asserts that the accused is not criminally responsible because he has a legal excuse or justifi-

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72. Maguire v. State, 192 Md. 615, 623, 65 A.2d 299, 302 (1949).
73. State v. Gibson, 4 Md. App. 236, 247, 242 A.2d 575, 582, *aff'd*, 254 Md. 399, 254 A.2d 691 (1968). *See* Davis v. State, 7 Md. 151, 158-59 (1854).
74. MD. ANN. CODE art. 27, § 2 (1976).
75. *Id.* § 2A(d) (Supp. 1978).
76. Maryland provides its equity courts with exclusive jurisdiction to decide child custody matters. MD. CTS. & JUD. PROC. CODE ANN. § 3-602 (1974).
77. The modification petition should be filed pursuant to MD. ANN. CODE art. 16, § 186(a)(3)(ii) (1976).
78. MD. ANN. CODE art. 27, § 2A(e) (Supp. 1978).
79. *See* Bradford v. State, 234 Md. 505, 514, 200 A.2d 150, 155 (1964).

cation.[80] An affirmative defense requires the accused to establish its existence by a preponderance of the evidence.[81] The "complete" defense of the 1978 Child Abduction Act does not controvert any element of the offense. It is, rather, in the nature of a justification and, therefore, it should be deemed an affirmative defense.[82] As a result, a parent prosecuted under the 1978 Child Abduction Act should be required to prove by a preponderance of the evidence that the defense is applicable.

Another source of ambiguity in the 1978 Child Abduction Act is its "accessory" clause, which provides that "[a] relative . . . may not . . . act as an accessory to any of the actions forbidden in this section."[83] The clause is incongruous on its face. Although Maryland still recognizes the distinction between principals and accessories in felony cases,[84] the state also follows the common law rule that all participants who would be classified as principals or accessories before the fact if the crime was felonious are classified as principals when the offense is a misdemeanor.[85] To the extent the General Assembly intended to include any relative who aids or abets the commission of the act, whether or not present at the scene of the crime, the clause is, at best, redundant. They are all included as principals under the common law rule.

The "accessory" clause, however, should not apply to any person, relative or non-relative, who receives, comforts or assists a perpetrator knowing that a violation of the 1978 Child Abduction Act has been committed. The Maryland Court of Appeals, following the common law,[86] has defined an accessory after the fact as "one

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80. *Id.*

81. *Id.* This shifting of the burden to the accused raises a constitutional question under the due process clause of the United States Constitution. The Supreme Court has held that a state may shift the burden of proof in a criminal case from the state to the accused without violating the due process clause provided:

> (1) the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or (2) at least that upon a balancing of conveniences the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression.

Morris v. California, 291 U.S. 82, 88-89 (1934). *See generally* Note, *Affirmative Defenses Under New York's New Penal Law,* 4 SYRACUSE L. REV. 44, 47-48 (1968).

82. *Cf.* OHIO REV. CODE ANN. § 2905.04 (Page 1975) (designates the same defense an affirmative defense).

83. MD. ANN. CODE art. 27, § 2A(c)(4) (Supp. 1978).

84. Agresti v. State, 2 Md. App. 278, 280, 234 A.2d 284, 286 (1967). A principal is one who commits a crime as a perpetrating actor or one who aids or abets the commission of the crime while actually or constructively present at the scene of the crime. *Id.* An accessory before the fact procures, counsels or commands another in the commission of the crime but is not actually or constructively present at the scene of the crime. *Id.*

85. *See* Watson v. State, 208 Md. 210, 217, 117 A.2d 549, 552 (1955); Broadway v. State, 23 Md. App. 68, 78, 326 A.2d 212, 218 (1974).

86. *See* J. MILLER, CRIMINAL LAW § 77 (1934).

who, knowing that a felony has been committed, harbors and protects the felon or renders him any other assistance to elude punishment."[87] The critical element is that a felony must have been committed. There is no common law penalty for comforting or aiding a misdemeanant after the crime.[88] The Maryland Court of Appeals has further proclaimed that the "technical [definition of an accessory after the fact is] too fundamental in the common law of crime to be overcome by juridical reasoning."[89] The ambiguous insertion of the "accessory" clause in the 1978 Child Abduction Act should not serve to overcome the common law rule by implication[90] because the Maryland Constitution requires the General Assembly to do so expressly.[91] To accomplish the purpose of including those who would be classified as accessories after the fact if the crime were a felony, the statute should require language expressly providing for one who harbors, protects or renders any other assistance for the purpose of eluding punishment to any relative who has violated any section of the Act.

Notwithstanding the qualified nature of the "accessory" clause which apparently limits its application to relatives, a non-relative participant should be subject to the same sanctions. The general rule is that an aider or abettor is criminally responsible only for those crimes committed by the perpetrator which are the natural or probable consequence of the crime that was counseled, commanded, aided or abetted.[92] If the perpetrator is a parent or other relative, any relative or non-relative assisting in the commission of the act is criminally liable as a principal in the misdemeanor offense.[93]

If a parent or relative, however, is an accessory to a felonious taking by a non-relative, the 1978 Child Abduction Act will not protect the parent or relative from a felony conviction.[94] An unlawful taking by a non-relative with the intent to deprive the lawful custodian of custody, or an accessory to that act, remains subject to the sanctions provided by the 1876 Child Abduction Act.[95]

The net result of the 1978 Child Abduction Act is to limit the sanction for the unlawful taking or detention of a child under twelve by a parent or other relative to a misdemeanor conviction. Any

87. Watson v. State, 208 Md. 210, 217-18, 117 A.2d 549, 552 (1955).
88. *Id.* at 217, 117 A.2d at 552.
89. *Id.* at 218-19, 117 A.2d at 552.
90. *Cf.* Agresti v. State, 2 Md. App. 278, 281-82, 234 A.2d 284, 287 (1967) (The Maryland Court of Appeals is very cautious in interpreting statutes so as not to give them any greater effect than possible in abrogating the common law rules.).
91. MD. CONST., DECL. OF RIGHTS art. 5.
92. *See, e.g.*, State v. Lucas, 55 Iowa 321, 7 N.W. 583 (1880); State v. Craft, 338 Mo. 831, 92 S.W.2d 626, 630 (1936); Watts v. State, 5 W. Va. 532, 536 (1872).
93. See text accompanying note 85 *supra*.
94. The accessory clause is limited "to any of the actions forbidden" by the 1978 Child Abduction Act. MD. ANN. CODE art. 27, § 2A(c)(4). If the perpetrator is a non-relative, the 1876 Child Abduction Act applies. *Id.* § 2 (1976).
95. MD. ANN. CODE art. 27, § 2 (1976).

person, relative or non-relative, who assists in the commission of the act should be subject to the same limited sanctions. A non-relative who unlawfully takes a child under twelve years of age is subject to the felony sanctions provided by the 1876 Child Abduction Act or Maryland's kidnapping statutes.[96] If the child is twelve or older, the kidnapping statutes alone apply. A relative who is an accessory to one of these felonious takings should be subject to the same felony sanctions. In no case, however, is a parent guilty of kidnapping.[97] If a parent unlawfully takes a child twelve or older, the prosecution is limited to the common law offense of false imprisonment.[98]

IV. REMAINING PROBLEMS

Maryland's 1978 Child Abduction Act is limited to an unlawful taking in violation of a child custody order.[99] The statute does not apply when a parent, sensing an unfavorable resolution of the custody issue, removes the child to another state before a custody decree is rendered. In Maryland, both parents have an equal right to custody of the child[100] so that either may legally take the child until a court order altering custody is issued. In addition, a custody order obtained after the parent has left the state with the child should not create criminal liability on the part of the out-of-state parent even when a demand for the child has been made.[101] Use of the statute to hold the out-of-state parent criminally responsible for the mere detention of the child in another state in violation of the custody decree would constitute an invalid exercise of extraterritorial criminal jurisdiction.[102]

The Texas legislature has uniquely provided for the situation in which a child is removed to another state after a custody proceeding is instituted but prior to the time the court issues its decree. The Texas statute not only prohibits a taking or detention in violation of a child custody award, but also provides a sanction for the taking of a child to defeat the court's jurisdiction when a person "has not been awarded custody of the child by a court of competent jurisdiction and knows that a suit for divorce, or a civil suit or application for habeas corpus to dispose of the child's custody, has been filed."[103]

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96. *Id.* §§ 2, 337, 338.
97. See text accompanying notes 49 & 50 *supra*.
98. Normally, the detention or carrying away of a person is not unlawful if it is with the consent of the person taken. *See* text accompanying note 51 *supra*. In the case of a minor, however, courts have held that a detention or carrying away of the child is, as a matter of law, without the consent of the child when it occurs without the consent of the lawful custodian, regardless of any evidence to the contrary. *See* State v. Farrar, 41 N.H. 53, 59 (1860) (seminal case).
99. See the definition of "lawful custodian" at note 63 *supra*.
100. MD. ANN. CODE art. 72A, § 1 (1976).
101. *See* State v. McCormick, 5 FAM. L. REP. (BNA) 3005 (Minn. Sup. Ct. 1978).
102. *Id.*
103. TEX. PENAL CODE ANN. tit. 6, § 25.03(a)(2) (Vernon 1974).

The Maryland General Assembly may be called upon eventually to incorporate a similar provision into its legislation.

Another question is whether the misdemeanor penalty provided by the 1978 Child Abduction Act will cause state governors, who at times have been reluctant to extradite persons for misdemeanor offenses,[104] to refuse to extradite parental kidnappers in these cases. Some states, aware of the extradition problem, have made parental child-stealing a felony.[105]

A more important question is whether states will be able to effectively locate the abducted children. Commentators and federal legislators are arguing that federal legislation is needed to assist the states in this endeavor.[106] Solutions proposed include amending the federal kidnapping statute to impose federal criminal sanctions for parental kidnapping.[107] One argument in support of the federal criminalization approach to the problem is that it would confer clear authority for FBI investigation, thus facilitating the location of abducted children.[108]

V. CONCLUSION

With the passage of the 1978 Child Abduction Act, Maryland has taken a second legislative step to deter parental child abductions. Problems, however, still remain. In particular, the ability of local police forces to locate abducted children without federal assistance is still a critical question.[109] The case supporting the General Assembly's response is patent; the real question is whether it is enough.

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104. *See, e.g.*, State v. McCormick, 5 FAM. L. REP. (BNA) 3005, 3006 (Minn. Sup. Ct. 1978); OHIO REV. CODE ANN. § 2905.04 note (Page 1975); FOSTER & FREED, *supra* note 57, at 1018.
105. OHIO REV. CODE ANN. § 2905.04 note (Page 1975); TEX. PENAL CODE ANN. tit. 6, § 25.03 note (Vernon 1974). *See* COLO. REV. STAT. § 18-3-304 (1973); KAN. STAT. § 21-3422a (Supp. 1978); WYO. STAT. § 6-4-204 (1977). *But see* [1979] 5 FAM. L. REP. (BNA) 1059 (felonization rejected in Virginia).
106. *See* Coombs, *The "Snatched" Child Is Halfway Home In Congress*, 11 FAM. L.Q. 407 (1978); FOSTER & FREED, *supra* note 57, at 1017.
107. The federal kidnapping statute now excludes parents from its ambit. 18 U.S.C. § 1201(a) (1952).
108. FOSTER & FREED, *supra* note 57, at 1017.
109. *Cf.* Zielenziger, *Paternal Kidnapping Leaves Kids Wondering Why Mom and Dad Can't Behave*, The Baltimore Sun, Dec. 20, 1978, § B (Home), at 1, col. 1 (mother of abducted children had to wait for a fortuitous parking violation by abducting father in Alabama before aducted children who had traveled through various states could be located and returned to mother in Maryland).